**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**HCA No. 3424 of 2001**

**BETWEEN**

**KAREN VICTORIA LA BORDE**

**Applicant**

**AND**

**JEAN MICHAEL GILBERT**

**Respondent**

**Before the Hon. Madam Justice Gobin**

**Appearances**

**Ms. Particia Roberts for Applicant**

**Ms. Lynette Seebaran-Suite for Respondent**

# JUDGMENT

1. This is an application by a former cohabitee under the provisions of the Cohabitational Relationships Act No. 30 of 1998 hereinafter called the Act.

2. By her originating summons filed on the 26th November 2001 the applicant claimed inter alia:

   (1) An order under S 21 (1) (d) of the Act for an order for a lump sum.

   (2) An order under S 21 (1) (e) of the act for a payment of a weekly, monthly or yearly or other periodic sum.

3. To my mind Section 21 indicates the various ways in which Court may give efficacy to orders that may be made in the exercise of its jurisdiction under "the Act". It is Section 4 of the Act which defines the jurisdiction of the Court. Broadly speaking it contemplates applications for declarations as to rights in property or adjustment orders and applications for maintenance, whether by way of periodical payments or by a lump sum payment.

**Claim for property adjustment order**

4. The instant application does not identify precisely what is being claimed. The Applicant has not identified any property of the Respondent in respect of which she seeks an adjustment order. In any case it is not in dispute that the Respondent has two items of property, namely:

(a) the home which the parties shared which is situate at 23 Second Avenue, Cascade

(b) his shareholding in the business Rituals.

5. If what is being claimed is a lump sum being the money value of an adjustment of property (and I suspect that it is), I must have regard to the matters set out at S 10 (1) (a), (b) and (c) which are as follows:

**S (10) 1 –**

**(a) the financial contributions made directly or indirectly by or on behalf of the cohabitants to the acquisition or improvement of the property and the financial resources of the partners.**

**(b) any other contributions, including any contribution made in the capacity of homemaker or parent, made by either of the cohabitants to the welfare of the family constituted by them.**

**(c) the right, title, interest or claim of a legal spouse in the property(for the purposes of this case this is not relevant).**

**<u>The Matrimonial home</u>**

6. The applicant does not allege that she made any substantial contribution whether directly or indirectly to the acquisition or improvement of the home that the parties shared. That property had been acquired solely by the Respondent prior to the commencement of their relationship. It is situate at 23 Second Avenue, Cascade and was constructed on a parcel of land owned by the Respondent and solely with his funds.

7. Much was made of the state of readiness of the premises at the time of the commencement of the live-in relationship and whether the Respondent was in occupation prior to the cohabitation. I do not consider a finding on this aspect of the matter to be of great moment but I say here that I prefer the Respondent's evidence that he had been living there for about one year before and that the home was finished and reasonably furnished to meet his needs and that of his son Sebastien who spent much time with him. The issuance of a completion certificate is not conclusive of the time of completion and I rather suspect the Respondent only sought to obtain one when he was about to acquire a mortgage on the property.

**Rituals**

8. The applicant does not claim that she made any "substantial" contribution to the business "Rituals" of which the Respondent is a director and which was the main source of his income. The Respondent's former wife Lorraine O'Connor was also a director of Rituals. Lorraine's active daily involvement in the business which operated from the home at the beginning was a source of much contention during the relationship. The Respondent's continued contact with his former wife was allegedly the cause of the failure of her own relationship with him, according to the Applicant.

9. In those circumstances, she would be hard pressed to allege that she made any meaningful contribution to "Rituals". I do not consider that her casual discussions with the Respondent on local tastes in music, her advice and occasional assistance, whether by way of transporting CD's or informally making contacts, amount to a contribution of such significance as should warrant an adjustment in this item of the Respondent's property.

10. Against this background, it must be stated that I considered the evidence as to the value of the Respondent's home and the income statements and financial records of Rituals relevant only to the issue of the Respondent's available resources. I would have referred to these if I decided to make an order.

11. I find that the Applicant made no substantial contribution to the acquisition or improvement of the home nor did she make any substantial or significant contribution to the business Rituals. I do not consider that her entertaining the business guests and friends at the home to have had any significant impact on the business.

12. It seems to me that in order to succeed in her claim for a property adjustment order, the Applicant would therefore have to show that she contributed significantly to the joint financial resources of the parties during the period of the cohabitation and indeed this is her case.

**The Application for maintenance**

13. The cohabitational relationship lasted about 6 years including the time the applicant spent at City University, London. The applicant is therefore entitled to make an application under S 7 (a) of the Act for maintenance. But the section expressly requires me to find as a prerequisite to making an order, that my failure to make the order would result in grave injustice to the applicant.

14. This of necessity leads me to consider the provisions of S 15 of the Act. In so doing I bear in mind that there is no general right to maintenance as between cohabitants and that "it was not the intention of parliament to accord

to cohabitants a status akin to marriage" (**Mendonca J. <u>Delzine v Crow HCA No. 3007 of 2000)</u>**.

15. Section 15 (1) provides:

> **"S 15 (1) A court may make a maintenance order, where it is satisfied as to one or more of the following matters:**
>
> **(a) that the applicant is unable to support himself adequately by reason of having the care and control of a child of the cohabitational relationship, or a child of the respondent, being in either case, a child who is –**
>
> **(i) under the age of 12 years ; or**
>
> **(ii) in the case of a physically disabled or mentally ill child, under the age of 18 years.**
>
> **(b) that the applicant's earning capacity has been adversely affected by the circumstances of the relationship, and in the opinion of the court a maintenance order would increase the applicant's earning capacity by enabling the applicant to undertake a course or programme of training or education; and**
>
> **(c) having regard to all the circumstances of the case, it is reasonable to make the order.**

16. There are so far two different views as to how S. 15 (1) is to be construed. There has been a difference of opinion as to whether Ss (1), (2) and (3) are to be read disjunctively or whether Ss (1) and (2) are to be read disjunctively but both subject to Ss (3).

17. The opinions are to be found in the respective judgments of Justice Jamadar in **Cv. 3525 of 2002 – <u>Majani v Fernandes</u>** and Justice Jones in **<u>HCA 1489 of 2002 – Stewart</u> <u>v. Theodore</u>**. I have considered them both and it is with the greatest reluctance and respect that I must disagree with my sister Jones. I favour the more liberal construction of the section which follows from the judgment of Justice Jamadar.

18. If the court's jurisdiction were so limited as Justice Jones has held, many older cohabitees with no young children, with limited opportunities for retraining or education, or persons, again with no young children who were simply unable to enter the job market by reason of age or infirmity would not be entitled to a maintenance order.

19. I therefore hold that 15 (1) (c) of the Act is to be read disjunctively in relation to 15 (a) and 15 (1) (b). It gives a broad power to the Court to entertain an application for maintenance if it is reasonable, having regard to all the circumstances of the case.

20. Having found that the Applicant is entitled to apply for property adjustment order and for maintenance I find it convenient to consider the case for maintenance and property adjustment as a whole. This is because the

result in both instances depends on a finding of fact as to whether the applicant made the substantial financial contribution that she alleges.

21. Section 7 (a) of the Act requires me to find as a pre-requisite to making an order that my failure to make the order would result in grave injustice to the applicant. If indeed I find that the applicant made as significant a contribution to the joint resources of the parties as she claims, not only would she in my opinion succeed in having an adjustment of property order expressed as a lump sum to reflect her contribution. If I were to so find, my failure to make an order for maintenance in the circumstances would then result in grave injustice to the applicant.

22. As with all applications where the Court is applying statutory criteria in order to determine what if any order should be made, there can be no universal formula. Each case must turn on its own facts.

23. In this particular case, it seems to me that the applicant's success on these applications turns on my findings as to the extent of her contribution. In the absence of a finding of a substantial contribution such as she alleges, there is nothing else in my view which would (when the relevant criteria are applied), entitle her to the orders she seeks.

24. Before I proceed to deal with my findings on the alleged financial contribution it is perhaps convenient to set out some of my findings which have led me to the foregoing conclusion.

**Applying the Criteria under S. 15 (2) to the facts as I have found**

25. The applicant is now 40 years old and the Respondent is 49. Although the applicant has sought to raise an issue as to her medical condition there is no medical evidence to suggest that her epileptic condition is in any way debilitating. She also complained of a heart problem which, according to the report of Dr. Winston Ince, does not affect her lifestyle. It seems to me that the Applicant's present state of health does not in anyway negatively affect her ability to engage in employment in the future.

26. The Applicant claims to be unemployed and complains that she has been so since the breakdown of the relationship. She claims that she has been looking for employment but has not been successful.

27. She has sought to attribute the blame for her failure to have completed her masters dissertation and her consequent "inability" to find employment, on the Defendant. On the one hand she says she was unable to complete her Masters dissertation because she had to cut short her stay in England when the Respondent withdrew his support. This is somewhat inconsistent with her evidence on the other hand that the Respondent did not support her while she

was studying and that she managed to survive on her income from her wine business "Prosperite" and with financial assistance from her family.

28. There also remain glaring inconsistencies in her evidence as to the circumstances of her failure to complete her Msc. course. At paragraph 22 of her affidavit of 6th September 2002, she said she had to repeat a course and needed to stay for two more weeks in London. She asked the Respondent for £500 for the extended stay, he said no and she was forced to return to Trinidad.

29. In her earlier affidavit of 28th January 2002 she indicated that Entertainment lawyer Alex Grower advanced her £500 to tie up some loose ends. It would seem to me that if £500 was what she required for the extended stay, she could have used Grower's money for that purpose.

30. But it changes once more. In her affidavit of the 18th February 2003 she indicates the Respondent did not agree for her to stay an extra two months to complete her dissertation topic.

31. Cheques produced by the Respondent show that in the months following her return to Trinidad the Respondent paid the Applicant the sum of $37,000.00. It would seem to me that if the applicant genuinely wished to complete her Masters she could have done so. Presumably, she still had

family support. In the light of all of this I cannot accept that the Respondent's conduct contributed to the failure of the Applicant to conclude her program. Further, I find it hard to accept that the applicant believed that she having filed this application in Court, could not leave the country to finish her dissertation.

32. The Applicant professes to have remained unemployed since the break-up of the relationship, but has however been managing somehow to meet monthly expenses of $8,250.00 with no income. I do not accept her explanation that she is living on advances from family members and her current boyfriend.

33. It would seem to me that the applicant has been less that forthright about her resources. I do not believe her to be as destitute as she has attempted to make out. I do not assess the applicant to be someone who would incur debt through advances for a period of 4 years on the expectation she was bound to succeed in these Court proceedings.

34. The Respondent's resources exceed those of the Applicant. He has the home he always had, shares in a company which is doing a lot better than it did when the relationship began and his income including directors fees and allowances.

35. The Respondent continues to have his financial responsibilities to his son Sebastien. In the course of the matter it was disclosed that he recently remarried. No evidence was led as to whether his wife relies upon him for support.

36. The parties enjoyed a comfortable lifestyle which included foreign travel, a fair amount of business related entertaining and a fair amount of dining out and socializing. The applicant claims to have contributed to the welfare of the business and the family by her management of much of this entertainment, by funding most of it and by generally managing the household help.

37. I find that the applicant did indeed assist in organising such entertainment as there was for house guests and indeed business guests. I find that she did act as hostess perhaps on more occasions that the respondent can recall. I do not find that in doing so she went beyond what one could expect of a woman in her situation who was living in the Respondent's home and enjoying the benefits of the lifestyle he afforded her.

38. I find her financial contribution in respect of such entertainment to have been limited perhaps to advancing monies which the Respondent would reimburse. In her affidavit of 28th January 2002, the applicant indicated a monthly breakdown of their expenses in the sum of $25,800.00. While this

information was supplied by the Respondent it appears it was accepted by the Applicant. That breakdown included a sum of $3,000.00 to herself. When it was suggested by Counsel for the Respondent that he gave her this sum as an allowance. The applicant answered that this was to reimburse her when she spent money on the household. This answer suggested that her contribution was not as significant as she claims.

39. I accept that in the home, the Applicant would have added to her personal touch to the décor she found there. It is accepted that she would have purchased small appliances and done things she said she did which included refurbishing the counter top, purchasing food and managing the household, including the household help.

40. In so far as her alleged contribution to Sebastien's welfare is concerned, I find that from her own evidence as to the relationship with the child, she was limited by the child's unwillingness to open up to her. The child was territorial with his father, spoke French to exclude her and was not very outgoing. I accept she tried with him but without much success.

41. It appears that she assessed that the best way to deal with what she perceived as Sebastien's problems was by not imposing herself on him. This was not an unreasonable approach. I do find that she would have ensured on the occasions that the child was there that his meals were provided as were

hers and the Respondent's and that he was supervised if his father happened not to be there. The overall picture is that there was not much of a relationship.

42. At the end of the day I do not assess her limited contribution in these areas to justify the orders sought. The applicant was after all being provided with a home, a fairly comfortable lifestyle. While she was a student abroad she could not have been in a position to make any contribution to the family or the resources. During this time she continued to receive support from the applicant.

**The Applicant's case/Financial contributions to the joint resources of the parties**

43. I have said before that this case turns on my findings on the alleged financial contributions of the applicant. The applicant alleged that at the time she and the Respondent began to cohabit they discussed the pooling of their resources. According to her this would have been necessary because he had limited income in the sum of $4,500.00 as directors fees and it was the availability of her salary from TSTT that allowed them to meet their expenses.

44. Following upon this alleged agreement the applicant claims to have contributed all of her income towards their joint expenses.

45. I turn to the quantum which she claims she expended. In her first affidavit filed on the 26th November 2001, she claimed this to have been $850,000.00 sourced as follows: $485,000.00 from TSTT which included her VSEP payments. Net income of $350,000.00 from her company, Prosperite Trading Company.

46. By her affidavit filed on 18th February 2003 the sum had increased from $1,300,000.00 to $1,400,000.00. In arriving at this increased figure the Applicant had included sums available through loans, credit cards and overdraft facilities.

47. Finally, in her financial record which was introduced in evidence and marked KLB (1) her grand total, sources of income had climbed to $1,722,748.50.

48. That her original claim as to the quantum available to her to invest in the relationship had doubled by the end of her case raises issues as to her credibility. But there are several matters which raise doubt as to whether Applicant can support her claim that these sums of money were in fact available to her as income or that she in fact spent any of it on their joint needs.

49. I turn to the Applicant's financial record for a closer examination of her statement as to sources of income.

**Source (1) TSTT non VSEP salaried earnings**

50. The Applicant tabled this source as providing $260,372.00 for her contribution to the resources of the party. In arriving at the figure she totalled the Basic Salary for the years 1995, 1996 and 1997 as shown by a letter from TSTT dated 9th November 2001. The Applicant says her take home salary from TSTT during the period was in the order of $6,000.00.

51. The Applicant's statements for Account No. 9105191135 for the months April and May 1997 however showed a payroll credit of $4,610.00. Both statements also reflect a loan deduction of $629.00. I conclude that the non VSEP salaried earnings were significantly less than the applicant alleged. As to whether it was used for the benefit of the household is another matter.

52. Her Credit Union statement indicates that she had loan payments to the Credit Union even before the commencement of the cohabitational relationship. Prior to her cohabitation with the Respondent and at a time when she claimed to have had a simple and affordable standard of living, there was a pattern of regularly refinancing ongoing loans and repaying same through a standing order. The record shows this continued with little change. The

applicant would have had even less money available after her Credit Union deduction.

53. The applicant in my view deliberately overstated the quantum that was available to her. Regrettably, I have concluded that this characterised her approach throughout the preparation of the financial material I requested. I turn to the next source.

**TSTT VSEP salaried Earnings**

54. That the Plaintiff received a cheque in the sum of $155,333.56 cannot be disputed. When one looks at the opening balance in her two accounts shortly after she took her VSEP package, her deposits (allowing for the transfer of $75,000.00 from one account to the next) exceeds that sum of $155,333.56 by some $47,000.00. I therefore accept that the Applicant received further cash payments in this sum. In the absence of any other documentary evidence, and having regard to my conclusions about the applicant's general credibility, I find that this was all the money she received upon her separation from the company.

55. In any case it is not in dispute that the proceeds of both accounts into which the applicant deposited her VSEP earnings were more or less depleted by December 1997. I find this to be significant.

56. There is no evidence as to particulars of the medical loan and in the absence of documentary evidence and especially in the light of my assessment of the credibility of the Applicant. I am not prepared to accept that these funds became available to her during the period of the cohabitation or in any event that they were applied to the resources of the parties.

57. As to her telephone benefits I am not prepared to treat the applicant's dollar conversion of this perk, if there was such, as a benefit to the joint resources of the parties. There is no evidence as to what if any was the monthly allowance. I have looked at several telephone bills attached to the Defendant's bundle "JMGC". On the face of these, there is nothing to suggest that there was any concession to the account holder.

**Proceeds of overdraft facilities, Credit cards**

58. The Applicant calculated the total of these recurrent advances without making any allowance for her liability for repayment. This is obviously flawed. I accept Mrs. Suite's submission that the result claimed by the Application is a fiction.

**Unit Trust Corporation**

59. The Applicant gave evidence that out of her VSEP payment she invested the sum of $85,000.00 in the UTC. No documentary evidence of the history and current status of this account was produced although the applicant

said she had provided same to her attorneys. She said that the proceeds of the account were depleted sometime in 1998 but I find this difficult to accept in the light of the fact that there was a fund appreciation of $24,606.00. In the absence of any other evidence I do not accept that the funds were in fact depleted nor indeed that the proceeds of the fund appreciation were applied to the joint resources of the parties.

**PROSPERITÉ**

60. The income from this business according to the Applicant's record was $606,463.00. It emerged in the course of her cross-examination that this was her gross income. She also indicated her profit margin would have been 40% which is what she would have had available to apply to the joint resources.

61. But the applicant also claimed that because of the Defendant's refusal to support her, she spent £30,000 on her tuition fees for her Masters at City University. This would easily have absorbed all of her income from her business. While she claimed to have also had assistance from her relatives it seems to me that there would have been nothing overflowing from this source to apply to the joint resources of the parties.

62. It would seem to me that all the applicant's living expenses in London and travel to and from London would have had to have been funded

from some other source. It is not hard to believe that the Defendant was that source.

**The Defendant's Resources**

63. During the trial Counsel for the applicant requested Ritual's financial statements. I understood it to be for the purpose of demonstrating that the Defendant had limited resources in terms of his director's fees and allowances. This according to the applicant was why the parties needed to pool their resources and why all of her moneys were utilised for the benefit of the household.

64. Having pitched her case this way the applicant identified his salary firstly as $4,500.00 and then at some later stage as $12,000.00. This is wholly inconsistent with the statement deposed in her affidavit and referred to above, of the household expenses as being $25,000.00 per month including the allowance paid to her of $3,000.00.

65. The financial records which were produced in the several bundles by the Defendant show that a large portion of the household expenses were in fact borne by Rituals. The Defendant received director's fees allowance in cash which ranged over the years from $4,500.00 to $15,000.00 but in addition to this it is clear that the Company carried the household.

66. Indeed I think it is convenient here to note that in none of the bank statements produced by the applicant for the period following December 1997, nor in any other document has she been able to identify any particular record of spending towards the household.

**Conclusion**

67. As I indicated before the Applicant's case turned on a finding of fact as to whether she made the enormous financial contribution she claimed she did, to the joint resources of the parties. Not only have her financial records failed to withstand scrutiny; I have found the applicant's credibility to be wanting on this material aspect of the case.

68. Insofar as I have found that she did make some non-financial contribution I find she has been adequately compensated. The Applicant has accepted that she received some $70,000 from the Respondent for her MSc studies (para. 12 affidavit of 26/11/21). Further she received $37,000.00 after the breakdown. The Respondent has said that he gave her cash amounting to about $150,000.00.

69. I am inclined to prefer the respondent's evidence on this but in any case given my findings on her financial contributions I think that $107,000.00 which she acknowledges she received together with all the other non-financial

benefits over the period of the cohabitation including housing, food, travel, entertainment, is not inadequate.

70. In the circumstances I refuse the reliefs sought by the Applicant and dismiss her originating summons.

71. On the question of costs I make no order as to costs. The Applicant's financial records were only produced at the request of the Court. I do believe that this litigation would not have been so protracted had the parties addressed their minds to wholly relevant matters at an early stage.

72. Early on in the proceedings I made certain comments on the unsavoury and demeaning allegations of conduct. Counsel for the Respondent in her submissions nevertheless referred to the issue of conduct on the part of the applicant.

73. Let me say here that I do not consider that conduct was an issue in this case and I thought that this had been made clear early on. S 27 (1) of the Matrimonial Proceedings and Property Act Ch. 45:51 makes specific reference to the Courts jurisdiction to take into account the conduct of parties. That section notwithstanding, Judges have over the years given little weight to these allegations save of course where the conduct alleged is "gross and obvious".

74. Experience has taught that the less time judges, attorneys and consequently the parties spend on faultfinding, the more efficiently can cases be dealt with. Indeed the inclusion of allegations of conduct very often causes parties to remain unable and unwilling to focus on the more important issues in the case. The practice does not assist the courts.

75. Under the Act S 15 (2) (j) provides that the court may have regard to:

> **"any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account"**

76. It is perhaps arguable that under this section and where it is so significant a Court may have regard to conduct. But the practice of raising issues of conduct save where the conduct alleged has had a direct effect on the ability to earn, or on the value of the property or other resources of a party, is to be discouraged. Attorneys and litigants are advised against conduct in litigation which may be viewed as counter-productive.

**Dated this 30th day of September 2005**

**CAROL GOBIN**

**JUDGE**