IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

Civil Appeal No. 24 of 2017

BETWEEN

LEO FRANCIS VASQUEZ APPELLANT

AND

KARIMA SHOMAN VASQUEZ RESPONDENT

Before the Honourable: Madam Justice Minnet Hafiz Bertram P (Ag)
Madam Justice Marguerite Woodstock-Riley JA
Mr. Justice Peter Foster JA

By written submissions

Ms. Audrey Matura of Matura & Co. for the Appellant
Ms. S Grinage of MH Chebat & Co. for the Respondent

Delivered by promulgation on 12 May 2022.

HAFIZ-BERTRAM P (Ag.)

Introduction

[1] This is an appeal against the decision of Arana J (as she was then) dated 12 July 2017, in which an Order was made for the alteration of property rights and maintenance during divorce proceedings. The appeal challenges only the order made for maintenance by the trial judge.

[2] Karima Shoman Vasquez, the Petitioner ("the wife") filed a Petition dated 20 October 2020 for maintenance, among other relief, made pursuant to section 148 (A) (1), section 152(1) and section 153(1) of the Supreme Court of Judicature Act, Cap 91 ('the Act') and section 16 of the Married Women's Property Act, Cap 176 of the Laws of Belize, Revised Edition, 2000 ('Married Women's Property Act'). Leo Francis Vasquez, the Respondent ('the husband') has appealed the order of the trial judge ordering him to pay $1,000.00 per month to the wife as maintenance for the rest of her life.

[3] Section 152 of the Act gives the trial court the power to grant maintenance. In my view, the trial judge has properly exercised her discretion after considering the statutory factors and the evidence in awarding $1,000.00 monthly to the wife. It is a decision that a reasonable judge could have reached based on the evidence. There is not sufficient basis for this Court to interfere with the order made by the trial judge.

Factual Background

[4] The husband and wife were married on 26 December 1987. On 12 April 2010, the wife applied for dissolution of the marriage on the ground that the husband had committed adultery. The Decree Nisi was pronounced on 11 June 2010 and the Decree was made final and absolute on 8 October 2010.

[5] On 20 October 2010, the wife filed a petition in the Supreme Court of Belize ('the trial court') and sought several reliefs which includes (a) An order for the husband to pay maintenance to her for life in the manner to which she has been accustomed, or until further order of the court; (b) the husband to bear the cost of the petition; and (c) such other relief and orders as court may deem just.

[6] On 11 July 2013, the trial court ordered the husband to pay interim maintenance to the wife and two children but, he did not commence making payments of interim maintenance for the wife until his salary was garnished by the order of the trial court dated 18 October 2013. That order was varied by a subsequent order and at the time of the hearing before the trial judge, the husband was paying the sum of $800.00 per month to the wife as interim maintenance.

[7] The husband and the wife filed five affidavits each and by an agreement between them on 13 October 2016, the affidavits constituted the evidence before the trial court. There was no cross-examination as agreed between the parties.

[8] The husband and the wife have provided evidence of their income and expenditure. The husband was a Director of Finance at the Social Security Board and since 2014 is the General Manager of Corporate Services at the Social Security Board. The wife is the Office Manager at the law firm of Lisa Shoman.

[9] The issues determined by the trial judge was whether the husband should be ordered to pay maintenance/ alimony to the wife, the form of maintenance and the quantum of maintenance.

The decision of the trial judge

[10] The trial judge found that the wife is entitled to maintenance and ordered the husband to make payments to her in the form of monthly sums pursuant to section 152(2) of the Act. In relation to the quantum of maintenance, the judge ordered the husband to pay the wife $1,000.00 per month for the rest of her life. At paragraph 12 of the decision, the judge stated that she took into consideration the respective income and expenses of both parties and in reaching the quantum she had regard to all the evidence as contained in all the affidavits filed on behalf of the husband and the wife as well as the written submissions of the parties.

The Appeal

[11] The husband filed a notice of appeal on 21 August 2017 appealing the decision of the trial judge from paragraphs 5 -12. The grounds of appeal are:

(i) The trial judge erred in law in seeking to award a relief under section 152(2) of the Act which was not applied for by the wife as her application was made specifically under section 152(1) of the Act, which provides only a *"gross sum or annual sum."*

(ii) the trial judge failed to take into account under the heading of the ability of the husband, all the contributions of property,

matrimonial assets, over-payment of maintenance that the wife had already obtained from the husband;

(iii) the trial judge erred in law in finding a higher lifestyle that the wife was accustomed to than the one the evidence clearly pointed to and in so doing placed a heavier burden on the husband;

(iv) Ground 4 was abandoned.

(v) The trial judge erred in law in failing to take into account certain conduct of the parties and took into account other irrelevant conduct of the parties in determining that maintenance should be awarded;

(vi) That in deciding the quantum of $1,000.00 per month to be paid by the husband to the wife as maintenance for the rest of her life, the judge failed to take into account the earning ability, education, age and prospect of re-marriage;

(vii) The judge erred in law in condemning the husband to pay to the wife the cost of the proceedings in full to be agreed or assessed without taking into consideration the delay by the wife in determining the matter;

(viii) The judgment is against the weight of the evidence.

Relief sought

[12] The relief sought by the husband is as follows:

(i) The order for the husband to pay maintenance of $1,000. to the wife be quashed;

(ii) That the court finds the application was made under section 152(1) of the Act;

(iii) In the alternative, if the court finds in favor of the relief under section 152(2) of the Act, that the quantum be $500.00 up to the husband's retirement;

(iv) That the husband is not condemned to pay the cost of the application; and

(v) Cost in the Court of Appeal.

Jurisdiction of the court to grant maintenance

Supreme Court of Judicature (Amendment) Act, 2001

[13] Section 152(1) of the Act provides:

> "152.-(1) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may think to be reasonable, and the court may for that purpose order that it shall be referred to the Registrar to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.
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> (2) In any such case as aforesaid the Court may, if it thinks fit, either in addition to *or instead of an order under subsection (1),* direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as a Court may think reasonable...."

Vidrine v Vidrine

[14] In the court below and in this Court, Mr. Chebat SC relied on the Belize Court of Appeal case of **Thomas Vidrine v Sari Vidrine**, Civil Appeal No. 2 of 2010, in which Barrow JA (as he was then) set out the applicable law for maintenance. Barrow JA, as he was then, at paragraph 40 of **Vidrine's case** said that the maintenance jurisdiction of the Supreme Court is contained in section 152 of the Act as was discussed in Civil Appeal No. 31 of 2008, **Tilvan King v Linda Aguilar King** (unreported; judgment delivered 19 June 2009). He stated further that section 152 (2) "*extends the power of the court to order a husband to pay a wife such monthly or weekly sum for her maintenance and support as the court may think reasonable. This is the maintenance jurisdiction of the Supreme Court."*

Matrimonial Causes Rules, Cap 91 of the Subsidiary Laws of Belize

[15] Rule 69 of the Matrimonial Causes Rules, Cap 91 of the Subsidiary Laws of Belize ("the Rules") provides for investigations to be done by the trial court before granting maintenance. Rule 69(1) states:

"69. (1) Upon an application for maintenance or periodical payments the pleadings when completed shall be referred to the court and the court shall investigate the averments therein contained, in the presence of the parties or their Attorneys- at- law, and for that purpose shall be at liberty to require any affidavits, the production of any document, and the attendance of the husband or wife for the purpose of being examined or cross examined, and to take the oral evidence of any witnesses, and shall direct such order to issue as to the maintenance of either party to the marriage or the children of the marriage as the court shall think fit."

[16] The investigation as shown in Rule 69 is in relation to matters specified in section 152 namely: (a) the fortune of the wife; (b) the ability of the husband; and (c) the conduct of the parties. See also **Vidrine's** case where Barrow JA, as he was then, said at para 62:

"In Belize, unlike the cases in England, there is no common list of matters to be considered both for maintenance and property adjustment applications….The closest the Act comes to making a list is to identify in s.152 the three factors to be considered , being the fortune of the wife, the ability of the husband and the conduct of the parties."

As stated by the trial judge, there was no dispute by the parties about the applicable laws which gives the court the power to grant maintenance.

Procedure for making application for maintenance

[17] Rule 65 of the Rules provides for the procedure in making an application for maintenance. It states:

65. (1) Application for maintenance or periodical payments on a decree for dissolution or nullity of marriage shall be made in a separate petition which may be filed at anytime after the *decree nisi* but not later than one calendar month after decree absolute except by leave to be applied for by summons to a judge."

When the Court of Appeal entitled to interfere with finding of facts by trial judge

[18] The issues raised by the husband challenges the assessment of the evidence by the trial judge who addressed the three factors under section 152, namely; (a) The fortune of the wife; (b) The ability of the husband and (c) The conduct of the parties. As stated by the judge, she also took into consideration all the evidence and the submissions of the parties.

[19] The question to be considered is whether this Court is entitled to overturn the findings of fact by the trial judge. Mr. Chebat SC relied on **Stephanie Jones v Jessie Stephenson**, Civil Appeal No. 21 of 2016, which cited with approval the dictum of Lord Reid in the UK case of **Henderson v Foxworth Investments Ltd.** [2014] 1 WLR 2600, [2014] UKSC 41, which explains the role of the Court when it is called upon to review findings of fact by a trial court. In the recent Caribbean Court of Justice case, **Merlene Todd v Desiree Price and Ann Jennifer Jeboo** [2021] CCJ 2 (AJ) GY, the CCJ in addressing the issue as to whether the Court of Appeal was entitled to overturn the findings of fact by the trial judge said at paragraph 42:

> "[42] The principles which govern the review of findings of fact by an appellate court were authoritatively stated by this Court in *Campbell v Narine* [2016] CCJ 07 (AJ), (2016) 88 WIR 319. These principles were endorsed, and further developed by this Court in *The Medical Council of Guyana v Sahadeo*, [2016] CCJ 14 (AJ). *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ) at [46], and *Thakur v Ori*. [2018] CCJ 16 (AJ). *The Medical Council of Guyana* case cited with approval the UK Supreme Court case of *Henderson v Foxworth Investments Ltd.* The point which emerges with clarity from these cases is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was "plainly wrong" and should not interfere unless the inferences drawn by the trial judge were "plainly unreasonable". The meaning of "plainly" in this context was explained in Henderson at [62], where Lord Reid said:
>
> > There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

[20] In the instant matter, there was no cross-examination of the witnesses, the husband nor the wife. The trial judge assessed the untested affidavit evidence that was before the court and the voluminous exhibits in making the decision about (a) granting maintenance; (b) the form of maintenance and (c) the amount of maintenance. There is no indication in the judgment of the trial judge about conflicts of the affidavit evidence or documentary evidence contradicting the affidavit evidence. The trial judge had the liberty under Rule 69(1) to require the parties attendance for the purpose of being cross-examined and to take oral evidence, but this was not done. It can be inferred that the trial judge was satisfied with the evidence before the court. Neither of the parties contested the evidence before the court. It must be concluded that it was intended to be accepted by the parties.

<u>Ground 1</u>: ***The trial judge erred in law in seeking to award a relief under section 152(2) of the Act which was not applied for by the wife as her application was made specifically under section 152(1) of the Act, which provides only a "gross sum or annual sum."***

[21] The Petition filed by the wife dated 20 October 2010 for maintenance was made pursuant to section 152(1) of the Act as shown in the rubric. The trial judge made an order for monthly maintenance pursuant section 152(2) of the Act. The judge stated in her judgment that paragraph 40 of **Vidrine's** case confirms that the maintenance jurisdiction of the court is contained in section 152 of the Act. This is indeed the position presently in Belize. On a proper reading of section 152(2) it gives the court the option of ordering a gross sum or annual sum under Section 152(1) and "…*either in addition to or instead of an order under subsection (1), direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as a Court may think reasonable*...." There is therefore no merit in this ground as the court is clothed with the power under section 152 (2), if it thinks fit to make an order for maintenance.

[22] The entitlement to maintenance and the form of maintenance was determined by the trial judge at paragraph 7 of the decision. The judge said:

"Ruling on Issue One

7. It appears from the arguments presented by both sides that there is no serious question as to whether maintenance should be paid to the Petitioner. The issue seems to be the very narrow one as to the form such maintenance is to take, as the Respondent seems to be querying whether based on the pleadings the Petitioner is entitled to a lump sum or to periodical payments. Since that is the case I rule on this first issue that the Petitioner is indeed entitled to maintenance from the Respondent. I will order that the Respondent make payments to the Petitioner in the form of monthly sums as maintenance and I do so pursuant to section 152(2) of the Supreme Court of Judicature Act."

[23] The jurisdiction of the court to grant permanent maintenance is section 152 of the Act which provides for alimony as shown in the side notes and this should not be confused with *alimony pendente lite*. Section 152(1) provides for security of maintenance to the wife of a gross sum or annual sum for a term not exceeding the life of the wife. Section 152(2) speaks of payment of monthly or weekly sums for the wife's maintenance during the joint lives of both parties. When the two sections are read together, simply put, the court has the power to grant security or payment or both security and payment.

[24] The Order under section 151(1) is only for security of a gross sum or annual sum. The husband shall provide the security and the wife has the benefit of the security. The order under section 152(2) is an order for the husband to pay monthly or weekly payments and here the court has no power to order security for that payment.

[25] Before making an order under section 152, the court must consider three factors, namely the fortune of the wife, the ability of the husband and the conduct of both the husband and the wife. The trial judge considered these factors and ordered that the husband make monthly payments to the wife as maintenance pursuant to section 152(2) of the Act. Although the judge did not address the reason for not making an order under section 151(1), it is obvious that the judge did not consider such an order appropriate based on all the evidence before the court, in particular, the ability of the husband.

[26] Ms. Matura submitted that the application by the wife was for alimony under section 152(1) which provides only for a gross sum or annual sum, therefore the trial judge should not exercise a discretion under section 152(2) as the court was not called upon to do so. I disagree with this position taken by counsel. It is for the trial judge in exercising her discretion to determine which order is appropriate under the circumstances of the case, that is, an order for security and/or an order for monthly or weekly payments. It is irrelevant the wife mentioned only section 152(1) in the rubric and chose not to mention a specific section in the body of the application. Further, both parties in their affidavit evidence requested monthly payments. At paragraph 12 of the decision, the judge stated that the wife requested that the amount of approximately $1,300.00 per month be the starting point for maintenance while the husband asked that the sum of $500.00 per month be the quantum. The trial judge awarded the wife the sum of $1000.00 monthly to be paid by the husband to her as maintenance for the rest of her life.

[27] In my opinion, on an application by the wife for maintenance, regardless if is under 151(1) or 151(2) the court has the power to: (a) may make an order under section 152(1) that the husband **shall secure** to the wife such "*gross sum of money or annual sum of money"* for a term, but not exceeding the life of the wife; (b) In addition to or instead of an order for security under section 151(1), the court may order the husband **to pay** to the wife during their joint lives a monthly or weekly sum for the wife's maintenance.

[28] Ms. Matura further submitted that the husband has no ability to secure a gross or annual sum. In my view, this argument shows that the judge had assessed the evidence properly and hence the reason no order for security was made under section 151(1). At paragraph 57 of the submissions for the husband, counsel relied on the case of **Shearn v Shearn** [1931] P. 1, and submitted that the husband in the instant case is not "*possessed of ample free capital to appropriate a sufficient part of it to secure the whole of the maintenance."* Ms. Matura submitted that the husband disclosed every penny and provided proof of every expense and disclosed his obligation to his present wife. In **Shearn's** case at page 5, the court said:

> "[the] interest of both the wife and husband have to be considered. Regard must be paid (*inter alia*) to the ability of the husband. As regards the wife, the object of the whole procedure is to provide maintenance from the time she has divorced her husband. The court will naturally desire to make the maintenance as secure as possible, and in cases where it can properly be done the court will order the husband who is possessed of ample free capital to appropriate a sufficient part of it to secure the whole of the maintenance."

[29] In the instant matter, it seems from the evidence that the husband does not have the ability or capital to secure a gross or annual sum. The monthly maintenance is from his salary, his only source of income. Therefore, the trial judge cannot be faulted for not making an order under section 152(1). In my opinion, the trial judge properly exercised her discretion after considering the factors under section 152(1) of the Act and made a reasonable decision to order the husband to pay monthly maintenance to the wife without an additional order for security under section 151(1). The husband had not shown to the trial court that he has the financial ability to secure a gross or annual sum under section 151(1). The monthly maintenance ordered to be paid by the husband is from his only source of income, his salary.

Lump sum payment

[30] The affidavit evidence of the husband (Third affidavit at para 41 and Fifth affidavit para. 10) shows that he preferred to make one lump sum payment. The trial court has no jurisdiction to order one lump sum payment and this is made clear by Barrow JA in **Vidrine v Vidrine,** at para. 43, where the judge said: "*Supreme Court Act confers no power on the court to make an order for the payment of a lump sum to the wife, but confers power only to order payment of a weekly or monthly sum or to settle property on the wife to secure payment of those periodic sums; see Civil Appeal No. 10 of 1992,* ***Genus v Genus*** *(unreported judgment delivered 12th February 1993)."*

[31] In **Genus's** case the main thrust of the appeal was the lack of jurisdiction on the part of the judge to make an order for the payment of a lump sum by the husband to the wife. It was held that:

"The power of a judge to make orders for maintenance is conferred by section 151 of the Matrimonial Causes Act Cap. 82. There is provision there for a gross sum of money to be secured but there is no provision for the making of a lump sum order. In *Lately on Divorce* 13th Edition (1945) the law is stated thus –

> "The court has no power to order a husband to pay a lump sum by way of maintenance or to order that a lump sum be secured to her …… for a longer period than her own life."

That was the position which existed in the United Kingdom prior to the passage of the Matrimonial Causes Act 1973 but now under the provision of section 23 (l) (c) of that Act, upon granting of a decree of divorce, nullity or judicial separation the Court can make an order that either party in the marriage shall pay to the other such lump sum or sums as may be so specified.

This provision has not yet been enacted in Belize and the judge therefore had no power in this case to order the payment of a lump sum by the appellant to the respondent."

[32] The position in Belize is still the same today. The court has no jurisdiction to grant lump sum payments.

Whether the wife made her application for maintenance within the required time frame?

Rule 65 of the Matrimonial Causes Rules

[33] Ms. Matura submitted that an application under section 152(2) for maintenance must be made within the time frame allowed by Rule 65 of the Rules. Counsel argued that the *decree nisi* was granted on 11 June 2010 and the application for maintenance was made on 5 October 2010, which is three weeks outside of the statutory provisions and no leave was sought to make the application.

[34] In my view, the position taken by Ms. Matura is a misinterpretation of the law since the "*not later than one month*" referred to decree absolute and not *decree nisi.* The law plainly states that the application for maintenance may be filed at anytime after the *decree nisi* but not later than one calendar month after decree absolute

except by leave. The decree absolute was made on 8 October 2010 and the Petition for maintenance and other matters was filed on 5 October 2010, which is within the time limit and therefore no leave was required from the trial court. The trial judge correctly found that the wife's petition for maintenance and other matters was filed on 5 October 2010 and therefore satisfies the Rules.

Grounds 2, 3, and 6 - Investigations specified under section 152 of the Act

[35] The appellant dealt with grounds 2, 3, and 6 together since they are inextricably linked. The issues raised under these grounds concern investigations as described by Rule 69 to be done by the trial judge before making an award for maintenance. The investigations are in relation to matters specified in section 152 namely: (a) the fortune of the wife; (b) the ability of the husband; and (c) the conduct of the parties. See also **Vidrine and Vidrine** at para 62.

Considerations by the trial judge in relation to quantum of maintenance

[36] The trial judge under the heading of "Quantum of Maintenance" addressed the statutory requirements at paragraph 8 of her decision. The judge said:

> **"Quantum of Maintenance**
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> 8. Both counsel for the Petitioner and the Respondent agree on the law that the court should consider in determining the amount of maintenance that should be ordered. The matters that the court should take into account during its investigation into the amount of maintenance to be awarded under section 152 of the Supreme Court of Judicature Act Cap 91 are as follows:
>
> (i) The fortune of the wife
> (ii) The ability of the husband
> (iii) The conduct of the parties
>
> It is also the practice that maintenance is generally awarded on the basis of **one-third of the joint incomes of the parties, less the wife's income**. The objective of such was not to establish a clean break between husband and wife by making appropriate financial provision for the wife, but was to supply the former wife with the necessaries, comforts, and advantages incidental to her

social position. **(D Tolstoy the Law and Practice of Divorce and Matrimonial Causes,** Sixth Edition (1967) at 144).

As aptly cited by Mrs. Matura Shepherd in her submissions, the rationale as to how the one-third rule evolved was clearly articulated by Lord Denning in **Watchel v. Watchel** [1973] 1 ALLER 829 at 839…"

> "There was, we think, much good sense in taking one-third as a starting point. When a marriage breaks up, there will thenceforward be two households instead of one. The husband will have to go out to work all day and must get some woman to look after the house-either a wife, if he remarries, or a housekeeper, if he does not. He will also have to provide maintenance for his children. The wife will not usually have too much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her. In any case, when there are two households the greater expense will, in most cases, fall on the husband than the wife. As a start has to be made somewhere, it seems to us that in the past it was quite fair to start with one-third**… but this so-called rule is not a rule and must never be so regarded. In any calculation the court has to have a starting point.** If it is not to be one-third, should it be one-half? Or one quarter? 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. There may be cases where more than one-third is right. There are likely to be many others where less than one-third is the only practicable solution. But one-third as a flexible starting point is in general more likely to lead to the correct final result than a starting point of equality, or a quarter."

<u>The starting point</u>

[37] It should be noted that in **Watchel's case**, as shown above, the so-called one-third rule is not a rule and must never be so regarded. It is a starting point as there may be cases where one-third is not right.

[38] Ms. Matura relying on **Watchel v Watchel** applied the one-third formula. The calculation by Ms. Matura is: The salary of the wife $23,400.00 per annum plus the salary of the husband, $72,000.00 per annum = $95,400.00 as the combined income.

One third of $95,400.00 = $31,800. The salary of the wife $23,400.00 was then deducted from the sum of $31,800 which leaves a balance of $8,400. per annum. The monthly sum being $700.00. according to the husband's calculation.

[39] The trial judge did not put her mathematical calculations in the judgment as to how she arrived at the total of $1000. per month maintenance and did not address a starting point but it can be gleaned from paragraph 8 of the judgment that it was accepted by the court that maintenance is generally awarded on the basis of one-third of the joint incomes of the parties, less the wife's income. If the trial judge had applied one-third formula the starting point would have been $1333.00. with an income of 96,000. The judge reduced that amount by $333.00. The calculation being 96,000.00 plus 24,000. = 120,000. Divided by one-third = 40,000.00 less 24,000.00 = 16,000.00 per annum. The monthly sum being $1,333.00.

The decision awarding $1,000.00 maintenance by the trial judge

[40] At paragraph 12 of the judgment, the trial judge ordered $1,000.00 monthly maintenance for the wife after considering the law and evidence, including the income and expenses of both parties. This is less than the one-third starting point. The judge said:

> "Court's Decision on Quantum of Maintenance
>
> **12.** The Petitioner is asking that the amount of approximately $1,300.00 be the starting point, while the Respondent is asking that the sum of $500.00 be the quantum. The Petitioner earns approximately $24,000.00 as a Legal Secretary and the Respondent earns approximately $96,000.00 as General Manager of Corporate Services at the Social Security Board. I award the Petitioner the sum of $1,000.00 per month to be paid by the Respondent to the Petitioner as maintenance for the rest of her life, taking the respective income and expenses of both parties into account. In reaching this quantum, I have had regard to all the evidence as contained in all the affidavits filed on behalf of the Petitioner and the Respondent, as well as the written submissions filed on their behalf. While it is true that the Court's role in maintenance proceedings is not to punish the Respondent, at the same time the Court cannot close its eyes to the fact that Belize is still a fault based jurisdiction, and …… it is the Respondent's conduct in committing adultery that brought the marriage to an end and has forced the Petitioner into the position of having to apply to this Court for maintenance. In performing this balancing exercise in awarding this sum for maintenance to the Petitioner, I have kept in mind that while the Respondent is also responsible for maintaining his new wife on his salary, I note that his new wife ….. is the owner

of 9,999 shares in a well-established commercial enterprise in Belize known as Dave's Furniture World, as evidenced by Exhibit KV9 attached to the Fourth Affidavit of the Petitioner dated 16th day of July, 2014. I also order that the full ownership of the two lots properties located near Mile 14 Phillip Goldson Highway Trinidad Farm be transferred to the Petitioner by the Respondent."

[41] Ms. Matura submitted that the trial judge miscalculated and inflated the salary of the husband stating it is about $96,000. instead of $72,000. The husband's first affidavit sworn in 2013 shows that his monthly net income is $5,013.19 after deductions of $496.00 for a vehicle loan and $168.34 for medical insurance. Without the deductions the monthly gross salary is $5,678.46. That is, $$77,741,52 annually. Ms. Matura submitted that the yearly income is $72,000. per year. The wife's evidence is that the husband's monthly net income is $6,478.46 (Vehicle allowance $400.00 and Telephone allowance $400.00 included) and that his annual net income including his vacation grant of $4000.00 and gratuity of $10,000.00 is $91,741.52.

[42] The documentary evidence provided by the husband did not include all his pay slips. He submitted spreadsheets, bank statements and other proof of his income from the Social Security Board. There is evidence that he gets a gratuity and travel allowance. Also, that he had loans which may not exist now. The judge did not show the calculation for the sum of $96,000. But, in considering the bank statements which show other deposits apart from the monthly salary, that is, vacation grant and gratuity, I do not consider that there is sufficient basis for me to interfere with the sum of $96,000.00 as stated by the trial judge.

[43] In my view, the judge adequately addressed the statutory requirements under section 152 and the evidence before making an order for the monthly maintenance of $1,000.00 to be paid by the husband to the wife which is less than the one-third starting point. Further, the interim maintenance of $800.00 ordered by the trial judge in a previous application was not sufficient to meet the wife's expenses.

[44] As submitted by Mr. Chebat SC, the husband is contesting the conclusions arrived at by the trial judge after assessment of all the evidence. Therefore, he had to satisfy the test for the appellate court to overturn a finding of fact by a trial judge.

That test being, "*whether the decision under appeal is one that no reasonable judge could have reached.*" See the case of **Henderson.** In my view, the husband has not satisfied that test to overturn the decision of the trial judge.

Did the judge fail to take into account under the ability of the husband, all the contributions of property, matrimonial assets, over-payment of maintenance that the wife had already obtained from the husband?

[45] Ms. Matura argued that the husband's ability is based solely on his income from one source, his contracted employment. Further, that the husband does not have a house of his own and had to move in with his new wife and he has to fulfil his matrimonial obligations to his new wife. As such the husband requested a payment of $500.00 monthly as maintenance. Counsel further argued that the husband had given up all and every matrimonial property and assets and is left with his bare salary. Therefore, it would be unconscionable that he should be asked to provide any further money than already provided. She relied on the case of **Howard v Howard** [1945] P at page 4 where Lord Greene stated "*what was to be looked at is the means of the husband and by "means" is meant what he is in fact getting or can be fairly assumed to be likely to get."*

[46] Ms. Matura submitted that the fortune of the wife needs to be looked at against the fortune of the husband. The trial judge at paragraph 10, under the heading of "*The ability of the husband"* stated the submissions for both the husband and the wife and considered the affidavit evidence from both parties. This included the evidence of the husband on contributions of property, matrimonial assets and the allegation of over-payment of maintenance that the wife had already obtained from him. The judge was aware that the husband did not have a house of his own and had to move in with his new wife. Further, the evidence considered by the judge is that the wife had to move in with her family. At paragraph 12 of the judgment, the judge stated: "*I have had regard to all the evidence as contained in all the affidavits filed on behalf of the Petitioner and the Respondent, as well as the written submissions filed on their behalf."*

[47] The evidence considered by the trial judge under the ability of the husband included the income from the husband which is from one source, his expenses and matrimonial assets as shown at paragraph 10 of the judgment. An order was made by the trial judge at para 12 for "*the full ownership of the two lots (properties) located near Mile 14 Phillip Goldson Highway Trinidad Farm be transferred to the Petitioner (wife) by the Respondent (husband).*" The judge was fully apprised of the properties given to the wife and was satisfied of the ability of the husband to pay maintenance from his salary when she made the order. The value of the matrimonial property and assets given to the wife (which did not include a house) was clearly not sufficient to cause the judge to refuse an order for maintenance in favour of the wife for the rest of her life.

[48] The case of **Howard v Howard** relied on by Ms Matura can be distinguished from the instant matter. In that case, the court made an order the effect of which was to put pressure on trustees to make to the husband an allowance out of a settlement income which was far in excess of what he could be ordered to pay. In my opinion, there was no failure by the judge as argued by counsel under the factor of "ability" in relation to the husband.

<u>The affidavit evidence showing income and expenses for the husband</u>

[49] In the husband's first affidavit sworn in July 2013, he provided spreadsheets prepared by himself to show his income for 2009, 2010, 2011 and 2012. The spreadsheets when compared to the bank statements exhibited at LV 45 does not match up. Monies were being deposited in two different accounts, a joint account and a sole account. The joint account was closed in 2010. The details of the sole checking account was disclosed in the husband's fourth affidavit sworn in July 2016 after it was ordered by the trial court.

[50] At paragraph 72, he deposed that he has a monthly income of $5,013.19 after deductions of $493.00 for a vehicle loan and $168.34 for medical and life insurance. The pay slips exhibited by the husband as LV 36 show that he was receiving a motor vehicle allowance of $400.00 and telephone allowance of $400.00 per month, which is a total of $96,000.00 per annum. There is also evidence that the husband was

paid a vacation grant of approximately, $4,000.00 per year. In my view, there is no reason why this allowance should not be considered as income. See Exhibit LV 2.

[51] It was not until the fifth affidavit of the husband sworn in October 2016, at paragraph 8, that the husband gave evidence that he received a bonus from the Social Security Board. Deposits in August 2010 and September 2012, show that the husband received $10,000.00 annually.

[52] There is no explanation for other deposits as shown by the bank statements (not mentioned in the spreadsheets). There is no direct evidence in the affidavits as to allowances, gratuity and/or bonus and travel grant, except for the fifth affidavit which speaks of a bonus. This could not have been an easy tasks for the trial judge to determine the income of the husband.

[53] As for over-payment of maintenance to the wife, as I understand it, this is the subject of an appeal. It would not be proper for this court to comment on that issue.

Whether the trial judge erred in law in finding a higher lifestyle that the wife was accustomed to than the one the evidence clearly pointed to and in so doing placed a heavier burden on the husband.

[54] There is nothing in the judgment to suggest that the trial judge found a higher lifestyle than the wife was accustomed to. The court made a determination based on the statutory requirements, that is, the three factors under section 152(1) referred to as investigations under the rules. The trial judge set out the three factors and considered the submissions and evidence of each of these factors. The judge also stated and considered the practice under which maintenance is generally awarded which is one-third of the joint income of the parties less the wife's income. The judge stated that the objective as shown by *D. Tolstoy The Law and Practice of Divorce and Matrimonial Causes*, Sixth Edition (1967) at p. 144, was not to establish a clean break between husband and wife by making appropriate financial provision for the wife but was to "*supply ….the former wife with the necessaries, comforts, and advantages incidental to her social position*." (See paragraph 8 of the judgment).

The trial judge in exercising her discretion ordered maintenance below the one-third income of the parties less the wife's income.

Whether the trial judge failed to consider the earning ability, education, age and prospect of re-marriage in deciding on the quantum of $1000. per annum

[55] The husband complained that the judge failed to consider the earning ability, education, age, and prospect of re-marriage of the wife. Ms. Matura submitted that the wife completed her Bachelor of Arts in Child Education but never pursued a career in that field. She opted to stay at home and took care of her children when they were younger. At the time of the determination of this matter, the children were grown and she has been working as a legal secretary for 10 years. I believe that it is important to note that the wife is no longer a home maker and the earning ability of the wife as an Office Manager has been considered by the trial judge. Further, the wife's age and choosing not to remarry cannot be to her detriment. Should the wife remarry, an application can be made to the court by the husband to vary the maintenance.

Ground 5 : Whether trial judge erred in law in failing to take into account certain conduct of the parties and took into account other irrelevant conduct of the parties in determining that maintenance should be awarded?

[56] It can be seen from the judgment of the trial judge that there was no serious question as to whether maintenance should be awarded to the wife. The judge said:

> "It appears from the arguments presented by both sides that there is no serious question as to whether maintenance should be paid to the Petitioner. The issue seems to be the very narrow one as to the form such maintenance is to take, as the Respondent seems to be querying whether based on the pleadings the Petitioner entitled to a lump sum or to periodical payments."

[57] The submissions of the parties in the court below confirms that this was indeed the position. It was about lump sum payment, gross or annual payment or monthly payments. Also, the quantum of maintenance. The wife asked for over $1200.00 and the husband offered $500.00. The wife at the time of the hearing was receiving $800.00 a month as interim maintenance from the husband and her salary as an Office

Manager. Yet she could not meet her expenses and had to depend on family members to assist her. Surely, the trial judge had no difficulty in determining she is entitled to maintenance based on the income and expenses of both parties.

[58] Ms. Matura in the appeal submitted that the court should not look at the cause of the breakdown of the marriage as this would seek to punish one or the other for the failure of the marriage. Counsel further submitted that the conduct which is to be assessed is in relation to the financial provisions a husband has to make and not who caused the breakdown of the marriage.

[59] In summary, the trial judge at paragraph 12 of the decision considered the following in making the award for maintenance:

(i) The respective income and expenses of both parties;

(ii) Thereafter, in general the trial judge stated that in reaching the quantum, she had regard "*to all the evidence as contained in all the affidavits filed on behalf of the Petitioner and the Respondent, as well as the written submissions filed on their behalf."*

(iii) The trial judge then informed herself that the court's role is not to punish the husband in maintenance proceeding but at the same time cannot close its eyes to the fact "*that Belize is still a fault based jurisdiction, and …… it is the Respondent's conduct in committing adultery that brought the marriage to an end and has forced the Petitioner into the position of having to apply to this Court for maintenance."*

(iv) The court had done a balancing exercise and noted that the husband is responsible for maintaining his new wife from his salary but also noted that the new wife is the owner of a well-established business.

[60] It can be seen by the judgment that the trial judge was quite aware of the role of the court in maintenance proceedings and specifically informed herself not to punish the husband. She then went on to say that at the same time the court cannot close

its eyes to the fact "*that Belize is still a fault based jurisdiction, and …… it is the Respondent's conduct in committing adultery that brought the marriage to an end and has forced the Petitioner into the position of having to apply to this Court for maintenance.* The breakdown of the marriage is evidential and Belize is in fact a fault based jurisdiction. Further, the breakdown of the marriage is not the only consideration by the trial judge who had before her evidence as shown at paragraph 11, which shows the behaviour of the husband in relation to promises of maintenance and breach of the court order for interim maintenance which caused his salary to be garnished. At paragraph 11, the judge said:

> "The Conduct of the Parties
> 11. The Petitioner argues that the first matter that the Court must take account of is the Respondent's adultery was the cause of the breakdown of the marriage. The circumstances that compel the Petitioner to be obliged to make this application to the Court are not of her making.
>
> The Petitioner also deposes in her Third Affidavit dated 10th day of July, 2013 that shortly after the breakdown of the marriage, the Respondent made promises to her and to their children that he would support them. When the Respondent first moved out of the matrimonial home he freely permitted the Petitioner to use any monies out of their joint account to pay the expenses of the family. He then stopped paying his entire salary into the joint account and started paying only $2,500.00 in March 2010 then $2,200.00 in July 2011. Then in January 2012 after he re-married he stopped paying any maintenance at all to the Petitioner and only paid minimal amounts for the children of the marriage of $250.00 monthly from January to July, no maintenance for August, October and December, and one payment of $250.00 for November 2012. **For the entire year of 2012, the Respondent paid nothing at all to the Petitioner for her maintenance and only $2,000.00 to maintain his children for the entire year.** She submits that this behaviour on the part of the Respondent was indicative of a deep personal animus that he had developed towards his former wife and the uncaring attitude towards the welfare of his children at a time when both were enrolled in Junior College and living with their mother at the home of their maternal aunt. **It is at this time that she deposes she used the monies from the sale of the household furniture and appliances as proven by the receipts in KSV 10 and KSV11.** She also recounts the refusal of the Respondent to pay the amount ordered by this Court as interim maintenance, failure to apply to stay or to vary the court's order and only forcibly complied when the amount was garnished from his salary. **This indicates that the Respondent wanted to pay only such sums as he wanted to pay as**

monthly interim maintenance notwithstanding the order of the Court. She also submits that the Respondent has, since January of 2012, acted in a manner which demonstrably indicates that he is manifestly unwilling to pay any maintenance to the Petitioner, and that this is a matter which the Court should take into account." (emphasis added)

[61] In my view, all the matters considered by the trial judge are relevant. There was a breach of a court order to pay maintenance which is a serious matter and the husband's salary had to be garnished. Nevertheless, the conduct of the husband did not cause an increase of the maintenance ordered by the court. The judge considered the financial aspects and ordered below the one-third starting point as monthly maintenance.

[62] Ms. Matura submitted that the conduct of the wife was not considered by the trial judge as there was no mention of what the wife had done in relation to the finances of the marriage. However, it can be seen from the evidence that the judge did consider the financial conduct of the wife. See paragraph 11 above which shows that the wife was not receiving maintenance and only $2,000.00 a year for the children. "*It is at this time that she deposes she used the monies from the sale of the household furniture and appliances as proven by the receipts in KSV 10 and KSV11."*

[63] The cases of **Miller v Miller, McFarlane v McFarlane** [2006] UKHL, relied upon by Ms. Matura dealt with divorces that had been based on the neutral fact that the marriages have been broken down irretrievably. Belize however, is still a fault based jurisdiction.

The judge erred in law in condemning the husband to pay to the wife the cost of the proceedings in full to be agreed or assessed without taking into consideration the delay by the wife in determining the matter.

[64] The trial judge at paragraph 16 of her decision determined whether the husband should be ordered to pay the costs of the Petition. The judge stated:

> "16. The Petitioner asks that the Respondent pay the costs of these proceedings. The issue of costs is discretionary, and I find that the

> Respondent's behaviour in refusing to obey the order of the court in relation to payments of interim maintenance to the Petitioner to be downright disrespectful of this court and bordering on contempt. There was no application by the Respondent to vary the quantum of interim payments, and there was no compliance with said order until his salary was garnished by this court. I therefore order that the Respondent be condemned to pay to the Petitioner the costs of these proceedings in full to be agreed or assessed."

[65] Ms. Matura argued that much of the delay in the trial before the lower court had been at the request for adjournments by the wife and a few adjournments because of the trial court. Counsel referred to the evidence of the husband about his attempts to get the matter re-listed. In my view, the matter of adjournments and trial date is in the control of the court and not the wife. In any event, the trial judge in exercising her discretion to order the husband to pay costs, gave her reasons for doing so, that is, disobedience of a court order. As such, this Court has no reason to interfere with the discretion exercised by the trial judge.

Whether the judgment is against the weight of the evidence

[66] Ms. Matura argued that the main issue in contention is that the husband has to pay $1,000.00 monthly for the rest of his life to the wife. Further, that he is working on a contract basis and to provide for the wife for the rest of his life and her life does not correspond with the evidence. In my view, the order by the court to pay maintenance for the rest of the life of the husband or the wife, can be varied if there is a change in circumstances.

[67] Counsel also referred to the trial judge's finding that the husband's income is $96,000.00. This issue of the inflation of the husband's salary was addressed above under the ground of the ability of the husband. Even if the trial judge was wrong in her calculation as to income, there is not sufficient basis to interfere with the order of $1,000.00 monthly maintenance. The $800.00 ordered as interim maintenance was not sufficient to cover the wife's monthly expenses. Further, the award $1000.00 is way below the practice of one-third of the joint income of the parties less the wife's income, which is a good starting point. The following can be gleaned from the affidavit evidence:

Net income of the husband as shown by his first affidavit

Monthly

Net salary	$5,678.46
Vehicle Allowance	$ 400.00
Telephone allowance	$ 400.00
Monthly net income	$6,478.46

Annually income of the husband as shown by affidavit and exhibits

Salary and allowances $6,478.46 x 12 =	$77,741.52
Vacation grant	$ 4,000.00
Bonus/Gratuity	$ 10,000.00
Annual Net Income	$ 91,741.52

Net and annual Income of the wife

The wife's annual salary and net income is $23,400.00.

Application of one-third

Husband's net income	$ 91,741.52
Wife's net income	$ 23,400.00
Total income of both parties	$115,141.52

1/3 of joint income of $115,141.52 =		$ 38,380.51
Less wife's income		$ 23,400.00
Total annually	=	$ 14,980.51
Total monthly	=	$ 1,248.38

[68] The starting point of monthly maintenance is $1,248.38. based on the evidence which does not include other unexplained deposits. Therefore, there is not sufficient basis for this Court to interfere with the judgment of the trial judge in ordering the husband to pay $1000.00 monthly as maintenance to the wife.

Order

[69] For reasons discussed above, I would propose the following order:

(i) The appeal is dismissed and the judgment of the trial judge affirmed.

(ii) The appellant to pay the respondent's costs of the appeal to be agreed or taxed.

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HAFIZ BERTRAM P (Ag)

WOODSTOCK-RILEY JA

[70] I have read the draft judgment of Madam President (Ag) and concur that the decision of the trial judge is one a reasonable judge could have reached. I concur with the orders proposed in the judgment. I am constrained to express concern at the reference to and reliance on Lord Dennings' rationale in **Watchel v Watchel** (1973) 1 ALLER 829 at 839 for the acceptance of a 'one third rule' or starting point for maintenance orders. Lord Denning noted:

> "…there was, we think, much good sense in taking one-third as a starting point. When a marriage breaks up, there will thenceforward be two households instead of one. The husband will have to go out to work all day and must get some woman to look after the house-either a wife, if he marries, or a housekeeper, if he does not. He will also have to provide maintenance for his children. The wife will not usually have too much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the work herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her …"

[71] There are statutory provisions as to what should be considered in determining maintenance and as noted the trial judge properly made a decision based on those considerations which to my mind should continue to be the guide in maintenance proceedings.

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WOODSTOCK-RILEY JA

FOSTER JA

[72] I have read in draft the judgment of Hafiz Bertram P(Ag) and I concur in the reasons for judgment given, and the orders proposed therein.

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FOSTER JA