

**IN THE SUPREME COURT OF BELIZE, A.D. 2019**

**ACTION: 260 OF 2019**

**BETWEEN**

**(DIANE LORI TABONY**

**PETITIONER**

**(AND**

**(AUGUST HENRY TABONY**

**RESPONDENT**

**BEFORE the Honourable Madam Justice Sonya Young**

**Decision**

27<sup>th</sup> May, 2021

**Appearances:**

Mr. Fred Lumor SC with Ms. Sheena Pitts, Counsel for the Claimants.

Mr. Andrew Marshalleck SC with Ms. Stacey Castillo, Counsel for the Defendant.

**DECISION**

1. This is an Application for the expedited hearing of the Action for permanent alimony or maintenance, interim maintenance, disclosure and attendance of the deponent Respondent for cross-examination in the action. This matter with another matter, concerning the same parties for the division of matrimonial property (filed in 2018) are matters recently inherited by this Court.

2. Briefly, by way of background, the Applicant and the Respondent were married on the 24<sup>th</sup> October, 1986 and separated in March, 2013. They eventually divorced in July, 2019 on the grounds of irretrievable breakdown.
3. In 2018, the Applicant filed a petition for alimony pending suit which was discontinued on 9<sup>th</sup> March, 2021 without being heard. This fresh Application for an Interim Maintenance Order was filed on the 3<sup>rd</sup> February, 2021 within the substantive action for permanent alimony or maintenance which had been filed in August, 2019.

**Attendance for Cross-examination:**

4. The Respondent has agreed to his own cross-examination and indicated that he would be making a similar Application in relation to the deponent Petitioner. The Petitioner's Application is therefore granted as prayed. With the consent of Counsel for the Applicant, an Order will also be made for the leave to cross-examine the Applicant in the substantive matter.

**Interim Maintenance:**

5. The matter which occupies most of this Application is the interim maintenance. In such an Application, the Court would expect to see some clear evidence on which to make its determination that the Interim Order was necessary. This of course requires that the Court be made aware generally of the standard of living to which the Applicant was accustomed, her fortune or her needs and the Respondent's ability or means.
6. If such a need is found to exist, then the Court will be well positioned to make an assessment of what a reasonable amount would be. While the

conduct of the parties may have an impact on the overall consideration, it is certainly not determinative.

7. The Court is, however, not required to conduct a full scale investigation into the allegations made by both parties in their pleadings. This would be foolhardy if only because it would be a futile attempt to give considerable weight to evidence which has not been tested through cross-examination and which may in any event not be fully or substantiated at all, in trial.
8. This position is made quite clear through **Rule 69(2)** of the *Matrimonial Causes Rules*:

*“Pending the final determination of an application for maintenance or periodical payments an interim order may be made upon such terms as shall appear to the Court to be just and without prejudice to effect of the order to be ultimately made.”*
9. Actually, the very case which Senior Counsel for the Applicant refers to and quotes from supports this view. In *Porter v Porter [1969] 3 ALL ER 640*, the Court of Appeal made an Interim Maintenance Order and remitted the matter for rehearing of the Petition for maintenance with the advice that an affidavit of the Respondent’s means be ordered by the Court below before a final order was made.
10. The investigation of the type which required an affidavit as to means was therefore reserved for the full hearing, not the interim hearing. As Saches J said at pg 645(1), *“...a judgment on ultimate issues can not be made on an interim order.”*

11. Much of the Applicant's focus seemed to be placed on property, interests and rights and not where it should have been on her own financial position and the standard she is accustomed to. Most of that information had to be gleaned from other affidavits on which she relied but not the affidavit which was filed in support of her Application.
12. This Court agrees with Maria J in *Usher v Usher Action No. 219 of 2005* that the grant of interim maintenance is not automatic. After considering the pleadings and any affidavits filed or evidence given, she states at page 3: *"The test, in my view, at this stage in an application such as this, is that the petitioner needs to satisfy the court as to why she needs an interim alimony pending suit."*
13. A full investigation is, therefore, not required and for this reason the sum granted is usually far less than that which may be eventually ordered. The Interim Order is made only for what the Court considers to be just in the circumstances and it has no prejudicial effect on the final order.

**The Lifestyle:**

14. This Court considers the lifestyle both parties lived prior to divorce. It seems that they lived well above average. There were frequent trips earning platinum airline status, couple and family vacations abroad, comfortable homes and numerous businesses which the Respondent seemed to have had some serious control over as he could offer the Petitioner her choice of position. There was health insurance, membership at a casino and tennis club.

### **The Applicant's Fortune:**

15. The Applicant's submissions contained a solitary paragraph on this issue. She had passed working age and had been living on her savings since 2015. Her situation has now become dire causing her to experience painful public and private embarrassment.
16. The Applicant says that she has worked with or at the businesses which she helped her husband start and grow - The Toucan Stores. She was given a stipend by the Respondent for her efforts. From 2012, she started getting 50% of the profits of the Toucan Stores and from 2013 she got a monthly sum of US\$7,000.00, which included the 50% profit. But that all ceased in March, 2015 by the directive of the Respondent.
17. Since then, she has had one short term consultancy job. She has an IRA retirement fund with over US \$100,000.00, for which she will be penalized if she accesses it early. Up to August, 2019, she had \$14,700.00 in her accounts. She provided copies of bank statements in support. She does not speak of any other source of income.
18. The Applicant adds that since early 2015, she no longer lives in the home she shared with the Respondent and has had no access whatsoever to the assets acquired jointly. She currently lives in rented premises and has curtailed her spending tremendously, spending only on necessities and not the luxuries to which she has been accustomed.
19. She says she has property that was rented but which she is attempting now to sell. She admits to living currently with her partner in Canada because of the

Covid pandemic but intends to return to Belize. The Court takes judicial notice that flights have begun operating out of Canada and into Belize for some time now. That situation could not be without choice at this time.

20. The Respondent says the Applicant had at all material times been paid a salary by Toucan El Salvador for primarily managing with some book keeping and purchasing merchandise for the store. He exhibited general journal entries of Tabony Industries Limited showing salary payments to “Diane” between 2006 and 2012.
21. He insists that the US\$7,000.00 per month (which the Applicant referred to as 50% share in the profits of the business) was taken by the Applicant from the business without his knowledge or consent and there was no agreement to share any profits with her.
22. The Respondent maintains that the Applicant is financially independent. He asked the Court to consider that the Applicant has been able to travel at a time when she says her situation is dire. He points out that her affidavits between 2019 and 2021 are sworn to in Canada and Mexico City.

**The Respondent’s Means:**

23. Senior Counsel for the Applicant also focused considerable energy on the Respondent’s means. A lot of the focus was on assets which he seemed to consider ought to be held jointly and which are perhaps the subject matter of other proceedings. He made much about the Respondent’s failure to substantiate his statement as to his means. He submitted that the Court

definitely could not investigate the Respondent's allegations since there had not been the necessary disclosure.

24. What was left for the Court's consideration was the Applicant's allegation that millions of dollars in wealth was generated during the marriage. She suggested that a lot of it was in the form of investments, companies, property or other assets and she provided an extensive list of property (real and personal) which she says they own together. There is also a trust created by the Respondent to which their two (2) children and their heirs are the primary beneficiaries. The Applicant is not named.
25. The Respondent admitted that the Toucan Stores were his separate property (paragraph 55 of the Affidavit dated 1<sup>st</sup> October, 2019). But he also said that they generated wealth for him by virtue of his shareholding in Tabony Industries Ltd. He admitted rental income, acquiring and selling properties and other profits derived from Tabony Industries and companies in which he held shares.
26. Initially, the Respondent said he now only has property in El Salvador, a social security benefit from the USA (the amount was not disclosed) and earnings of US\$1,000.00 per month from his directorship of Tabony Industries Limited. He uses his directorship earnings for food and personal expenses. He, therefore, has nothing sufficient to pay maintenance to the Applicant.
27. By a later affidavit, he admitted also owning shares in Seaside Ventures LLC a Nevisian Company, which he says has only BZD \$10,000.00 in an

account. He failed to say how many shares he has in this company.

28. He is also a 100% shareholder in Corner Lot Ltd; a company with assets valued at BZD \$250,000.00 but which he says is indebted to Heritage Bank for \$1,250,000.00. He holds shares, on trust, for Brittney O'Daniel.
29. He and another are the beneficial owners of Quantum San Pedro Limited which has no assets in its name but owns a suite of offices worth approximately USD \$190,000.00. He has two parcels of land in San Pedro which he says he holds on trust for Santa Rita Holdings Ltd.
30. He is adamant that all of the properties listed by the Applicant in her petition have been settled in the trust or are owned by third party Companies who are not parties to these proceedings.

**Other Circumstances:**

31. This marriage has lasted over 33 years. There are no minor children or adult children needing special care or treatment. The Applicant says she is 64 and is undergoing weekly trauma therapy for which she provided no proof.
32. The conduct of the parties remains to be considered at trial as the divorce had been granted on the grounds of irretrievable breakdown. Both parties alleged adultery. The Applicant adds cruelty as well but admitted adultery in her discretion statement. The Respondent says that the Applicant currently lives with the person with whom he alleged her adultery.



33. The Petitioner seems to have moved on and resides permanently or temporarily with her new partner. She says the Respondent has also moved on and currently provides for someone with whom he has and has had a relationship before the marriage ended.
34. There is also the issue of a prenuptial agreement which the parties entered into and which the Respondent says would preclude any intention of either party having to maintain the other. That agreement is being contested in other proceedings.

**Determination:**

35. The Court is unable to properly determine the Respondent's means but there was nothing from the Respondent which disputed that the Applicant was not earning or which demonstrated that she did in fact have means other than what she stated.
36. The Respondent did assert that the Applicant was not reliant on him because she had her own salary. From what is before this Court, that salary came from the Toucan Stores. The Respondent has, however, not said that currently, the Applicant continues to receive this salary.
37. This Court finds that when the Respondent said he "misspoke" as to some of the assets he holds, this was quite unfortunate, although he sincerely apologized. It was indeed surprising that someone living off of US\$1,000.00 per month would not remember \$10,000.00 sitting in a company account, or valuable shares held in other companies.

38. The Court notes the Respondent's admission in that letter to the Applicant in 1994 of being able to live well on the interest alone. That statement admits that there was something generating sufficient interest.
39. The Court also notes that the Respondent had sufficient to place in a trust, clearly admitting that notwithstanding, he would be able to continue living to a standard befitting his needs. That trust was in existence since 2010 but the Respondent continued to live and to live well. He admitted in 2016 to making millions.
40. He also admitted to placing in that trust, the income he generated from his own businesses and investments and having to travel frequently to manage his businesses (paragraph 14 of Affidavit dated 1<sup>st</sup> October, 2019). What are these businesses and investments and what are they now generating?
41. The Respondent had difficulty with the statement of expenses submitted by the Applicant. This Court agrees that the statement is not without its issues. But we are not at trial at this time and the Applicant is not at this stage seeking the grand total on that statement. She seeks USD \$5,000.00.
42. The fact remains that the Applicant must have ordinary living expenses. She has no income and the Court has no evidence of other means for her to draw from without penalty or sale of property (which is unpredictable). This Court is satisfied that there exists a need in relation to the Applicant and it is also satisfied that the Respondent has the requisite means. I do not find that any of the other circumstances precludes me from making an Interim Order.

43. Considering what the Applicant stated in her consolidated affidavit dated 17<sup>th</sup> January, 2020 as her reduced monthly expenses, this Court will order interim maintenance in the sum of BZD \$6,000.00 per month to be paid by the Respondent to the Applicant.

**Expedited Hearing:**

44. The Petitioner says her situation is dire but an Interim Maintenance Order has been made which ought to make her situation a little easier. The Applicant has also not shown any real urgency or any reason why this case ought to be moved ahead of any other case already before the Court. The Court's own calendar does not allow for an expedited hearing at this time except where there is a clear and obvious need.

45. However, the Court will endeavor to hear the matter with efficiency owing to the ages of the parties and the Interim Order which burdens the Respondent without there being a full hearing. This Application is, therefore, dismissed.

**Disclosure:**

46. The Applicant seeks the disclosure of the total income and expenses generated by eleven Toucan Gift Stores (the Toucan Stores) which she says are owned by the parties. She seeks that information from the year 2013 to present including bank statements held in the name of the stores, the Respondent's name alone, in names of Nominees, Representatives, companies, trusts or other entities of which the Respondent is the beneficial owner.

47. This Application is wide but it seems to focus on the Toucan Gift Stores and related entities. While this Court appreciates the need for information which the Applicant may be unable to attain otherwise, there is a procedure to all this. I do agree with the Respondent that the businesses or some interest in them must first be proven to belong to the parties or the Respondent.
48. The Respondent admits to being a director and shareholder of Tabony Industries Ltd. He also produced certificates which show that the Toucan Stores are registered business names belonging to Tabony Industries Ltd. The date of registration of those business names is March, 2015, although the stores were operational long before that date.
49. While the Applicant asked the Court to find the date of registration suspicious or instructive, the Court also notes that the Applicant herself admitted to paying the trade license for the Toucan Stores in the name of Tabony Associates and not in the parties' personal names.
50. The use of Tabony Associates is an appreciation that the Toucan Stores may not have been owned by her or the Respondent personally but by some entity called Tabony Associates. The precise nature of that entity remains unexplained by the Applicant who exhibited the 2015 Trade License.
51. However, with nothing more this Court finds it impossible to grant the full Application. In fact, one ponders whether much of this Application for disclosure was not better suited elsewhere. Even *Nixon v Nixon [1969] 3 ALL ER 1133* on which the Applicant relies points the Applicant in a different direction.

52. Finally, while I am prepared to make an Interim Maintenance Order even before the issue of the prenuptial agreement has been determined I am not prepared to make the disclosure orders as prayed.

**Disposition:**

1. The Respondent is ordered to pay interim maintenance to the Applicant in the sum of BZD \$6,000.00 per month beginning at the end of May, 2021 until further Order of the Court.
2. The Application for leave to cross-examine the Respondent on his Affidavits is granted and by consent the Respondent is also granted leave to cross-examine the Applicant/Petitioner.
3. The Applications for an expedited hearing and specific disclosure are dismissed.
4. Cost shall be in the cause.

**SONYA YOUNG  
SUPREME COURT JUDGE**