

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHMT/1999/0098

BETWEEN:

SALLY ANN NOEL

Petitioner

And

ARTHUR NOEL

Respondent

Appearances:

Mrs Shaheda Ali-Schneider, and Mrs Stacey-Ann Saunders-Osborne for the Petitioner

Mr John Fuller for the Respondent

2010: March 04

2011: April 14

JUDGMENT

- [1] **THOMAS J:** The matter before the Court concerns committal proceeding with respect to an Order of the Court and also the status of a certain sum of \$51,615.20
- [2] The background is that on 15th February, 2001 this Court made an Order that the Respondent must pay the Petitioner the monthly sum of \$2500.00 for the maintenance of the two children of the marriage, Marc Noel and Stuart Noel. The Order bore a penal notice which warned of legal consequences for disobeying the said Order. Further hearing was adjourned to 8th March 2001.

- [3] The next Court event came on 9th October 2009 when a Notice of Motion for Committal was filed by the Petitioner. The notice sought the committal of the Respondent for contempt of the Order of 15th February, 2001.

THE EVIDENCE

Sally Ann Noel

- [4] In an affidavit in support of even date the Petitioner refers to the Order of 15th February, 2001 and its requirements and goes on to depose that the Respondent has been in breach of the said Order by failing to pay the maintenance as ordered for the months of July, August, September and October.
- [5] The Petitioner further deposes that the Respondent is an Aircraft Engineer employed by LIAT (1975) Limited and that to the best of her knowledge the Respondent has the means to pay and satisfy the said Order of the Court.
- [6] In a Supplemental Affidavit filed on 8th January, 2010 the Petitioner identifies herself as the person who swore the affidavit in support of Motion for Committal and that his Affidavit [filed on 8th January 2010] is supplemental to that of 9th October, 2009.
- [7] In this Supplemental Affidavit the affiant exhibits copies of her Antigua Commercial Bank statements for account #105602701 spanning the period 12th January, 2005 to 31st December, 2009. According to affiant the said bank account was used exclusively for the purpose of receiving deposits for the children's maintenance payments from the Respondent.
- [8] At paragraphs 3 and 4 of the following is deposed:

“3. From the year 2001 until the month of June 2009 the Respondent each and without interruption has paid the maintenance payments amounting to \$2,500.00 for the benefit of the children together with any reimbursements which he owed me for pre-paying his agreed share of the children's school fees, school materials or lessons.

4. The Respondent to the detriment of the children has since the month of July 2009 willfully refused and/or neglected to pay the sums ordered by this Honourable Court. The Respondent is currently in arrears of maintenance in the sum of \$17,500.00 for the months of July 2009 to January 2010.”

[9] In cross examination the Petitioner testified that subsequent to the Order of 15th February, 2001 there was a trial over which Mr Justice Moe presided. She said that she did not recall the date of the trial or if she gave evidence. The Petitioner went on to testify that the trial concerned maintenance for the children and the Judge did make an Order for the payment of \$2500.00 per month for the two children. She also added that she could not recall if the Order was a temporary Order.

[8] Mrs Sally Noel, the Petitioner was next cross-examined by learned counsel for the Respondent; on various aspects of her relationship with her husband, the Respondent and ended up saying that since 1999 they have had altercations and she filed for maintenance and later a petition for divorce on 8th October, 1999. In further testimony Mrs Noel said that since they have had little contact and no marital relations and that there have been many proceedings in Court.

[9] Concerning the sale and purchase of a certain house by the Petitioner, she testified that she did and tell her husband that that house was for sale but went on to say he gave her the money for the down payment on the house plus the legal fees.

[10] In further testimony the Petitioner said this:

“I did not call my husband about the house. I did not tell him I would repay when I got the cheque from my father's estate. The \$253,000 I got [from the estate] after I received the \$51,000.00 I did not tell him about the cheque. I did not beat my son with a broom stick. Arthur did not speak to me about my son being beaten. When I do need to discipline them I beat them with my hand or a belt. Mark is now fifteen.”

[11] Continuing on the quantum of the money in dispute, Mrs Noel said that her husband did not approach her about the loan and did not have any discussion about withholding maintenance payments for twenty months.

- [12] With respect to a further incident involving Marc, Mrs Noel gave evidence that about her son. She said that he did not drop water on the kitchen floor. She explained that about two years ago water fell from Marc's flask and he fell and had to go to Adeline Clinic. She also denied that he had to use a computer to block the blows.
- [13] It is Mrs Noel's testimony that she does not keep the boys as prisoners. She also denied that she does not allow the sons to visit their father. The witness however recalls that she withdraw \$14,200 from a joint account.
- [14] In re-examination Mrs Noel said that the money in the joint account was hers and it came as a result of money she received from a box and that she did not withdraw anything belonging to her husband.
- [15] Concerning the sons, it is Mrs Noel's testimony that Mr Noel is free to see them at any time except during school time as she tries to institute some measure of control; and otherwise they would not have to be withdrawn from their father.
- [16] Returning to the matter of the payments of Mrs Noels testified that she held a conversation with the Respondent and inquired of him why the account was not credited as maintenance was still outstanding. She also said that the conversation took place during the first or second week of August, 2009. According to her Mr Noel's did not respond and as a result she left the house.

Arthur Noel

- [17] In his evidence in chief, the Respondent, Arthur Noel said that he was an Aircraft Engineer, husband of Sally Ann Noel and father of Marc and Stuart Noel.
- [18] Regarding prior proceedings Mr Noel said this:

"I have not seen a Court Order in these proceedings. There was an Order on 15th February, 2001. Subsequently there was a trial on 8th March 2001. It was before Mr Justice Moe.

Evidence was given by Mrs Noel. I do not remember if I gave evidence. I do not remember the result of the trial. I have been paying \$2500.00 up to last year. It was a voluntary agreement. I was never served any Court Order."

[19] Mr Noel said that he recalled 22nd November, 2006 when he was approached by Sally Ann while in his car in her driveway and asked to have a word. According to him she told him her predicament one which necessitated the purchase of a house from her landlord and there was a need for her to obtain two loans. Mr Noel went on to say that Mrs Noel asked him to advance her the money until she received money from her sister and then she would repay him. The evidence in this regard continued thus:

"I asked her for a breakdown of the legal fees and deposit. She did this on the following day on a piece of paper. I told her I would prepare a draft on the following day. I do not remember the day – perhaps it was 24th November 2006. On that day I had to catch a flight and I told her that I instructed my bank to prepare a draft. It was for \$51,000. She got the amount. It was a RBTT draft. The agreement was that when she gets the money she would repay me. I asked her for the money and she said she did not get the cheque as yet. In June last year my son told me something. I did not approach her immediately. It was two weeks before exams for the boys and just in case it would cause a problem I waited and eventually brought up the matter.

There was a decision regarding the loan and she agreed to repay. She did not indicate how. Subsequently I made an arrangement and I called her house in August 2009. We came to the agreement that I would withhold the \$2,500.00 until the full amount is repaid. It was not in writing, she told me she bought the house. I had another discussion with her about the boys as a result of something indicated to me by my son."

[20] In cross examination by learned counsel for the Petitioner, Mrs Schneider, Mr Noel said that he recalls that Mr John Fuller represented him in the custody and divorce proceedings. He also said that he filed an affidavit and at paragraph 18 thereof he deposed that he was unwilling to pay \$3500.00 per month. He also added that at that time there was an interim order for the payment of \$2500 per month and that he had to appear at a later date, the result of which he did not recall.

[21] In further evidence concerning the payments Mr Noel said that the payments between 2001 and 2009 were voluntary payments and recalled that it was \$2500.00 he agreed to pay.

[22] Concerning a letter dated 6th February, 2001 Mr. Noel agreed that he said he would only pay the minimum required by law. He added that this was until the matter was settled.

[23] It was put to Mr. Noel that had it not been for the Order he would not have paid the money voluntarily. This was denied. Mr. Noel added that he said he would have paid the minimum which was \$600.00. Mr. Noel also denied that he only paid the \$2,500.00 because he was ordered to do so by the Court. He continued:

“I do not know if the Order was discharged or made final. I was not aware that I had to pay \$2500 per month. I paid it in 2009. I always paid the money – sometime more and sometimes less.”

[24] On the matter of the purchase of a home by Mrs Noel, the Respondent gave this testimony:

“I knew that Mrs Noel would be out of a place in 2006. I wanted to ensure that my children had a place to rest their heads. The draft for \$51,615.20 was not an advance. It was a advanced until the cheque came. In 2009 the money was paid and there were to be deductions until the amount was repaid.”

[25] In light of the foregoing it was put to the witness that he was fabricating the matter of the loan of \$51,615.20 and the manner of repayment. Mr Noel responded by saying that what was put was incorrect.

[26] In further evidence Mr Noel spoke of his duties and his earnings as an aeronautical engineer. He went on to say that his position has advanced and while he earns more, he takes home less. He also spoke of a stipend he receives from outside of Antigua and Barbuda once or twice per year.

[27] In further cross-examination, Mr. Noel was asked about O'Neil Richards whom he said he knew from 1988 as Mrs Noel's friend and is on her life. Mr. Noel went on to testify that in 1999 he accused Mr. Richards of a serious crime in a letter to Scotland Yard. According to Mr Noel: “The letter accused Mr. Richards of being involved in drugs. I was never arrested in 1999. I went to Police Headquarters and they did not let me go, but I was not there for two days.”

[28] It was then put to Mr. Noel that he was lying, not only in relation to the money, but also in relation to the letter and the order. Mr. Noel did not agree.

[29] In further testimony on the matter of the payments Mr. Noel said that he did accept that he owed \$17,500. He however conceded that he had not made any payments since July 2009 but disagreed that he did not make any payments between July 2009 and now.

[30] Finally, Mr. Noel ended his evidence in cross-examination that he never agreed that the repayment would come out of the money paid for the children. He added that coming to Court was a total surprise as there was no disagreement.

[31] There was no re-examination of Mr. Noel.

ISSUE

[32] The issue for determination is whether the Petitioner's Application should be granted in view of the Respondent's failure to pay in accordance with the Court Order of 15th February, 2001; or in the alternative, if there was an agreement to apply the proceeds of a loan from the Respondent to the Petitioner would satisfy the Order.

Petitioner's Submissions

[33] It is submitted by Mrs Schneider, on behalf of the Petitioner as follows:

1. The amount of \$51,615.20 was a gift from the Respondent to the Petitioner as revealed in cross-examination.
2. The money the Petitioner was expecting from her father's estate.
3. The evidence that the Respondent has consistently paid maintenance from 2001 to June 2009 cannot be disputed.
4. The Petitioner testified that there was never any discussion with the Respondent about crediting her bank account with the maintenance payments. It is the Petitioner's testimony that the Respondent never mentioned anything about her

having to repay the gift and crediting the gift to the amount he owed for maintenance.

5. The Respondent admitted under cross-examination that he would have continued making his contribution for the children of the marriage if it was not for the alleged loan and his contribution would be less than \$2500.00.
6. The Respondent has not proved to be a credible and forthright witness and the Court is urged to prefer the evidence of the Petitioner where there are contradictions.
7. [In light section 4(1)(b) of the Debtors Act], the Respondent by his own oral testimony has the means to pay the maintenance sums and has willfully refused to pay.
8. The Respondent's allegation that he gave a loan to the Petitioner and that it was agreed that the said loan would be credited to the Respondent's required maintenance payments is unfounded as it does not meet the requirement of a contract.
9. The Respondent is in contempt in failing to make the required payments in accordance with the Order of the Court.

Respondent's Submission

[34] Mr John Fuller for the Respondent submits the following:

1. The Respondent favourably considered the Petitioner's request for a loan of \$51,615.20.
2. The Petitioner had indicated to the Respondent that she would repay the money on a certain event.

3. Petitioner did not mention the repayment until June 2009 when the Respondent became aware that the Petitioner had in fact received inheritance money.
4. The court ought to reject the Petitioner's contention that the \$51,615.20 was a gift.
5. The Respondent's version of the events and circumstances are far more credible than that of the Petitioner.
6. After the Respondent became aware that the Petitioner had in fact received the inheritance money approached the Petitioner and there was an agreement that the money be converted to maintenance payments for the children.

Analysis and Conclusion

- [35] This matter, in the view of the Court, ought not to have engaged the Court as it must border on abuse of process. Abuse of process has been interpreted as proceedings that are vexatious, frivolous, scurrilous or obviously ill-founded.¹
- [36] The fact of the receipt of the sum of \$51,615.20 by the Petitioner is not in dispute. What is in dispute is its character. Was it a gift or a loan?
- [37] On the side of the Petitioner the matter of the Respondent suggesting that the house should be purchased and his inquiries as to the list of the initial costs loom large. Also looming large is the Petitioner's contention that there was never any discussion about a certain sum being repaid.
- [38] In short then, based on the evidence especially the Petitioner's denials that the repayment or crediting the certain sum towards the maintenance payments, the Petitioner's case is that the certain sum was a gift.
- [39] Some effort was made to highlight the issue of the letter which the Respondent wrote to Scotland Yard, Police in England alleging that the Petitioner's friend, O'Neil Richards,

¹ See: *Kotch v Chen* [1977] 98 1 OFLR 537

involvement in drugs. But this fact was not denied by the Respondent and he went on to admit that he was detained at the Police Headquarters, St. Johns, and the fact that the Respondent testified that he was not aware of the Order does not affect his credibility since the Petitioner herself conceded that up to June 2009, the Respondent did pay in accordance with the said Order.

[40] For the Applicant/Petitioner it is submitted that "through the Respondent's own oral evidence that the Court can be satisfied that the Respondent has had the means since the date of the default of the Order to pay maintenance sum due for the benefit of the children of the marriage and his willfully refused to pay the same."

[41] On the other hand, the Respondents case rests on his contention that there were discussions with the Petitioner concerning the repayment of the certain sum. At paragraph 11 of the submissions on behalf of the Respondent, the following is advanced:

"Upon being made aware that the Petitioner had received a large sum as her inheritance money the Respondent approached the Petitioner about the outstanding loan. The Petitioner made no suggestion as to when she would repay the monies and the Respondent then suggested that the loan be converted and credited to her as maintenance payments for the children to which the Petitioner agreed."

[42] With respect to the Applicant/Petitioner the Court does not regard her as a credible witness because the denial of beating Mark with a broomstick in the context of the receipt of the inheritance money is not accepted; the denial the inheritance money did not feature in the discussion concerning the money to purchase a house by the Applicant/Petitioner is also not accepted; and the denial that she curtailed the boys' visits to the Respondent is also rejected by the Court.

Conclusion

[43] Learned counsel for the Applicant/Petitioner has made submissions on the matter of the elements of a valid contract. However, the fundamental point is that both sides accept that the money was paid to or received, by the Applicant/Petitioner. And as noted before, the question is whether the money was a gift to the Applicant or whether it was to be credited

to payments due from the Respondent for maintenance as ordered. As such the Court does not consider the principles governing the formation of a valid contract to be applicable in this context.

[44] In all the circumstances the Court agrees with Mr. Fuller's submissions that the Respondent's story is more credible for the following reasons: As the Petitioner admitted, prior to July 2009, the Respondent was not in arrears in payment of maintenance for the children of the marriage; the Respondent gave as one of the reasons for the loan his desire to see that his children had a roof over their heads; the Respondent went to great lengths to ensure that the Petitioner received the bank draft as he was leaving to go on an overseas trip, the history of the relationship between the parties suggest that the matter of the gift of the certain sum was unlikely; the matter of the inheritance money would have had to come from the Applicant/Petitioner which then formed a major part of the handing over of the certain sum; the Court accepts that in the circumstances of the handing over of the draft; there was discussion between the parties with the agreement or understanding that there would be a cessation of payments of maintenance and credit for maintenance would be given for the money owed.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance, the national interest of Antigua and Barbuda and the Commonwealth of Dominica and international concerns arose and as such were given priority. These included challenges to a Commission of Inquiry set up by the Government of Antigua and Barbuda,² applications to strike out five election petitions filed by members of Parliament in the Commonwealth of Dominica³ and an application to remove the liquidator of the Stanford International Bank⁴. Further, this judge was

² ANUHCV2009/444 and ANUHCV2009/445

³ DOMHCV003 of 2010, DOMHCV 004 of 2010, DOMHCV 005 of 2010; DOMHCV006 of 2010 and DOMHCV007 of 2010

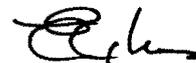
⁴ ANUHCV 2009/0149

transferred to another jurisdiction, where a single judge presides, with effect from 1st September 2010 with the foreseeable consequences. In any event since then some fourteen (14) judgments have been delivered. This accounts for the delay. Despite the foregoing a deep and sincere apology is tendered for the delay.

ORDER

[45] **IT IS HEREBY ORDERED AND DECLARED as follows:**

1. The sum of \$51,615.20 received by the Petitioner from the Respondent was not a gift but was a loan.
2. The Respondent did not make payments in accordance with the Order of 15th February, 2001 but there was a discussion and an agreement or understanding between the Petitioner and the Respondent that the sum of \$51,615.20 would be applied towards the outstanding payments due for the maintenance of the two children.
3. The Petitioner's application is therefore denied.
4. The Applicant/Petitioner must pay the Respondent costs in the amount of \$2500.00



Errol L. Thomas
High Court Judge [Ag]