5/8/92 1992.

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

ON 20, 21, 22, 23 July 1992.

CAUSE D 131 OF 1991

BETWEEN	JOHN MICHAEL DINAN	PETITIONER
AND	ELIZABETH MARIE DINAN	RESPONDENT

Mr. R. Alberga Q.C. and Mr. Clifford for the petitioner
Mrs. Maierhoffer for the respondent

MALONE C.J. JUDGMENT

The parties were married in Nassau, Bahamas, on the 2nd November 1974 and lived there for about four years before moving to Grand Cayman. They have two sons of their marriage. The elder, Christopher, was born on the 12th February 1980 in Grand Cayman. The younger, Richard, was born on the 16th March 1984 in Miami.

It is pleasing to note, now that the marriage has irretrievably broken down, that the parties have made arrangements in discharge of the responsibilities they owe to their children. In brief, the arrangements are that the husband, has accepted responsibility for all expenses incurred in relation to the children whilst the wife has the custody care and control of the children. Currently they live with her in the matrimonial home but during a large part of the year Christopher, who attends a boarding school in Canada, is abroad. In about two or three years from now, Richard may join his brother at the school in Canada. Unfortunately, the parties have not been as successful in resolving their differences over the family assets and payment of maintenance to the wife.

The husband and wife are non-Caymanians. He is a

chartered accountant and a partner in the firm of Coopers and Lybrand (Cayman). He is the sole income earner of the family. The wife has no professional qualification and no training in any skill. Prior to the birth of Christopher she had an unskilled job in Nassau and for a brief time after Christopher's birth she had a similar job in Grand Cayman. It is accepted by both parties that whilst Richard lives with her and attends school the wife cannot be expected to engage in other than a half day unskilled job. Further it is acknowledged that to obtain a work permit for an unskilled individual without Cayman status is difficult both because unskilled jobs are reserved for Caymanians and because employers are reluctant to obtain work permits for part-time employees. In my view employment by the wife is not a factor to be taken into account in determining the maintenance payable to her.

A condition to being a partner in the firm of Coopers and Lybrand (Cayman) is that the prospective partner is required to create what has been described as a frozen asset. It is a capital sum that is paid into an account which cannot be pledged or drawn upon whilst the prospective partner is a partner of the firm. In the case of the husband C.I.$25,000.00 of which C.I. $15,000.00 was a loan from Coopers and Lybrand (Cayman) constituted his initial contribution. The balance of C.I.$10,000.00 came from funds which the husband had at the time or which he borrowed from a bank. Today the frozen asset amounts to U.S.$139,000.00 but is only available on the husband leaving the partnership or to his estate on his death. Without it, the husband would not be a partner in his firm and as a consequence would not be in a position to carry on his present livelihood. Mrs. Maierhoffer submitted that the asset is a capital asset in which the wife has a share. However, because of the frozen nature of the asset the wife's share, Mrs. Maierhoffer submitted, should be realized out of another capital source. For example, from the husband's share in the proceeds derived from a sale of the matrimonial home. Mr. Alberga

accepted that the frozen asset could not be ignored. Adopting the language of Lord Denning M.R. in Wachtel v Wachtel (1973) 1 A.E.R. 829 at p 836 Mr. Alberga submitted that the frozen asset was a family asset:

> "of a revenue-producing nature,"

from which the wife benefited and could not be said to be missing out on something for which she must be given something in exchange. That benefit was the larger income of the husband for the reason, as Mr. Alberga expressed it, that:

> "It is because of it (the frozen asset) why the husband's income is as large as it is and it is because of it that he is able to offer more than 1/2 of his entire income to maintain his wife and children."

I do not accept that explanation as it seems to me that if the wife has an interest in a capital sum that cannot be realised out of that sum but can be realised out of another source she would be missing out on something if her interest was recognised and she was denied realisation of that interest. The fact that the existence of the asset provides her with a larger maintenance than might otherwise be the case puts her in a position no different from the husband who enjoys a larger income because of that asset. On the other hand, should she have an interest in the frozen asset which is not realized she looses out and the husband benefits from her loss when, in due course, he leaves the partnership and takes with him the whole of the frozen asset.

Apart from the matrimonial home, Mrs. Maierhoffer listed in addition to the frozen asset five other sources of capital possessed by the husband. They comprise two pension policies in the petitioner's name, endowment policies to secure the purchase of a home in England on his return to that country, two endowment policies for the children, a Volvo motor car and a life insurance policy with his firm for the protection of the firm

against a sudden realization of the frozen asset. The car, to my mind, is an obvious must and so too the life insurance with his firm. The endowment policies for the children are for their benefit. The husband's firm provides him with no pension. He must provide a pension for himself. Some five years ago he took out his first pension policies and in 1991 he added to them on the advice of his insurers. I am not satisfied that the addition of his pension was made to avoid an order of the Court requiring him to pay a lump sum to the wife. I look upon it as a precaution reasonably taken by a man who is aware of the responsibilities he owes to his family. The one questionable item is the amount of the coverage to secure the eventual purchase of a house in England. To meet that commitment the husband has to pay U.S.$30,000.00 annually in discharge of loans from the Royal Bank of Canada, the Cayman National Bank and Barclays Bank. I think that commitment greater than his circumstances justify.

The agreed value of the matrimonial home is U.S.$207.500.00 but it is subject to an outstanding mortgage of U.S.$96,134.38. The home was purchased in 1987 and is registered in the name of a Cayman company called E and J Ltd. The husband and wife each owns 50% of the shares in that company. The husband is adamant that the property be sold as he claims that unless it is sold he will go further and further into debt. The wife wants the husband to accept responsibility for the mortgage and transfer to her his shares in E and J Limited.

The husband's proposal essentially is that in addition to the sale of the matrimonial home the proceeds of sale after discharging the mortgage should be divided equally between the parties and a monthly sum of U.S.$3000.00 should be paid to the wife. It is submitted on behalf of the husband that he would use his portion of the proceeds to reduce his loans whilst the wife could use hers as a down payment on a home. She could then obtain a mortgage for the balance of the purchase price and use a part of her monthly payment of U.S.$3,000.00 to pay off the mortgage. The

feature of that proposal to which attention should be drawn is that, no provision is made for the payment of a lump sum of the magnitude demanded by the wife namely U.S.$300,000.00 . Indeed no such provision is possible if the husband's figures as to his means are near correct as he claims that the matrimonial home is the only capital source from which a lump sum can be derived. Admittedly there may be room for a reduction of annual expenditure as I am of the view that the expenditure annually of U.S. $30,000.00 to secure the eventual purchase of a home in England is excessive. But if even that item was removed altogether the annual deficit between cash flow and annual income would be of the order of $25,000.00 without the sale of the matrimonial home. Those figures which take no account of the payment to the wife of a sum representing the interest she may have in the frozen asset suggest to my mind that the sale of the matrimonial is needed to clear it of its U.S. $96,000.00 mortgage.

The interest of the wife in the matrimonial home, is clearly defined by the shares she holds in E and J company Ltd. She has no defined interest in the frozen asset and there is no provision similar to section 5(1)(f) of the English Matrimonial Proceedings and Property Act 1970 which is as follows:

> "It should be the duty of the court in deciding whether to exercise its powers under section 2 or 6 of this Act in relation to a party to the marriage and if so, in which manner, to have regard to all the circumstances of the case including the following matters that is to say:
>
> (f) The contributions made by each partner to the welfare of the family including any contributions by looking after the home or caring for the family."

As Lord Denning M.R. explained in Wachtel v Wachtel (ibid) that provision remedied the injustice which resulted from

the rule that contributions by the wife that were not financial contributions did not acquire for the wife an interest proportionate to her contributions. In this case the small sums earned by the wife when in the Bahamas did not, in my view, contribute to the creation of the frozen asset. If the wife has an interest in that asset she can have it only by reason of a contribution which is not of a financial nature. The question then is does the absence from our law of a provision similar to section 5(1)(f) of the English Law bar a finding that she has an interest in the frozen asset? I think not. I agree with Sir John Summerfield in J.R. Miller v A.L. Miller Case No. 60 of 1980 that the language of section 21 of the Matrimonial Causes Law No. 9 of 1976 ("the Law") confers so wide a discretion on this Court in making orders "as appropriate" pursuant to sections 18 and 21 that the court can take cognisance of the wife's contribution in looking after the house and family. Further, by virtue of the provisions of section 21(c) and (f) of the Law, the Court can, I think, in making an "appropriate" order provide, as Mrs. Maeierhoffer submitted, that the interest may be realized our of another source.

In this case, the parties have been married for close on 17 years. For most of these years they have divided the obligations of matrimony between them. The husband has provided for the family and the wife has devoted herself to caring for the home and the children. This is not a contribution in terms of money but it is a vital contribution which allows the husband to be as successful as he has been. It is deserving of recognition. The question is what is the worth of that contribution to her? In England the starting point in a case of this description when looking for an answer to that question is what is known as the one third rule. The adoption of that rule is "appropriate" in this instance because of the length of time the marriage has lasted and because it is within the constraints of section 18 of the Law. I shall adopt it bearing in mind as Lord Denning M.R. said in Wachtel v Wachtel (ibid) at page 939:

" But this so - called rule is not a rule and must never be so regarded.....A starting point at one - third of the combined resources of the parties is as good and rational a starting point as any other remembering that the essence of the legislation is to secure flexibility to meet the justice of particular cases, and not rigidity, forcing particular cases to be fitted into some so-called principle within which they do not easily lie."

The matrimonial home belongs in law equally to the husband and the wife. It is the only capital source from which a lump sum can be realized. As I largely accept the husband's average annual income and required cash flow figures, I am satisfied that the matrimonial home must be sold. If the sale realizes the agreed value of the matrimonial home, each party's share of the proceeds of sale after payment of the outstanding mortgage would be U.S. $55,602.01. A one third share of the frozen asset paid out of the husband's share of the proceeds of sale would give to the wife an additional U.S. $46,333.33 and would reduce the husband's share of the proceeds of sale to U.S.$9,349.48. With a capital sum of U.S.$102,016.14, the mortgage required for the purchase of a suitable house of about C.I.$120.000.00 would be of the order of C.I.$33,000.00. It would be within the means of the wife, if even the maintenance offered by the husband is not increased to meet the obligations of a mortgage of that amount.

The annual maintenance of U.S.$36,000.00 offered by the husband represents less than one fifth of the husband's average annual income of U.S.$185,000.00. If regard is had to the fact that U.S.$43,000.00 of his average annual income is now spent on the support of the children, U.S. $36,000.00 is a little more than one quarter of so much of his average annual income as

is not committed to his children. If as is anticipated the expenditure on the children rises to U.S.$70,000.00, U.S.$36,000.00 will be less than one third of such income. To my mind an annual income of U.S.$39,0000.00 by way of maintenance for the wife would be reasonable. Before it can be sanctioned however regard must be had to the husband's position if the foregoing proposals were implemented as he, too, must be treated fairly.

The husband's principal objection to the foregoing proposals would, I think be that he cannot afford the payment of the wife's interest in the frozen asset. The reason being that that payment together with the payment to the wife of her share in the matrimonial home, so reduces his share of those proceeds of sale that he has not the means to reduce his loans. Consequently his average annual income will be insufficient to meet his required cash flow. I am not impressed by that argument. It seems to me that the husband can cut back on his life style as for example by foregoing the ambition of acquiring a £200,000.00 house in England and, can restructure his loans so as to spread their repayment over a longer period of time. It is altogether unreasonable that he should aspire to a £200,000.00 home for himself in England and consider a C.I$110,000.00 apartment adequate for his wife and children. It is also altogether unreasonable that he should discharge in three years at a rate of U.S.$30,000.00 per annum the commitments he has made to enable him to purchase his £200,000.00 home and then declare that he has not the means to recognize the wife's interest in the frozen asset whilst reserving her interest for his eventual benefit.

For the foregoing reasons I order as follows:

1. The matrimonial home be sold for not less than US$200,000.00 and after payment of the mortgage one half of the proceeds of sale or U.S.$55,602.01 (whichever is the greater) together with U.S.$46.333.33 be paid to the wife and the balance to

the husband.

2. The sale of he matrimonial house to take place within 6 months of this day.

3. Until the sale of the matrimonial home the wife to remain in occupation of it and the husband to be responsible for the payment of the mortgage.

4. The husband do pay to the wife a monthly allowance of US$3,250.00 by way of maintenance for herself. The first payment to be made by the 15th August 1992 and subsequent payments by the 15th day of each succeeding month.

5. Liberty to apply.

Sir Denis Malone

5th August 1992.