

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv Appeals T 93/2000 & T106/2000

BETWEEN

THERESA TAITT PETERSON

APPELLANT/PETITIONER

AND

JOHN PETERSON

RESPONDENT

PANEL:

A. LUCKY, J.A.
W. KANGALOO, J.A.
S. JOHN, J.A.

APPEARANCES:

MR GASTON E. BENJAMIN
APPEARED ON BEHALF OF THE APPELLANT

MS CAROL GOBIN
APPEARED ON BEHALF OF THE RESPONDENT

DATE DELIVERED: 18th December, 2002

JUDGMENT

Delivered by Lucky JA

This is an appeal from an order made by Ventour J on 14th April 2000 whereby the learned judge ordered that:

1. The Respondent pay to the Appellant/Petitioner the sum of \$750.00 per month for each of the two children of the family namely:- JOHN PETERSON born 16th day of May, 1993 and JAHNARAH PETERSON born 16th day of May, 1993, with effect from 31st day of May, 2000 and continuing at the end of each successive month until each child attains the age of 18 years or until further order.
2. The Respondent pay to the Appellant/Petitioner a lump sum payment of \$100,00.00, to be paid within six (6) months from the date hereof.
3. The Respondent pay to the Petitioner the costs of the application fit for counsel.

The respondent cross-appealed against the order contending that both the periodical payments order and the lump sum order were too high. However, counsel for the respondent at the hearing of the appeal was granted leave to withdraw the appeal against the maintenance order for the children.

The appellant, Theresa Taitt Peterson, (the wife) seeks an increase in the sums awarded to her and the children.

The grounds of appeal of the wife are:

- (a) The decision is unreasonable and against the weight of the evidence or cannot be supported having regard to the evidence.
- (b) The sums awarded are too low that they and each of them constitute (s) an erroneous estimate of the sums to which the appellant is entitled for the children of the marriage and for herself.
- (c) The learned judge failed to apply correctly or at all the principles set out in section 27 of the Matrimonial Proceedings and Property Act Chapter 45:51.

Background:

John and Theresa Peterson were married on 26th December 1992. At the time of the marriage he was 44 years old, she was 23. He was a divorcee, she was a spinster. They have two children, twins, John and Jahnarah born on 16th May 1993. The marriage broke down in 1994 and a *decree nisi* was granted on 9th October 1998. It was based on two years separation with consent. The wife filed an application for ancillary relief which was determined by Ventour J on 14th April 2000.

The wife's appeal is founded on the ground that the decision of the trial judge, specifically in arriving at the amounts for maintenance of the children and the lump sum were too small and those ought to be increased by this Court. Particular criticism was directed to the

learned judge's approach in arriving at his order. Counsel for the appellant submitted that that trial judge took into account deductions which were not set out in the husband's affidavit.

In his judgment the learned judge said:

“It is true that the affidavit filed by the Respondent fails to satisfy the statutory duty placed on him to provide the Court with evidence of his assets. In fact the Respondent has chosen to file an affidavit simply to deny the several allegations made by the Petitioner in her affidavit of 13th January, 1999. He denies specifically that he is receiving a monthly income in excess of \$14,000.00 as alleged by the Petitioner and he states that his monthly salary is in fact \$11,360.00 and that he is also in receipt of a home subsidy of \$507.00 per month. He does not admit the valuation ascribed to the Patience Hill property by the Petitioner and denies that he owns any land at Plymouth in Tobago. He states that he owns the matrimonial home jointly with his ex-wife one Amryl Peterson and that the said property is subject to a mortgage in favour of Scotia Trust.

That, unfortunately, is the extent of the Respondent's evidence with respect to his assets and income. I must admit however, that the Court received little or no assistance from Counsel for the Petitioner who, for reasons best known to himself, refused to cross-examine the Respondent on his affidavit filed on 14th April, 1999 or with respect to the evidence provided to this Court by Mr Stewart Martin of TSTT”.

In arriving at his findings the learned judge took into consideration the unchallenged testimony of Stewart Martin, (called by the husband), the accounting officer of TSTT, who said that the husband was in receipt of a basic salary of \$13,510.00 per month, a home subsidy of \$507.00 and an acting allowance of \$2,863.64. He was unable to say for what period the acting allowance would continue.

He gave the deductions as follows:

PAYE.....	\$4,454.97
Pension	675.50
NIS	90.72
Health Surcharge	33.00
Medical Plan	129.61
Bank Mortgage	2,355.50
Telephone Workers Credit Union	1,500.00
ALGICO	392.62
CLICO	542.52
Unit Trust	700.00
Garnishee	830.25
Computer Loan	421.34

Total Deductions	<u>\$12,126.03</u>

Stewart Martin was not cross-examined by counsel for the wife on any of the deductions, neither was he asked by the judge or counsel to give an explanatory account. The learned judge commented that the Court had to **“do the best it can with the available evidence”** and as was said above he went on to say that he received little or no assistance from counsel for the wife, who did not cross-examine the husband on his affidavit. As a result the learned judge had to consider an application which seemed to be starved of the quality of evidence that would have been of assistance to him in arriving at his findings.

Perhaps it would be convenient to state here that in matrimonial matters such as in the instant matter, counsel ought to elicit or produce evidence which would be of valuable assistance to the trial judge. In my view this case was starved of material evidence and neither counsel was very helpful. If counsel had followed the provisions of section 27 of the Matrimonial Proceedings and Property Act (the Act) which sets out matters to which the Court is to have regard in deciding what order to make in awarding financial provision for a party and children of a marriage and had led evidence from which the “**matters**” could have been discerned, the judge would have been more informed and in a better position to make the awards. It seems to me that it is unfair to criticise a judge’s approach at arriving at an order when the very counsel who appeared before him failed to provide the necessary assistance to the Court.

Section 27 of the Act provides that:

27. (1) In deciding whether to exercise its powers under section 24 or 26 in relation to a party to the marriage and, if so, in what manner, the Court shall have regard to all the circumstances of the case including the following matters:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) the age of each party to the marriage and the duration of the marriage;*
- (e) any physical or mental disability of either of the parties to the marriage;*

- (f) *contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;*
- (g) *any order made under section 53;*
- (h) *in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;*

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3), it shall be the duty of the Court in deciding whether to exercise its powers under section 25 or 26 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters:

- (a) *the financial needs of the child;*
- (b) *the income, earning capacity (if any), property and other financial resources of the child;*
- (c) *any physical or mental disability of the child;*
- (d) *the standard of living enjoyed by the family before the breakdown of the marriage;*
- (e) *the manner in which he was being and in which the parties to the marriage expected him to be educated or trained,*

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him”.

The wife, based upon what her husband had told her and her own assessment as a lay person, valued the matrimonial home at \$1.5 million dollars. There is no evidence of an existing mortgage on the property or whether the Mortgage deduction Stewart Martin gave in evidence was for payments on an outstanding loan on that

property, neither was the balance on the loan for which the mortgage deduction was made, in evidence.

Counsel for the wife asked this Court to apply the principles set out in Wachtel v Wachtel [1973] 1 All ER. 829 specifically the “**one third rule**”, as a starting point in arriving at a finding. In the light of the value of the matrimonial home counsel suggested a lump sum figure of \$350,000.00.

Counsel for the husband agreed that there is a duty on the husband to disclose his assets. Counsel asked these questions: was there an attempt to mislead the court? Was the husband devious? Counsel answered by submitting that she did not think so because there is a provision for “**discovery**” under rule the 61(4) of the Matrimonial Causes Rules which reads:

“61 (4) Any party to an application for ancillary relief may be letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such documents, and may, in default of compliance by such other party, apply to the Court for directions.”

While counsel’s submission is correct rule 57 (2) provides that:

“57 (2) Where a respondent spouse or a petitioner is served with a notice in Form 16 or 17 in respect of an application for ancillary relief, not being an application to which rule 58 or 59 applies, then, unless the parties are agreed upon the terms of the proposed order, he shall, within fourteen days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if he does not do so, the Court may order him to file an affidavit containing such particulars.”

However, in the instant matter the husband did not file an affidavit containing full particulars of his property and income, either when required to do so by the rule or at all. Further there was no application by counsel for the wife in the court below pursuant to rule 61 (4). The foregoing supports my view that this case, (like so many other matrimonial matters), was not carefully managed, prepared or presented to the court.

Counsel for the husband submitted that the judge did not consider whether the husband has capital assets out of which to pay the lump sum of \$100,000.00 without seriously affecting his earning power, see Rayden on Divorce 14th ed. p. 789. para 70 which reads:-

“The Court of appeal has made the following comments. No order should be made for a lump sum unless the husband has capital assets out of which to pay it, without crippling his earning power. When the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments; or to make them unnecessary, which would also help to remove the bitterness which is so often attendant on periodical payments. Once made the parties can regard the book as closed.”

In the reasons for his order the learned judge said:

“In view of the the totality of the evidence and taking into consideration the several matters referred to in section 27 of the Matrimonial Procedures and Property Act, Chapter 45:51 and having considered in particular the relatively short period of the marriage (approximately two years) the age of the respective parties (the Respondent is 53 years old and the Petitioner 31 years old) the health of the parties, the earning of both the Petitioner and the Respondent; the fact that the Respondent had acquired the matrimonial home prior to his marriage to the Petitioner and the financial contribution of the

Petitioner to the marriage which on the evidence cannot be considered as substantial I proceeded to make the order for maintenance for the children of the family and the lump sum payment to the Petitioner as indicated earlier.”

Counsel for the husband contended that there is no evidence to show that the wife took care of the husband and children and contributed to the home, for example by purchasing groceries. She submitted that this is a case of minimum contribution on the part of the wife. Therefore the lump sum, of \$100,000 is excessive. Counsel had conceded that \$750.00 per month per child is adequate in the circumstances.

It is accepted that divorce creates many problems. The most frequent question that arises concerns the division of property and financial support for a spouse, usually the wife, and for the children. In the instant matter the wife is not seeking periodical payments for herself. The order of the Court ought to be as fair as possible to both sides, especially where there are young children as in this case, 9 years old.

The marriage lasted 26 months. The husband is the sole owner of the matrimonial home. The wife’s financial contribution to the home, which is not disputed, involved an improvement in the property. She purchased a 4 piece teak living room set for \$7,000.00; a teak coffee table for \$700.00; a teak space-saver and hutch combination for \$5,300.00; she gave the husband \$1,000 US and \$5,000 TT to assist in paying outstanding mortgage interest on

the property; cupboard doors and handles \$3,000.00; paint, kitchen floor tiles and bathroom tiles \$4,000.00; folding closet doors and plywood for bedroom cupboards \$1,200.00; a carpet \$2,000.00; and, \$4,000.00 in cash to assist in clearing an overdraft at a bank. The sum total is \$38,200.00. I think that in arriving at a lump sum this sum of \$38,200.00 ought to have been considered. The judge did not mention the foregoing in arriving at the sum of \$100,000, nor did he specify the method by which he arrived at his award. He seemed to have considered the length of the marriage among other things because he said that he considered the “relatively short period of the marriage (approximately two years)”.

Section 27 (1) (d) of the Act provides that the duration of the marriage is one of matters to which the Court is to have regard in deciding what orders to make. Counsel for the parties had different views as to whether this was a short marriage which lasted for 26 months. Therefore the question must be asked: how short is a short marriage?

In **Matrimonial Property Finance** Volume I, fourth edition by *Peter Duckworth* at p.264 the question is posed: “**How short is a short marriage**”? The author answers as follows:

“There is of course no magic in the term ‘short marriage’. Eight years is the medium length of all marriages in England and Wales ending in divorce, so in a sense, a short marriage is something less (but see Foster v Foster (1977) 7 Fam Law 112 where a 12-year marriage was regarded as ‘short’ in view of the 28 years which had elapsed since the parting; no lump sum for wife). Needless to say, it is all a question

of degree and the presence or absence of children is an important psychological factor. The length of a marriage ought to be judged by the period of effective cohabitation, not the duration of the empty shell (implicit from Browne v Pritchard {1975} 1 W L R 1366 at 1368D-E and 1371ff).

Recent decisions in the local matrimonial courts show that the medium length of marriages which end in divorce could be seven years. In **Hubah v Hubah** HCA 212/82, a two year marriage was considered a short marriage. There was one child of the marriage. **Tom Pack v Tom Pack** H.C.M. 645/89, four years and no children was considered a short marriage; **Lee Young v Lee Young** HCM 563/86, marriage of 6 years was deemed a short marriage – no children; **Conquest v Conquest** HCM 73/89, a 4 years marriage was deemed short; **Sheppard v Sheppard** HCM 349/91, 2 year marriage was deemed short; **Ellis v Ellis** HCM 277/90, seven year marriage, one child was deemed a short marriage, husband was 67, wife was 47 years old. **Critchlow v Critchlow** H.C. 1070/87, a four year marriage deemed short. **Rivers v Rivers**, 6 year marriage, one child, deemed short. **Lynch v Lynch** C.A. Civ 10/80. This was a seven year marriage. The matrimonial home was acquired by the business before the marriage. The wife was awarded \$20,000.00. **Seepersad v Seepersad** H.C. SM 160/91. Marriage lasted 5 years. **John v John**. HCM 224/95. Marriage of 6 years was deemed a short marriage.

The crucial question in this matter is: what is a suitable lump sum to be awarded to the wife. Mr Benjamin referred to the dicta in

Wachtel v Wachtel (cit above) 839 (c) and to the ‘so called’ “**one third rule**”. This rule has been criticised in several cases. It is not a rule per se but a starting point in arriving at an award. The award can be more or less than one third depending on the circumstances. Counsel for the wife submitted that the marriage was not a short marriage in these circumstances. He cited **Gangler v Gangler** [1976] 2 All ER. 81 in which a three (3) year marriage was not classed as a short marriage. In that judgment **Sir George Baker P.** said at p. 82 e – f:

“I do not think for myself, this can properly be classed a short marriage.” Of course, it was not a very long marriage. I am not seeking to lay down what is short, what is not very short, what is not very long, and what is long; that would be trying to define the length of a piece of string”.

It seems to me that in the circumstances of that case the learned judge was saying that a three year marriage was not a short marriage neither was it medium or long. He seemed, in my respectful view, to be betwixt and between. Ventour J did not specifically say it was a short marriage. He simply said he **“considered in particular the relatively short period of the marriage (approximately two years)”**.

Counsel for the husband submitted that this was a short marriage and that being so it was a major factor to be considered in arriving at a lump sum. I agree with her and for the reasons set out above I am of the view that this was a short marriage.

The age of the parties is not disputed, the husband is now 54 years old, the wife is 33. The wife, moreso, is still at a marriageable age and has a permanent job; she has custody of the children. There is no evidence of her role as wife and mother; and, her financial contributions during the marriage are set out above.

Counsel for the wife has submitted that the one-third rule is applicable and in these circumstances should be \$500,000.00 ie one third the value of the matrimonial home. That figure he said should be adjusted downwards, presumably because of the length of the marriage. He contended that an award of \$350,000.00 lump sum for the wife and \$1,500.00 per month for each child was reasonable. Counsel for the husband seems to have taken a pragmatic approach. She submitted that the marriage was a “**short marriage**”; **Wachtel v Wachtel** ought to be distinguished; the one third rule is not applicable and suggested a reasonable lump sum should be in the vicinity of \$40,000 to \$50,000 (because of the financial position of the husband) plus a portion of the value spent on improvement of the house. Counsel submitted that \$750.00 per month per child is adequate.

I think the ‘one third rule’ set out in **Wachtel v Wachtel** ought to be used as a guide to a solution but it is not necessarily the only way. The judge’s reasons for arriving at the awards were not in-depth or analytical of the evidence bearing in mind the principles set out in section 27 of the Act. It is therefore open to this Court to

review the exercise of the wide discretion given to the judge under the Act.

The wife has custody of the children and a home ought to be provided for them where they can enjoy a comfortable standard of living. There is no evidence of the standard of living prior to the breakdown of the marriage because of the failure of counsel to lead such evidence at the trial.

The marriage was short; the wife is relatively young and has a permanent job; she is still of a marriageable age; the children are young, 9 years old; the wife has put a deposit on a house and currently can rent a home at below \$800 - \$1000 per month; the husband has a home, a valuable asset and still earns a salary with a **“take home”** pay of approximately \$4,754.00 per month. He can easily afford \$1,500 per month for his children.

Fairness requires the court to take into account all the circumstances of the case. Having regard to the evidence, the principles set out in the Act and relevant case law, I would vary the order of Ventor J as follows:

the respondent to pay the appellant a lump sum payment of \$75,000.00 within three months of the date hereof.

The order that the respondent pay to the appellant the sum of \$750.00 per month per child with effect from 31st May 2000 to

continue until each child attains the age of 18 years or until further order is upheld.

For the above reasons the wife's appeal is dismissed and the husband succeeds in respect of that part of his cross appeal which he pursued.

In the circumstances I think it will be fair to order that each side bears his/her costs.

Anthony Lucky
Justice of Appeal

I have read the judgment of Lucky JA in draft. I agree with it and have nothing to add.

Wendell Kangaloo
Justice of Appeal

I also agree.

Stanley John
Justice of Appeal

