

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 1651 OF 2003

JASMINE ALBERT

PLAINTIFF

AND

IRWIN MOHAMMED

RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mrs. Lynette Seebaran-Suite for the Plaintiff

Mrs. Hyacinth Griffith for the Respondent

JUDGMENT

1. By her Originating Summons dated the 4th July 2004 the Plaintiff seeks the following relief:

- (i) Pursuant to the Family Law (Guardianship of Minors) Act:
maintenance of the child of the family, Marisa born on the 29th October 1995 and a lump sum to compensate her for liabilities and expenses reasonably incurred in maintaining two children of the family before the making of this order and
- (ii) Pursuant to the Cohabital Relationships Act 1998: a property adjustment order with respect of premises situate at Perseverance Road

Haleland Park Maraval (hereinafter called “the Haleland Park property”)

2. The originating summons was subsequently amended to include relief pursuant to the Partition Ordinance.
3. On the 6th October 2003 the Respondent was ordered to pay the sum of \$500.00 for the maintenance of the child Marisa.
4. By an order made by consent on an application by the Plaintiff for an exclusion order on the 9th February 2004 the Plaintiff was granted a non-molestation order and care and control of the minor child of the family Marisa and the Respondent agreed to pay the sum of \$2,500.00 a month for the provision of alternate accommodation for the Plaintiff and the said minor child pending the determination of the proceedings.

The Facts

5. Let me say from the outset that neither party struck me as being particularly truthful. Both parties gave the impression of being prepared to stretch the truth to suit their respective ends. Luckily, save for the question of the contributions of the parties to the acquisition of the Haleland Park premises and their relative financial positions, the relevant facts are more or less not in dispute.
6. The parties met in the year 1976. The Respondent was at that time living with his wife and continued to do so until the year 1999. The Plaintiff was at all times prior to December 1999 living in rented premises. Three children were born to the parties: Anton born on the 31st July 1979; Adam born on the 15th May 1984

and Marisa born on the 29th October 1995. Of the three children, at the time when this application was made the child Marisa was the only minor child. At all material times until the parties began to live together the children lived with the Plaintiff and the Respondent assisted in their financial support. Anton is now married and lives on his own. Adam lives with the Respondent in the Haleland Park property and the child Marisa lives with the Plaintiff in rented premises.

7. In the month of March 1997 as a result of a “lotto” ticket purchased by their eldest son Anton the sum of \$1,794,559.18, was paid out by the National Lottery Board in the name of the Plaintiff. There is some issue as to the source of the funds from which the ticket was purchased and the ownership of the proceeds. The Respondent says that it was purchased from the change from \$20.00 given by him to Anton to buy ice. The Plaintiff says that it was purchased out of Anton’s money and that he gave the proceeds to her. According to Anton, who swore to an affidavit in the proceedings he purchased the tickets, which cost \$30.00, from his pocket change. He says that he gave the money to his mother for her birthday and requested that she make a better life for the other children and himself.

8. Most of the proceeds were by the 14th March 1997, the day after receipt, placed in a joint account in the names of the Plaintiff and the Respondent. From these proceeds the Haleland Park property was purchased in the names of both parties in the month of December 1997. Renovations of the Haleland Park property commenced financed by the proceeds of the lotto win and were

completed in the month of December 1999. As well, furniture and appliances for the home were purchased from these proceeds.

9. The parties and the children moved into the Haleland Park property in the month of December 1999.

10. The Haleland Park property was in the month of February 2004 valued at \$2,650,000.00.

11. By the time of the hearing of the evidence there was some \$300.00 left from the lotto winnings.

12. The relationship between the parties finally broke down in or around the month of May or June 2003 and in the month of September 2003 the Plaintiff filed the instant application.

13. Both parties lived in the Haleland Park property until the month of February 2004 when, upon the Plaintiff making her application for an exclusion order and the Respondent agreeing to pay for accommodation for the Plaintiff and the minor child of the family, the Plaintiff vacated the said premises.

14. The Plaintiff is, at present, employed by the eldest child as a sales assistant at a monthly salary of \$2,000.00. Throughout the period of the relationship she worked at various jobs at salaries which by and large did not exceed what she now earns. In September 2003 the expenses for herself and the two younger children were given by her to be \$7,545.75. No particulars have been given of her present expenses for the child Marisa. From the expenses listed it would seem that the sum of approximately \$2,000.00 a month represented her monthly expenses for the child Marisa at the time.

15. The Plaintiff is also a co-beneficiary of the estate of her deceased stepfather. From this estate she receives the sum of \$650.00 US a month from an apartment left to her by her stepfather, holds the proceeds of a similar monthly sum on trust for her stepsister and is the joint holder of a fixed deposit together with her son Anton in the sum of approximately \$149,000.00 US in July 2003. She says that she has been able to meet the family's expenses from the funds in the joint account and from borrowing from the monies held by her in trust for her stepsister.

16. The Respondent is an electronic technician. Prior to the year 2001 he was a director in the Upper Level Club, a nightclub, and carried on a business "Irwin Electronic Engineering". In the year 2001 the club closed down causing his income to drop substantially according to him. Irwin Electronic Engineering is now his only source of income. He says that he runs the business from two apartments situate at Gittens Apartments, Begerac Road, Maraval (hereinafter called "the Gittens Apartments") and a rented room which he uses for storage of his equipment. These apartments, originally the matrimonial home shared with his wife, were purchased by him in the month of July 1998 for the sum of \$320,000.00. The Respondent is engaged in providing lighting equipment for shows and technical advice. He also has satellite and cable television systems and according to him has worked in Antigua and Guyana. He still does work in Grenada and Trinidad for Issa Nicholas. He states that his gross income fluctuates from \$12,000.00 a month in the peak seasons like carnival to \$3,000.00 a month in the slow seasons. Save that his business expenses amount to

approximately \$8,000.00 a month he has given no evidence of his expenses. He says that the down payment for the Gittens Apartments was obtained from savings from his earnings. He pays a mortgage on these premises. He also owns a 21-foot powerboat which he says that if he were to sell he would sell for a million dollars.

17. One of the issues of fact for my determination is the ownership of the proceeds from the lotto winnings. The evidence of the Plaintiff is that the money belonged to her. The gist of her evidence is that the Haleland Park property and the majority of the funds were only put in the Respondent's name because he assured her that if she did so they would be married and that if anything were to happen to her he would ensure that the children were well taken care of.

18. The Respondent on the other hand denies that he promised to marry the Plaintiff at that time, claims that the funds were given to him by their son and says that despite the fact that the funds were his he decided that they be utilized for the benefit of the family. Accordingly the Haleland Park property and the lotto winnings were put into their joint names.

19. The evidence of Anton, while helpful in parts, is to mind my evidence given in hindsight and at a time when the Plaintiff and Marisa were staying with him and his family as a result of the Plaintiff's claims of violence towards her by the Respondent. I am not prepared to speculate on the source of the funds used to purchase the ticket it is clear that the decision to purchase was Anton's and the money came directly from his pocket.

20. I find that the winning ticket having been purchased by Anton the funds belonged to him. That said, it is clear from the evidence that while he may have given the physical ticket to his mother his intention and indeed the intention of all three of them was that this money be used for the benefit of the family as constituted by the Plaintiff, the Defendant and the three children. To my mind it is the receipt of this money that was the straw that broke the back of the Respondent's marriage and allowed the Plaintiff and the children to formally pry the Respondent away from his wife.

The Applications pursuant to The Family Law (Guardianship of Minors) Act

21. The power to make an order for the payment of a lump sum arises under section 20 (1) of the Family Law (Guardianship of Minors) Act (hereinafter in this part called "the Act") which provides that "without prejudice to the generality of sections 13(2), 13(5), 14(1) or 15(b) an order under any of those provisions for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order for maintenance to be met". As an aside it must be noted that none of these provisions provide for the payment of a lump sum and for the legislation to make sense section 20(1) must be read as allowing such a payment. Of more relevance to the application before the Court is the fact that neither of the sections referred to by section 20(1) allow for the making of a maintenance order with respect to an adult child. The only jurisdiction given the Court by this Act to

make any payments for maintenance for an adult child is by section 16 which provides for the continuance of an order made under sections 13, 14 or 15.

22. In the circumstances I am of the view that there is no jurisdiction to make an order for the payment of a lump sum with respect to liabilities or expenses incurred on behalf of an adult child.

23. With respect to the child Marisa there is no evidence of the Plaintiff's actual expenses and liabilities for her not met by the Respondent. The Plaintiff's evidence is that prior to the parties living together the Respondent contributed the sum of \$4,900.00 a month to their expenses. Sometime after the parties began to live together the Plaintiff claims that the Respondent reduced his contribution to \$200.00 a week and from the month of April 2003 has paid nothing towards the children's care and upkeep. According to her from some unspecified time she was forced to use money standing in the joint account of the parties, that is the lotto winnings, and to borrow money from her stepfather's estate to support herself and the children. The Respondent denies that he did not support the family and avers that at all times he paid the bills and in particular the school fees and lessons for Marisa, the children's toiletries and groceries for the home generally. The question is whether this money came from his earnings from the business or from the joint funds. Given the state of the evidence, however, I am not prepared to make the lump sum order sought under this Act.

24. With respect to the maintenance order for the child Marissa, attempts were made during the course of the hearing to have the parties agree as to what her expenses were and to the quantum and method of payment. These attempts have

not resulted in any agreement. The parties have however placed before me their correspondence in this regard. In all the circumstances I order that the Respondent pay to the Plaintiff the sum of \$ 1,200.00 a month for the maintenance of the child Marisa as well as pay for her school fees, school books, school uniforms and school equipment and one half of her medical, dental and optical expenses.

The Cohabital Relationships Act

Jurisdiction

25. The first issue that arises for the determination of the Court is whether the Court has jurisdiction under the Cohabital Relationships Act (hereinafter under this part called “the Act”) to make an adjustment order, that is, an order under sections 6 and 10 of the Act.

26. The jurisdiction of the Court to make such an order is set out in section 7 and arises in circumstances where the Court is satisfied that:

- (i) The parties have lived in a cohabital relationship for a period of not less than five years; or
- (ii) The applicant has a child arising out of the cohabital relationship; or
- (iii) The applicant has made substantial contributions of the kind referred to in section 10 of the Act and that a failure to make the order would result in grave injustice to the Applicant.

27. A “cohabitational relationship” is defined by the Act as “the relationship between the parties, who not being married to each other, are living or have lived together as husband and wife on a bona fide domestic basis.” The phrase bona fide domestic basis is not defined by the Act.

28. In **HCA No. 3007 of 2001 Anthony Delzine v Judy Stowe** the phrase “living together on a bona fide domestic basis” was examined by Mendonca J in the light of the facts of that case. In so doing the learned trial Judge accepted that the Act was based on legislation coming out of the New South Wales jurisdiction of Australia (hereinafter called “ the NSW Act”). The learned trial judge considered section 4(2) of the NSW Act which provides that in determining whether two persons are in a de facto relationship all the circumstances of the case must be taken into account including:

- (i) The duration of the relationship;
- (ii) The nature and extent of the common residence;
- (iii) Whether or not a sexual relationship exists;
- (iv) The degree of financial dependence or interdependence and any arrangement for financial support between the parties;
- (v) The ownership, use and acquisition of property
- (vi) The degree of mutual commitment to a shared life
- (vii) The care and support of the children
- (viii) The performance of household duties and
- (ix) The reputation and public aspects of the relationship.

29. The NSW Act further provides that no finding in respect of any of the matters mentioned above or in respect of any combination of them shall be regarded as necessary for the existence of a de facto relationship and a Court in determining whether such a relationship exists is entitled to have regard to such matters and to attach such weight to any matter as may seem appropriate in the circumstances of the case.

30. While this section does not form a part of the Act it must be noted that it was in fact an amendment introduced into the NSW Act as a result of various decisions of the New South Wales Court and in particular the cases of **D v Mc A [1986] DFC 95-030** and **Roy v Sturgeon** (1986) 11 NSWLR 454 both of which although not binding on this Court are certainly of persuasive authority.

31. Using the above mentioned indices, and indeed on a common sense approach, and bearing in mind that the purpose of the legislation is to confer rights and obligations on parties in their capacity as cohabitants as opposed to unmarried parents of children or parties in a more casual or visiting relationship I am of the opinion that one of the determining factors in this case is the fact of the Respondent's continuing residence with his wife up to the year 1999. This fact taken alone, to my mind, demonstrates not only that there was no common residence but that there was no mutual commitment to a shared life or any public aspect to the relationship. If not for the lotto winnings, the purchase of the Haleland Park property together and the establishment of the joint accounts this fact, that is the cohabitation with his wife, would have led to the inescapable

conclusion that the parties did not live together on a bona fide domestic basis until the year 1999.

32. However bearing in mind the persuasive authorities and the indices referred to above I am of the view that the opening of the joint accounts in March 1997, the purchase of the Haleland Park property in December 1997 in their joint names with the intention of it being a residence for the family and the subsequent renovations and improvements done to the property as a joint enterprise all point to the existence of a bona fide domestic relationship from, at the earliest March 1997, when the accounts were opened or at the latest, December 1997 when the Haleland Park property was purchased.

33. Whatever the date of the actual commencement of the relationship I find that the parties have lived together as husband and wife on a bona fide domestic basis for a period in excess of the five years as demanded by the Act. In the circumstances I find that I have the jurisdiction to make an adjustment order with respect to the Haleland Park property as sought by the Plaintiff.

The Property Adjustment Order.

34. Section 10 of the Act, insofar as it is relevant, provides that “on an application for an adjustment order the High Court may make any order as is just and equitable having regard to

- (i) 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; and
- (ii) Any other contributions, including any contributions made in the capacity of homemaker or parent made by either party to the welfare of the family constituted by them”

34. Unlike the provisions of the Matrimonial Proceedings and Property Act Chap 45:51, save for the powers of adjournment contained in section 11 of the Act, the Act is retrospective in its terms. It seeks to compensate the parties for their contributions rather than ensure that the parties as far as possible are allowed to maintain the same standard of living on the break down of the relationship as they enjoyed during the relationship. Neither does the Act accord any consideration to the conduct of the parties except insofar as it relates to their contributions, financial or otherwise.

The relevant period for assessing the contributions

36. Are contributions made before the commencement of the cohabitational relationship relevant? Given the wording of the section and in particular the use by the legislature of the words “by and on behalf of the cohabitants” and “the financial resources of the partners” in sub-section (a) and “to the welfare of the family as constituted by them” in sub-section (b) I am of the opinion that save insofar as a consideration of contributions made prior to the cohabitational

relationship may have a bearing on the question of whether the order of the Court is at the end of the day just and equitable, the contributions to be considered by the section are those which were made pursuant to the cohabitational relationship and not before.

37. In order to satisfy the section therefore the Court is required to look at the contributions made by the parties during the cohabitational relationship and then looking at all the circumstances test the order by ascertaining whether it is all the circumstances a just and equitable one.

38. In dealing with this issue Mendonca J in the **Stowe case** adopted the words of Davies AJA in **Jones v Grech (2001) NSWCA 208** in which he said “In general, an inquiry under section 20 requires examination, first, of the identity and value of the respective assets of the parties, secondly, of the contributions of the type contemplated by paragraphs (a) and (b) made by each partner, and, lastly whether in all of the circumstances of the case the contributions have already been sufficiently recognized and compensated for and if not, whether it is just and equitable to make an order so that the contributions of one or the other of the parties was sufficiently recognized and compensated for”.

39. According to Mendonca J in the **Stowe case** “to disregard the context in which the contributions are made, may lead the Court into misconstruing the significance of the contributions. It is therefore necessary to have regard to the context in which the contributions were made, or, as is said the contributions should not be considered in isolation from the nature and incidents of the relationship as a whole.”

40. In the circumstances of this case I find that at the commencement of the relationship therefore the parties held the following property jointly:

- (i) The Haleland Park property;
- (ii) The balance of the proceeds of the lotto winnings;

The Defendant also had his business assets and a powerboat. There is also some evidence of motor vehicles held by one or the other of the parties.

41. At the termination of the relationship the parties hold jointly

- (i) The Haleland Park property valued at \$2,650,000.00
- (ii) Furniture and appliances;
- (iii) The sum of approximately \$ 300.00 in the joint bank account;

All of which were purchased out of the proceeds of the lotto win.

42. As well the Plaintiff holds the apartment and the fixed deposit held jointly with Anton received from her stepfather. The Respondent continues to hold his business assets and he is the owner of the Gittens Apartments.

Contributions made during the Cohabital Relationship.

43. At the time of the commencement of the relationship there were two minor children of the relationship, Adam was 13 years and Marisa 2 years. The children lived with the Plaintiff. According to the Plaintiff after the receipt of the lotto winnings the Respondent stopped making his usual contributions to the family and the winnings were used for the family's expenses. Save to say that he has always looked after Marisa's needs without assistance from the Plaintiff the Respondent has not challenged this statement. Further given the Respondent's

evidence of his reduced circumstances since the year 2001 it is reasonable to assume that at least from that time the Respondent would less have been able to have afforded to continue to make the contribution that he had been making previously. As well, from his evidence the Respondent had, from the year 1998, the added expense of the mortgage payments for the Gittens Apartments. In the circumstances I accept the evidence of the Plaintiff in this regard.

44. The Plaintiff on the other hand continued to look after the two minor children of the family, for a further period of two years while the parties continued to physically live apart. Although there is no direct evidence it is reasonable to assume that on the parties moving in together the Plaintiff continued in her role as caregiver and homemaker. As well the Respondent's work up the islands would have contributed to her having the bulk of the responsibility with respect to the minor children even after the parties began to live together.

45. In the circumstances bearing in mind the contributions of the parties and having regard to the context in which these contributions were made I find that:

- (i) At the commencement of the relationship both parties held the Haleland Park property and the funds out of which this property was improved and furnished in equal shares.
- (ii) By virtue of her contributions in the capacity of homemaker and parent to the welfare of the family as constituted by them during the period of the cohabitational relationship that is December 1997 to June 2003 the Plaintiff has acquired an interest in the said Haleland Park property over and above that of the Respondent.

- (iii) Further, the failure of the Respondent to contribute adequately to the family finances resulted in the sums of money standing to the parties' benefit in the joint account and monies inherited by the Plaintiff were spent on the day to day expenses of the family and as a result the Plaintiff's savings were depleted and the Respondent was able to conserve his personal resources and income.

46. In the circumstances taking all the relevant facts into consideration I find that the Plaintiff is entitled to an 80% share in the Haleland Park property and the Respondent 20%.

47. Although the Act does not specifically provide that the Court seek to achieve a clean break between the parties I note that by section 21(1) of the Act in exercising its powers under the Act the court may

- (i) order the transfer of property;
- (ii) order the payment of a lump sum; and
- (iii) make an order in relation to the use or occupancy of the home occupied by the cohabitants;

48. In the circumstances I order that upon the Plaintiff paying to the Defendant the sum of \$530,000.00, which on my calculations represents the Respondent's 20% interest, the Respondent is to transfer to the Plaintiff all his share and interest in the Haleland Park property. The Respondent is to vacate the Haleland Park property on or before the 20th December 2004. In order to ensure the preservation of the property I will as well grant an injunction against the

Respondent in similar terms to that agreed to by the parties upon the Plaintiff vacating the Haleland Park property. I will hear the Attorneys on costs.

Dated this 6th day of December 2004

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Judith A. D. Jones
Judge

NOTE: *Contrary to that stated in paragraph 46. Section 9 of the Act provides for the making of an order or orders which will end the financial relationship between the parties and avoid further proceedings between them.*

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JASMINE ALBERT

PLAINTIFF

AND

IRWIN MOHAMMED

RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mrs. Lynette Seebaran-Suite for the Plaintiff

Mrs. Hyacinth Griffith for the Respondent

ORDER

1. The custody of the child Marisa is hereby granted to the Plaintiff with liberal access to the Respondent;
2. The Respondent is to pay to the Plaintiff the sum of \$1,200.00 a month for the maintenance of the said child and to pay her school fees, schoolbooks, school uniforms and school equipment and half of all medical dental and optical expenses. The said monthly payments to commence on the 15th December 2004 and thereafter on the 15th day of each and every succeeding month until the said child attains the age of 18 years or until further order.

3. In the event that the Respondent fails to pay the said school fees when due or purchase the said school books, school uniforms and school equipment for the said child by the 15th of August of each year and with respect to the medical, dental and optical expenses the Plaintiff shall be at liberty to pay and / or purchase same and to obtain reimbursement from the Respondent within 30 days of the said expenditure.
4. The Plaintiff is to pay to the Respondent the sum of \$ 530,000.00 on or before the 6th March 2005 representing his 20% interest in No 30 A 1, Perseverance Road Haleland Park Maraval.
5. Upon the payment of the said sum referred to at 4 above the Respondent shall execute the necessary documents transferring to the Plaintiff all his interest in the said premises.
6. In default of 4 above, the premises to be put up for sale by either party and the proceeds of sale after the payment of all reasonable expenses be divided among the parties 80% to the Plaintiff and 20% to the Respondent.
7. In default of 5 above the Registrar of the Supreme Court is empowered to execute the necessary transfer of documents on the Respondent's behalf.
8. The Respondent is to vacate the premises situate at No.30 A 1, Perseverance Road, Haleland Park, Maraval by 6 pm on the 20th December 2004.

9. An injunction is hereby granted restraining the Respondent by himself his servants and/or agents from damaging and/or altering the premises situate at No 30 A 1, Perseverance Road, Haleland Park, Maraval and from removing any furniture and /or appliances from the said premises without the consent of the Plaintiff.
10. Liberty to apply.
11. The question of costs is reserved until the 10th December 2004.

Dated this 6th day of December 2004

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Judith A. D. Jones
Judge