

18.8.95

LEGAL DEPARTMENT
CAYMAN ISLANDS GOVERNMENT
AUG 23 1995
FILE -
COUNSEL- *Bae*

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: D75/92

IN CHAMBERS

| | | |
|---------|-----------------------|------------|
| BETWEEN | JOANNE LANGDON FOSTER | PETITIONER |
| AND | ROBERT DON FOSTER | RESPONDENT |

Mr. Pierre Lamontagne Q.C. with Mr. Graham Hampson for the petitioner
Mr. James Turner with Mr. Timothy Shea for the respondent

SCHOFIELD J. JUDGMENT

I am here dealing with cross-summonses filed by the petitioner (to whom I shall refer as "the wife") and the respondent (to whom I shall refer as "the husband") seeking orders for ancillary relief before a pronouncement is made on dissolution of the marriage. There now being no dispute over custody of the children, it having been agreed that the wife should continue to have the care, control and custody of the two children of the marriage, and this Court approving that arrangement, the only matters left for determination are those relating to financial provision for the wife and the children.

First I must deal with a preliminary point which I decided upon at the

commencement of the hearing and upon which I said I would give reasons in this judgment. The wife had deposed that she had been offered a job with an airline operating out of Cayman some time in 1991 and that she was not taken on in the post because of her husband's interference. At the hearing the husband's counsel sought to tender in evidence an affidavit of the then manager of that airline in Cayman contradicting the wife's evidence that had been offered the post. The wife's counsel sought leave to have the deponent called for cross-examination and in the absence of the deponent sought to have the affidavit excluded from consideration. The arguments on the point raised an issue which has some significance on the rules to be applied in matrimonial causes.

Section 30 (1) of our Evidence Law reads:

"30. (1) In civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not is subject to this section and to rules of Court, admissible as evidence of any fact stated therein of which oral evidence by him would be admissible."

The question next raised is :which rules of Court is the admissibility of such a statement subject to ? 0.1 r 2. GCR states that the Grand Court Rules shall not apply to any proceedings which are governed by the Matrimonial Causes Rules 1986 as amended. However the Rule does provide certain exceptions to that general statement, one of which is 0.38. The Rules therefore purport to apply 0.38 to proceedings governed by the Matrimonial Causes Rules. 0.38 r 2 provides for the circumstances

under which evidence by affidavit may be admitted. The Grand Court Rules were made by the Rules Committee in the exercise of the powers conferred upon it by section 19 of the Grand Court Law. Section 4 of the Matrimonial Causes Law says:

"4. The Court may make rules and orders for regulating the practice and procedure, Court fees, taxation of costs and other matters arising out of matrimonial suits brought under this Law and, pending the making of any rule or order in any particular matters, the practice and procedure of the Supreme Court of Jamaica, shall, subject to any necessary modifications and adaptations, be applicable to matters arising out of this Law."

It will be seen therefore that any rules and orders regulating matters ancillary to a suit for the dissolution of marriage must be made by the Court, which has been interpreted in relation to the Fees Rules as being the three judges of the Grand Court. The Grand Court Rules which were made by the Rules Committee cannot be applied to such proceedings.

We therefore look to the Matrimonial Causes Rules for direction on the circumstances in which affidavit evidence is admissible only to find that there is no such direction. We must therefore look to the practice and procedure prevailing in the Supreme Court of Jamaica. Rule 48 (2) of the Jamaican Matrimonial Causes Rules, 1989, reads:

"48 (2) Upon the hearing of an application for ancillary relief the Judge shall have power to order the attendance of the spouses and any other person for the purpose of being examined or cross-examined or may take the oral evidence of witnesses, and at any stage of the proceedings may order the discovery and

production of any document or call for further affidavits."

It was accepted by the parties that this rule gave me a discretion to admit the affidavit sought to be tendered with or without calling the deponent to testify. The affidavit was made by a witness living in Minnesota, United States of America. He was answering evidence of the wife much of which evidence was hearsay and which did not go to an issue which appeared central to my determinations. As it transpires I am confirmed in my initial view in that regard. In all the circumstances I exercised my discretion to admit the evidence without the necessity of calling the witness for cross-examination.

Now let me turn to the matters in issue . The parties were married in April 1980 about a year after the husband's divorce from his first wife. At the time of marriage the husband was twenty seven years old and the wife was thirty-four. The parties separated on 16th June 1990, although the wife did not present a petition for divorce until 7th August 1992. We are here dealing with a marriage which lasted ten years. There were two boys born to the parties the first of whom is fourteen and the second of whom is ten years old today.

The wife is an American citizen and a graduate nurse. At the time of the marriage she had a remunerative position with a pharmaceutical company in the United States of America. She relinquished her job to join the husband in the Cayman Islands. The husband has no formal qualifications except in the dive industry. At the time of marriage

he worked as a divemaster by day and a drummer in a well-known local band by night. The husband's father is wealthy and had purchased for him and his first wife a house at Batabano, West Bay, registered it in their names, only to purchase the first-wife's half share yet again on the divorce of the husband and his first wife. It was in this house that the husband and the wife resided after they were married. It was of course, at that time registered in the joint names of the husband and his father. In her affidavits the wife contended that approximately \$50,000 was paid towards the purchase of the Batabano house from trust funds of which the husband was a beneficiary. From the evidence of the husband's father it seems clear that the husband was and is the beneficiary of only two amounts from trust funds. A sum of JA \$14,000 was paid by the husband's father as proceeds of a trust fund he had set up for the husband and his brother. That was used towards the purchase of a house in the United States of America for the husband and his first wife which was later sold with no equity remaining. The husband was the beneficiary under the will of his grandmother of a one-ninth portion of \$77,006.00. He used the funds to furnish the Batabano house. There are no other trust funds from which the husband may benefit. The wife's assertion that the present matrimonial home, owned by a company called Amity Cayman Ltd., a company which is controlled by a trust fund of which the husband is a beneficiary, is now accepted by the wife as an erroneous assertion. Amity Cayman Ltd. is owned by the husband's father; and I am satisfied of that and I believe that the wife is so satisfied also. I shall return to the position of the matrimonial home later.

The wife has deposed that she had US\$20,000 in savings when they were married and that she used half of that amount to pay the husband's debts. This the husband denies. The wife also says she brought furniture from the United States for the Batabano house. This is not denied by the husband. The parties left the Batabano house in 1981. There was a problem with rats and the parties took up residence at Beach Bay Condominiums where the wife was employed as manager. The husband subsequently transferred his half share in the Batabano house to his father. I accept the husband's evidence that he had not paid anything towards its purchase and that his father had spent money on its renovation. I also accept his father's evidence that some land at East End which he had paid for had been registered in the husband's daughter's name he told his son he wanted the Batabano house to be transferred to him. The parties had acquired no pecuniary interest in that property.

When the parties lived at Beach Bay the husband continued to work in the dive industry and to work as a drummer with the same band in the evenings. He also did some work around the condominium complex. In July 1981 with the assistance of a loan from a friend, the husband set up his own dive company. He was the majority shareholder and his friend took a small shareholding. As time went on the dive business expanded with substantial assistance from the husband's father in the form of bank guarantees, and the wife gradually became actively involved in the day-to-day running of the business. I am satisfied that during the time the parties continued with their interest in the dive business the wife put at least as much of her time and effort

into the business as the husband and probably more. In late 1989 the wife was granted Caymanian Status and a short time thereafter became fifty percent shareholder in what had now become a group of companies.

In September 1981 the parties moved into a house in Governor's Harbour which was purchased for their occupation by the husband's father. It was registered in his name and I accept his evidence that it was so registered because he was providing the funds for it. I do not accept the wife's contention that the husband put any money into the house purchase. Nor do I accept that there was any reason other than the clear and obvious one given by the husband's father for the house being registered in his name. In August 1987 the house was transferred to Amity Cayman Ltd. of which the husband's father is the sole proprietor, because he put all his properties into that company. The parties lived in that house, which became the matrimonial home, until their separation in 1990. From the date of separation the wife continued to live in the matrimonial home with her two sons. The parties have never paid any rent to the husband's father and he stated in his evidence that he will continue to permit the wife and the children to stay in the house rent-free so long as she does not re-marry or bring another man into the house. In her affidavit the wife said she has spent approximately \$60,000.00 on improvements to the property and in her evidence to Court she said it was more like \$80,000.00. This was called into question by the husband who put her to the strict proof thereof. Although the wife has not brought receipts to show her expenditure on the matrimonial home I do not doubt that she has contributed to improvements thereto. So, substantially and

particularly in the form of a new roof following Hurricane Gilbert, has the husband's father. It would not be out of keeping for the parties to seek to maintain and improve a house they were being permitted to occupy rent-free. Even so, says the wife, there are further repairs needed to the house which will cost, she estimates, \$50,000 to \$75,000. I have some reservations in accepting the wife's evidence that the matrimonial home is in such poor condition.

Significant sums have been spent upon it much of which have come from a generous father and father-in-law. The husband's father did not strike me as the kind of man who would permit his daughter-in-law and grandchildren to reside in poor conditions; the wife did not strike me as being the kind of woman who would permit herself and her children to live in poor conditions.

The group of businesses of the parties, continued to expand until 1988 when a fire destroyed the hotel which was the location of their main outlet. When they were in business together the parties remunerated themselves very well out of the business. They earned CI\$1000 each per week, had travel benefits, were provided with motor vehicles and a yacht and had the benefit of a group medical insurance policy. All this, of course, on top of having free housing and, they tell us, sometimes having the children's tuition and medical expenses paid for by the husband's father. It is clear that the parties got used to living in a style which, as will become apparent, their present circumstances cannot meet.

By the time of the parties' separation their businesses were in

serious decline. Apart from the loss of their main outlet the relationship of the parties affected the business. I accept the husband's father's evidence that he was, by 1990, seriously concerned about the group's spiralling debt burden. By mid-1990 the group owed to Barclay's Bank Plc and Cayman National Bank together sums in excess of US\$1.1m which were personally guaranteed by the husband's father. On the 25th July 1990 the parties relinquished their shares in all their companies to a company owned by the husband's father called Retsof Ltd. In consideration therefor the parties were released from their personal guarantees and thus, according to the husband, they were relieved of a potentially crippling liability. Thereupon the wife ceased her employment with the group business. The husband remained in their employment. However, the husband's father and Retsof Ltd. agreed to employ the wife as a consultant to the group at a salary of US\$5000 per month for one hundred months, which was a total remuneration package of US\$500,000.

In July 1991 the group of companies was sold to local investors. On that sale the husband relinquished his employment with the group and entered into a non-competition agreement whereby he would not work in the watersports or diving business in these Islands for a period of five years. This took away from the husband any possibility of earning a living in these Islands in one area of his expertise. Because of this his father entered into an informal unwritten agreement that he would pay the husband US\$500,000 by way of weekly instalments of CI\$1000. This mirrored the payments which were being made by the father to the wife. The wife took advice on the possible

United States tax implications of the consultancy agreement of the 25th July 1990. As a result that agreement was revoked on the 24th June 1992 and was replaced by a deed of gift under which the wife was to receive the sum of US\$500,000 by way of monthly payments of US\$5000 and under which the wife acknowledged receipt of payments of US\$5000 per month from 25th July 1990.

There is dispute between the parties over what these payments are meant to represent and although it has little effect upon the outcome of the case perhaps I ought to deal with the issue. The wife asserts that her father-in-law had promised when Retsof Ltd. took over the group of companies that she and her husband would receive the net proceeds of any future sale of the group and that the US\$500,000 was meant to represent half of the net proceeds of sale. She has maintained that although the net proceeds of sale of the group substantially exceeded US\$1m. she accepted the terms of the deed of gift because her father-in-law had paid her substantial sums on behalf of the husband as maintenance for herself and the children. The husband and his father testify that the husband's father had to pay substantial debts before he could sell the group of companies and that there were no net proceeds on the sale. In fact the husband's father's evidence is that he receives payment for the group by way of instalments, that he is still owed US\$1.3 m and if he lives to collect all the money owed him he will have lost about \$1.5 m on the group. His evidence is that the agreement to pay the wife US\$500,000 bore no relationship to commercial reality and was meant to provide the wife with funds to enable to her to live on the Island with her children in

some degree of comfort. In this regard I prefer the evidence of the husband's father. If in July 1990 the US\$500,000 was meant to represent payment for the wife's interest in the companies' shares there is no reason why the agreement should not have said so, rather than purport to be a consultancy agreement. I accept that the US\$500,000 was meant to enable the wife to become self-sufficient.

That desire did not bear fruit and the wife is far from self sufficient and demands from her husband a substantial settlement or maintenance. Her father-in-law honoured his responsibilities under the deed of gift and has gone a substantial step further and met demands from the wife for payments over and above the US\$5000 per month, at least until September 1994. The wife, on her own evidence, received from July 1990 to September 1994 a total of US\$680,341.10 from the husband's father. She alleges that of that total US\$250,000 represented payments under the deed of gift, US\$347,718.40 represented maintenance payments paid by the husband's father on behalf of her husband and US\$82,622.70 was assistance given to her to set up a beauty salon business. The husband and his father tell a different story. They both deny that any payment was made to the wife as maintenance on behalf of the husband. The husband's father says that it became apparent that the wife could not afford to live on US\$5000 per month so a practice developed weekly he met various bills of her directly and she would furnish him with a list of bills to be paid. Whenever he protested she would say she could no longer afford to live on the Island and intended to leave and take the children with her. The prospect of losing his grandchildren distressed the husband's

father and his wife and he invariably relented. He regarded the payments as being an advance on the gift of US\$500,000. The payment of US\$82,622.70 towards the beauty salon he paid out of the goodness of his heart. The husband's father has computed that between June 1991 and the end of July 1994 the wife had received from him sums totalling US\$594,399,44. He did not take into account in that total the amount of US\$5000 per month received by the wife for the period July 1990 to May 1991 under the consultancy agreement with the dive business. The husband's father wrote to the wife through his attorneys on 20th September 1994 to the effect that he considered that he had satisfied the terms of the deed of gift and that no further payments would be made under it.

The wife's claim, of course, is that only US\$250,000 was paid by the husband's father under the deed of gift and that the balance of the funds paid (apart from the US\$82,622.70 for the beauty salon) was on behalf of the husband. In that regard I prefer the evidence of the husband's father. There is a dearth of documentary evidence among the letters produced to Court to support the wife's claim in that regard. There is produced a letter of the 1st February 1993 which clearly links a request for money with a threat to remove the children from Cayman.

In addition to the amounts received from the husband's father the wife received direct from the husband a further \$44,239.85 as maintenance for the children from July 1990 to September 1994.

I should perhaps deal with one further aspect of the evidence before turning to the current position of the parties. It was contended by the wife that in 1991 she was offered a position with an airline operating out of these Islands but that the position was withdrawn because of her husband's intervention. There is also written proof that at one stage the husband and his father were attempting to sabotage her application for Caymanian status. I do not think that these allegations bear upon the outcome of this application. It may be that at some stage the husband and his father were, for whatever reason, reluctant to have the wife remain on the Island. But they have clearly relented. The wife got her Caymanian Status and has received substantial financial support from the husband's father including setting her up in business.

The husband owns a boat which he estimates is worth US\$40,000. His father purchased it for him and deducted the amount from the total gift he was to make to him. Using this boat the husband runs trips for tourists, strictly in contravention of the non-competition agreement with the businesses his father sold, and earns from that \$300 to \$400 per week. His main financial source of income has been the CI\$1000 per week payment from his father. His father computes the total payments he has made to his son from June 1991 to May 1995 at approximately CI\$465,000, This includes the contributions to school fees for the children (to which I shall return) and contributions to legal fees. The father has now said that, having paid CI\$65,000 over and above the agreed total, he will not support his son either.

The husband lives rent-free in a house provided for him by his father. His stated outgoings, compared to the wife's, are relatively modest although he did in fact get through over \$100,000 per annum in four years from 1991 to 1995. He pays health insurance coverage for the children, but relinquished that for the wife and unfortunately put her in some embarrassment by not informing her that he had done so. His bank account is overdrawn. The husband's assets, apart from the boat, are a motor vehicle worth \$18,000 and Harley Davidson motor cycle worth approximately US\$20,000. There is an interim order made under which he husband was to pay \$3000 per month to the wife. This is paid by the father. It is argued on his behalf that an order for maintenance of \$1000 per month is all he can afford. Of course, the husband's prospects are likely to improve in 1996 when he is released from the non-competition clause and when he hopes to get back into the dive business.

The wife is the sixty percent shareholder in her beauty salon business which has two outlets. The business owes money to its banker. The wife testified that she expects to earn US\$15,000 to US\$20,000 per annum from the business. She also has taken up work as a real estate agent and has earned \$6000 net from February to June this year. She hopes to earn more than \$18,000 per annum from that employment. The wife owns a boat for which she was offered \$1000 recently. She has a fairly new motor car on which she makes repayments to the bank of \$602 per month. She listed her monthly expenses at \$13,266. When one considers that she lives rent and mortgage-free this is a staggering figure. It is equally staggering that the wife has managed to get

through over US\$680,000 in slightly over four years with so little to show for it. In her fourth affidavit the wife asserts that the matrimonial home is really that of her and her husband. That she would need a lump sum payment of US\$950,000 if she is to live comfortably in the Cayman Islands or US\$750,000 if she is to live in the United States of America. Alternatively that she would need a monthly payment of CI\$13,266 and a further \$3000 to rent a house for herself and the children.

Turning now to the children, the oldest child attended school locally until mid-1992 but because of learning and behavioural problems the parties decided to send him to boarding school in the United States of America. He has been there ever since at the husband's father's expense although it seems the contributions on behalf of the parties have been taken into account against the total sums his father has agreed be paid. The boy thrives at the school and it was the parties' intention to send the youngest boy there too. With the withdrawal of the husband's father's financial support it seems to the parties that both boys will have to continue their education in Cayman unless the husband's father can be persuaded to relent in this regard. I should add that it is agreed by both parties that the children would be better off at boarding school in the United States and that to return the oldest child to Cayman may well have a detrimental effect upon him.

The wife contends that the "matrimonial home" belongs to the parties and that an order should be made which takes account of that. There

is absolutely no basis for that contention. The house belongs to Amity Cayman Ltd. a company owned by the husband's father who not only paid for the house but who has spent substantial sums upon it. It may well be that the parties, and particularly the wife, have also put money into repairs and improvements to the house, but they have had the use of it, rent-free, for a substantial period of time.

The parties have lived an extremely expensive life-style due to the kindness and generosity of the husband's father. This source of financial support has now been cut off, not surprisingly I may add, given the extent to which it has been abused. However, counsel for the wife would have me hold that their circumstances are not dissimilar to a discretionary trust or to other situations where payments may be made to a spouse with very little property or income. Whilst it may be true that if I make a substantial order against the husband his father would probably step in to rescue him I can see no justification morally or legally in attempting such a course. The father's past generosity should not be seen as investing the recipients of that generosity with a legal right.

The situation here is a far cry from a situation where a party divests himself of his wealth and puts it in the hands of third parties who have a discretion whether or not to make payments to the first party. The courts will look at the reality of the situation (see for example, Milburn v Milburn an unreported decision of the English Court of Appeal, 3rd October 1979) Nor are we in a situation such as existed in E v E (Financial Provision) [1990] 2 FLR 233. In that case the

husband was the only son of a rich man who kept tight control of his assets. The husband worked for his father for a modest salary but the father bought the parties a matrimonial home and supplemented their income so that they lived well. The last matrimonial home was settled on trusts but the first matrimonial home was still owned by the husband and was valued at 280,000 pounds. The father refused to assist in or countenance a capital settlement on the wife when the parties divorced and there was a major rift between the husband and his father as a result although Ewbank J., hearing the matter, felt that the rift would probably heal once the ancillary matters to the divorce had been settled. The children were in the custody of the husband. On awarding 200,000 pounds to the wife from the first matrimonial home Ewbank J had this to say at p 246:

"The husband, so far as I know, is a man of capability and potentiality. There is an indication in the article that I read that that may not be so, but I have no reason to doubt that he will be able to cope, by his own efforts if he has to, with the needs of himself and the children in the future, and more probably he will be able to cope with the assistance of his father."

In E v E the award was made out of assets in the hands of the husband and not out of assets in the hands of his father.

I must look at the reality of the situation (see Milburn v Milburn (supra)) which is that the husband has little earning capacity at least until next year and has little in the way of assets, although his Harley Davidson motor cycle strikes one as an unnecessary luxury when his children are in danger of losing adequate schooling. However, although his father has recently stated that he is

withdrawing financial support for both parties he has more recently assisted his son with various expenses. Moreover the father indicated in earlier affidavits that his obligations in that regard would come to an end in about October this year. I would be surprised if the father did not in the future step in to pay the odd bill for his son.

So far as the wife is concerned she has an interest in a business and two sources of income. Her income is tiny compared to her perceived needs but the brutal reality is that she cannot expect to live at anything approaching the standard which she has lived at in recent years. It would be wrong of his Court to force her father-in-law to maintain her at all, never mind at a standard which can only be described as profligate.

Section 18 of our Matrimonial Causes Law says:

"18. In dealing with all ancillary matters arising under this Law the Court shall have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and deserts of the parties".

Whilst it may be argued that the husband has squandered any opportunity he may have had to achieve a higher earning potential it cannot be a realistic expectation that he will be able to improve his income and earning potential outside the areas he has shown an interest inⁱⁿ the past. However he could probably work harder to improve his current earnings but by how much is difficult to assess.

It is in the best interests of the children that they attend boarding school in the United States. The husband has the means at his disposal, by selling his motor cycle, to provide for their education and travel expenses for at least the next year. By next year he will be in a better position to improve his earnings because the non-competition clause which so restricts him now will have lapsed. And he has a boat with which to immediately embark upon a potentially profitable enterprise. On his earnings I am satisfied that his offer of \$1000 per month maintenance is as much as he can manage at present. I am unable to make any order for a lump sum payment to the wife. I should add that these orders are made on the basis that the children, although being schooled in the United States, are not to be removed permanently from the jurisdiction. The wife's potential earnings and ability to start a new life do not appear to me to be better in the United States, and the children should retain their contacts with these Islands where they grew up and where they have been close to their Caymanian grandparents. I should also add that I expect the husband to continue paying the medical insurance for the children.

I order the husband to pay to the wife the sum of \$200 per month for her maintenance and \$400 per month for the maintenance of each of the two children commencing 1st September 1995. He will also pay the total cost of their school fees and related educational expenses in the United States and their travel to and from Cayman for each of the three holidays each year.

I make no order for costs.


D. Schofield
Judge

15th August 1995.