1) Divorce

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1994

Suit No. D58 of 1992

BETWEEN: JULIET CLARE BRATHWAITE

Petitioner

and

DESMOND ALLAN BENOIT BRATHWAITE

Respondent

APPEARANCES:

Mr. M. Michel for the Petitioner
Mr. A. Mc Namara for the Respondent

1994: December 14 and 21.

JUDGMENT

MATTHEW J. (In Chambers)

The Petitioner is 47 years old and the Respondent is 50 years old. They were married on April 26, 1980 and they have two children as follows:-

Robert Allan born May 14, 1981; and

James Alexander born August 8, 1982.

On September 23, 1992 the Petitioner filed a petition for divorce

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and on November 26, 1992 the Respondent filed an answer to the petition and he made a cross petition in which he also prayed for the marriage to be dissolved. A request for directions for trial was filed on November 27, 1992 and after that a reply and answer to the cross petition was filed on behalf of the Petitioner on January 12, 1993.

Despite the filing of the pleadings the Parties have not taken steps to proceed with the hearing of the divorce.

In the meantime on October 1, 1992 the Petitioner filed a notice of application for maintenance pending suit. On November 17, 1992 the Respondent filed an affidavit in reply to the application for maintenance pending suit where he, inter alia, urged the Court to accept that he continues to make a monthly payment of $1,000 to the Petitioner.

Two days later, on November 19, 1992, the Petitioner filed a rather lengthy affidavit of means where she sought maintenance in the region of $5,400 a month plus other payments.

On November 25, 1992 the Court ordered the Respondent to pay the Petitioner maintenance pending suit in the sum of $2,250 a month commencing November 30, 1992. The Respondent was given liberty to apply.

I notice that no such order has been filed by the Petitioner despite the fact that on November 16, 1994 on the Petitioner's application she was granted an extension of time within which to file the order made on November 25, 1992.

Let me emphasize that Order **42** of the Rules of the Supreme Court requires that every judgment or order of the Court must be filed not later than fourteen days from the date when the judgment was pronounced or the order made. The Petitioner must file the said order and the order I propose to make in these proceedings shall not begin to take effect until the said order has been appropriately filed.

The present proceedings arise from an alleged default by the Respondent in the compliance with the order made on November 25, 1992.

On June 14, 1994 the Petitioner filed a judgment summons claiming that there was an amount due and unpaid under the order amounting to $21,100.00. The summons was supported by an affidavit of the Petitioner filed on the same day in which she stated that the Respondent had not made payments from the month of August 1993 to May 1994 save for one payment of $500.00 for December 1993 and one of $900 for April 1994.

On November 14, 1994 the Respondent filed an affidavit in reply in

which he stated that the sum ordered on November 25, 1992 was mainly for the support of the children of the family as this was the main thrust of the application at the time and the matters stated in the Petitioner's affidavit in support of that application were mainly related to the support of the children. Paragraphs 4 and 5 of the Respondent's affidavit are as follows:-

"4. **That at some stage in July 1993 the Petitioner and I held discussions relating to the education of the children of the family and I agreed to the suggestions and indications of the Petitioner that the said children of the family should attend a boarding school in England. This was more so in view of the needs of our son Robert who has a learning disability resulting from dyslexia.**

5. **That at the time I pointed out to the Petitioner the impossibility of financing such a venture but due to her insistence I agreed only after making it quite clear that the expense of such schooling would require me taking a further loan and as such would totally prohibit me form making any other payments relating to the Petitioner herself."**

On November 25, 1994 the Petitioner filed another affidavit. In that affidavit she denied that the sum of $2,250 per month was ordered mainly for the support of the children. She referred to her affidavit in support of the application where she had deponed

to her own financial needs and also where she had deponed to the fact that the children's education were being met by the Respondent. Paragraphs 7, 8, and 9 of her affidavit are as follows:-

"7. That I agree that the Respondent and I discussed the question of the children attending school in England, but state that these discussions took place before July 1993.

8. That I deny that I ever agreed that the children attending school in England would deprive me of my entitlement to maintenance payments as per the Order of the Court, as the Respondent had always taken responsibility for the children's education, whether they were attending school in England or in St. Lucia.

9. That in June 1993 I caused my then Solicitor, Mr. Peter Foster, to write to the Respondent seeking to clarify the arrangements which he had made for the children's attendance at school in England and reminding him of his obligation to pay the maintenance pending suit due to me under the Order of the Court."

Learned Counsel for the Petitioner referred to her affidavit and submitted that the amount outstanding up to May 31, 1994 was $21,100.00 and that there had been no payments for the months of

June, 1994 to November 1994. Counsel observed that the Respondent by his affidavit agreed he had not paid the amounts but was alleging a reason for not doing so.

Counsel submitted that the Petitioner's affidavit in reply denied any agreement or understanding between the Parties that the maintenance payments would cease as a result of the children going on to England for their schooling.

Counsel pointed out that the contents of Mr. Peter Foster's letter which was annexed to the Petitioner's affidavit goes to negative what the Respondent had stated. Counsel submitted that the affidavit of the Petitioner filed on November 19, 1992 had very little to do with the children except that it said that the Respondent was responsible for the education of the children.

Counsel submitted if the other side was saying the order ought to be paid in a different form they should have come to the Court for a variation of the order.

In his reply learned Counsel for the Respondent observed that his client had complied with the order from the date it was made until July of last year. Counsel submitted that the main thrust of the Respondent's case is as stated at paragraphs **4** and **5** of his affidavit.

Counsel submitted that although one cannot unilaterally disobey the Court order if the Parties agree that the money will be paid but for a different purpose then one cannot later say the money has not been paid.

Counsel submitted that Mr. Foster's letter does not suggest there was no agreement between the Parties.

Counsel said there was no way that a salary of $7,500 a month could accommodate the payment of maintenance of $2,250 a month and payment of school fees in England at an amount of approximately $10,716.00 a month.

Counsel's final submission was that the Respondent had already paid the amounts claimed.

In answer to me learned Counsel stated that the amount of $10,716.00 covers school fees for the children in England, uniforms, air travel and back, boarding and feeding.

When I look at paragraphs **2,3, 5, 8** and **14** of the affidavit of means of the Petitioner filed on November 19, 1992 it is evident that she was stating that she depended on the Respondent heavily for maintenance. At paragraph **16** she was urging the Court to make periodic maintenance payments for herself and the children and in paragraph **17** she was saying she was destitute. Paragraph **17** is as

follows;-

> **"In the premises and contrary to the Respondent's allegations in paragraph 6 of his affidavit, I am not in a good and stable financial position, but am virtually destitute living as well from occasional handouts and donations of groceries."**

And in paragraphs **2** and **10** of the said affidavit she was alleging that school fees were paid by the Respondent.

In my judgment it is erroneous to state that the order made on November 25, 1992 was made mainly for the support of the children. That is not borne out by the affidavits and the Court made no such finding.

The Respondent relies on what is stated at paragraphs **4** and **5** of his affidavit.

It seems that the Parties did speak about the children going to England for their education. The Petitioner admits this at paragraph **7** of the affidavit filed on November 25, 1994. Paragraph **5** of the Respondent's affidavit seems to suggest there was an agreement to waive the order made on November 25, 1992.

The Petitioner has denied that there was any such agreement in paragraph **8** of her said affidavit.

Learned Counsel for the Respondent has submitted that one Party cannot unilaterally disobey a Court order. I am not sure that both Parties can vary the Court order and this becomes more significant when one of the Parties has said that there was no agreement to vary the order.

Now when the Parties were in love they must have been in ecstasy. They later got married. They managed their own business. Unfortunately the relationship soured. They came to the Court. The Court made an order. I do not think that the Courts are omnipotent or that they are always right. But I trust that they do the best they can in any given circumstance. When the Court made the order on November 25, 1992 it gave the Respondent liberty to apply. He did not apply. Neither did he appeal against the order.

How can he then go behind the order of the Court and now state that on the strength of discussions with the Petitioner the order was varied? He did not come to the Court for a variation of the order. He did not even get his lawyer to draw up a document bad as that might be or even seek Counsel's legal advice. If persons are allowed after the Court gives an order to go away and purport to amend that order and then when they find themselves in difficulty to return to the Court and rely on their deliberations the authority of the Court will have been rendered otiose. There would probably be anarchy.

In my judgment if a Party wishes to have a change in the order of the Court he or she ought to seek legal advice and come to the Court under Section 29 of the Divorce Act and seek a variation.

In a letter written to the Respondent by Mr. Peter Foster on behalf of the Petitioner on June 14, 1993 he stated as follows:-

"MR. DESMOND BRATHWAITE, **June 14th, 1993**
P.O. Box 554,
CASTRIES:

I act on behalf of my client, your wife JULIET BRATHWAITE.

My client is of the understanding that you have made arrangements to send the children to Stanbridge Earls School, England in September 1993 and requests full details of these arrangements, in particular the proposal that the children visit the school prior to the headmaster's vacation.

My client has spoken with the Bursar of Stanbridge Earls School who had indicated that the clothing list will cost FIVE HUNDRED POUND STERLING for each child. Presumably you will bear the cost of this.

Further, my client wishes to know whether you will be in St. Lucia in July, if not she would appreciate post dated maintenance cheques for herself for the months of July, August and September to be held by my offices to be deposited to her account, on the due dates.

Yours faithfully,
PETER I. FOSTER"

That letter is an indication that the Petitioner, despite arrangements for schooling in England, was expecting her cheque payments in full.

The letter preceded the arrangements which the Respondent said he

made with the Petitioner in July, 1993. I am not saying that in July 1993 she could not have changed her position from that of June, 1993. But I say it is evidence which supports her statement that she did not agree to waive her rights under the November 25, 1992 order.

I am not satisfied that she did.

Mr Mc Namara submitted that there is no way that a salary of $7,500 a month could accommodate maintenance payments of $2,250 a month and approximately $10,716 a month for schooling in England, and therefore that must mean there must have been an agreement to waive payment of the maintenance order. That is a non sequitur. There is no way that a salary of $7,500 can accommodate a monthly payment of $10,716.00 for school fees but presumably this is being done; and if that apparent impossibility is being accommodated how is it an additional apparent impossibility cannot in like manner be accommodated?

I am of the view that the order made on November 25, 1992 remains intact and on a strict interpretation the Respondent ought to pay the arrears of $21,000 under the order. However, I realise the order was for the maintenance of the wife and children. One cannot say because the children are not in St. Lucia the Respondent must pay one-third of the amount of the order. The house rent will not be reduced to one-third; the electricity consumption will not be

reduced to one-third; and there are other expenses which cannot be split in this way.

Because the children are in England with the consent of the Petitioner she must have been spending less on food which is being presently met from the Respondent's payments to the school. Perhaps it is just in the circumstances to make a deduction from the arrears to take account of that.

My order is that the Respondent pay the areas of maintenance in the sum of $18,400 and costs in the sum of $500 making a total of $18,900 to be paid by 31st January, 1995 or in default three weeks imprisonment.

A.N.J. MATTHEW
Puisne Judge