

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2012/FAM/div/FP/00009

BETWEEN

MH

Petitioner

AND

TH

Respondent

BEFORE The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Ms Constance McDonald for the Petitioner
Mr Hal O. Tynes for the Respondent

HEARING DATES: 2012: April 25
2013: March 20; 26 April

RULING

Gray Evans, J

1. This is an application for ancillary relief pursuant to a Notice filed 14 June 2012 in which the wife/petitioner applies for: (i) custody of the child of the marriage, with reasonable access to the respondent; (ii) maintenance for the said child; (iii) settlement of the matrimonial property; and (iv) a declaration pursuant to section 73 of the Matrimonial Causes Act.

2. The parties were married on 20 November 1993 when the husband/respondent was 24 and the wife/petitioner was 22. The marriage lasted for about 19 years. A decree nisi on the ground of the husband's cruelty was granted to the wife on 25 April 2012. The decree has not yet been made absolute.

3. The application is supported by an affidavit of means filed 10 October 2012 in which the petitioner avers as follows:

- 1) That I am the petitioner herein, and I make this Affidavit in support of my application for Ancillary Relief.
- 2) That I am employed as an Assistant Secretary at the Royal Bahamas Police Force in the City of Freeport, with a monthly income of \$2,512.00. The respondent is self-employed and I am unaware of his income, but his previous income was \$700.00 per week.
- 3) That there is one (1) child of the marriage namely: TAH Jr. born on the 18th day of September A.D., 1994. The said child is attending College of the Bahamas this fall and his tuition fees are \$1,550.00 per term.
- 4) The matrimonial property consist of a home situate at Block 21, Lot 63 Stunsail Lane East Sunrise Highway in the joint names of MH and TH. The market value of the home is \$310,000.00 and is currently mortgaged at Bank of The Bahamas. The outstanding balance is \$138,127.20. Myself and my son currently reside in the home. I pay the mortgage of \$1,400.00 monthly.
- 5) There is also a home in Ridgeland Park West in Nassau, New Providence also in joint names of MH and TH. The estimated market value is \$300,000.00 and it is currently mortgaged to the Bank of the Bahamas. The outstanding balance is \$57,130.34. I renovated this home and provided the down payment on it from my personal savings.
- 6) My monthly expenses are as follows:

Electricity	\$ 300.00
Water/Garbage	25.00
Cable	68.00
Telephone	35.00
Groceries	450.00
Medical Insurance	274.00
Life Insurance	218.00
College Tuition fees (\$1,550 per semester)	387.00
Gasoline	200.00
Entertainment	100.00

Miscellaneous Expenses (Clothing/Grooming etc)	100.00
Home Maintenance	150.00
Mortgage (Bank of the Bahamas)	1,400.00
Mortgage (Bank of the Bahamas Nassau)	<u>674.00</u>
TOTAL	<u>\$ 4,381.50</u>

7) My annual expenses are as follows:

Utility/Service Charges	\$ 100.00
Clothing	1,500.00
Dental Visits	300.00
Car License & Inspection	500.00
Car Maintenance	550.00
Travel/Vacation	4,000.00
Home Owners Insurance/ Occupiers Insurance	<u>\$2,777.91</u>
TOTAL	<u>\$9,737.91</u>

8) I hereby pray that the Honourable Court do make the following orders:

- (a) That care and control of the minor child,TAH Jr., be granted to myself with reasonable access to the respondent.
- (b) That the respondent pays \$300.00 for maintenance per month for the minor child TAH Jr.
- (c) That the respondent pays the costs of TAH Jr. tertiary education, and book expenses.
- (d) That the respondent transfers the car driven by the petitioner into her name and the petitioner to transfer the car driven by the respondent into his name alone.
- (e) That the respondent conveys his interest in Block 21 Lot 63 Stunsail Lane Freeport, Grand Bahama and Ridgeland Park West, Nassau, New Providence to the petitioner.
- (f) That a Declaration be made pursuant to the provisions of section 73 of the Matrimonial Causes Act.

4. In his affidavit filed 11 February 2013, the respondent avers as follows:

- 1) I am the respondent named herein and I make this Affidavit in answer to the petitioner's application for ancillary relief.
- 2) On the 25th April 2012 Her Ladyship the Honourable Justice Mrs. Estelle Gray Evans pronounced a Decree Nisi in the petitioner's favour upon the ground that since the celebration of the marriage I have treated the petitioner with cruelty.
- 3) There is one child of the said marriage, namely TAH Jr. who was born on 18th September 1994. Since the date of the aforementioned Decree Nisi the

said child of the marriage attained the age of majority and enrolled in The College of The Bahamas. While I desire the best for my son and applaud his efforts to better himself, I was not consulted before he enrolled in The College of The Bahamas and I am not presently able to contribute to his tuition and books.

- 4) I have read a copy of the petition filed herein on the 2nd February 2012 and a copy of an affidavit sworn by the petitioner herein on the 4th October 2012.
- 5) Regarding paragraph (8) (iii) of the petition and paragraph 5 of the said affidavit I say that early in our marriage I worked as a Police Officer while the petitioner worked at Government Publications and at that time we lived with Shirley Belle-Walker to whom we paid a nominal rent. As a consequence of the aforementioned generosity and a loan given to us by my father, the petitioner and I were able to purchase the home of Ridgeland Park West with the assistance of a mortgage granted by Bank of the Bahamas. As a condition of that mortgage the petitioner and I were asked to open an account at the Bank of the Bahamas into which our salaries were to be paid and the mortgage installments deducted. About a year after the aforementioned home was purchased I left the Police Force to enter the employ of Cable Bahamas Limited and was unemployed for three months but during this transition the petitioner and I made ends meet selling food on weekends. The petitioner, her parents, and I would all help with the preparation of the food and my parents supplied the fish needed to assist our endeavors during my unemployment. When I subsequently entered the employ of Freeport Jet Wash the petitioner and I, moved to Freeport, leased the home at Ridgeland Park West for \$800.00 per month and applied the proceeds of the lease to the mortgage. As far as I am aware the home at Ridgeland is still under lease.
- 6) As to paragraph (8) (viii) of the petition and paragraph 4 of the said affidavit I would say that after the petitioner and I moved to Freeport the petitioner took the initiative and went in search of property upon which to construct our Freeport home. We both liked Lot 63, Block 21, Stunsail Lane, East Sunrise Highway and used a significant portion of the money which the petitioner received from her employer by way of back pay to purchase the same. Shortly thereafter we obtained another loan from the Bank of The Bahamas in the sum of \$150,000.00 and drew down on the same to construct the house which now sits upon the aforementioned Lot 63. In addition to my monthly contributions towards the mortgage payments, I installed, (a) a security system, (b) the blinds, (c) the kitchen cabinets, (d) the wooden floors, (e) the bedroom closets and the garage door in the home. It took several months to complete all the finish work but with the physical assistance of my father, Mr. Wayne Reckley's son, and the now deceased Mr. McIntosh, who installed the motorized gates for me, the home was made comfortable. At the time we purchased Lot 63 Stunsail Lane, I was working at Integrated Securities Systems earning between \$650.00 and \$700.00 per week. In or about 2008 I left Integrated Systems and went to work with Sheba Systems where I also earned in the region of \$700.00 per week.
- 7) Throughout my marriage to the Petitioner all of my earnings were given to the petitioner who managed our affairs and pooled our resources to pay the utilities and other family expenses which included the mortgage on the matrimonial properties, food, school fees, and clothing.

8) In April of 2012 after shutting down my security business due to the economic downturn in Freeport I moved back to Nassau and started working for Lowes Security Limited where I presently earn a salary of \$2,400.00 per month.

9) My monthly expenses are as follows:

(a) Electricity	\$ 220.00
(b) Cable	145.00
(c) Telephone	210.00
(d) Groceries	520.00
(e) Gasoline	200.00
(f) Rent	700.00
(g) Haircut	30.00
(h) Entertainment	20.00

10) My annual expenses are as follows:

(a) Clothing	\$1,000.00
(b) Dental visits	100.00
(c) Car License and Inspection	200.00
(d) Car Insurance	296.00

11) In the result my total annual expenses are \$26,136.00 and I have no savings or other investments save for the aforementioned homes.

12) I therefore ask that the Court divide the matrimonial property equally between the petitioner and myself and refuse the petitioner's application for an Order that I be made to maintain the minor child or pay the costs of his tertiary education and books.

13) Save as is hereinbefore admitted I deny the allegations contained in the Petition and the said Affidavit.

5. To which the petitioner responded in her affidavit filed 6 March 2013:

- 1) That I am the petitioner herein.
- 2) I have read the respondent's Affidavit filed herein on the 11th February 2013 and I respond thereto as follows.
- 3) That the respondent's statement of paying a nominal rent to Mrs. Shirley Bell-Walker never happened. I resided at Soldier Road and because I did not have a vehicle to get to the hospital and it was nearing my delivery time Mrs. Bell-Walker suggest that I moved in with her until the baby was born. More importantly, the respondent still resided in Treasure Cay, Abaco. The respondent relocated to New Providence one week before the baby was born.
- 4) The respondent also stated that his father gave me money towards the down payment of the house located in Ridgeland Park West, this is not true. The twelve thousand (\$12,000.00) dollars was derived from entering into an asue with Mrs. Christina Brown c/o Cabinet Office, as well as working overtime on the Government Official Gazettes, the Prime Minister Speeches, and other official documents of the government that was deemed urgent. I also made up the Twelve thousand dollars

because I had a live birth and received sixteen (16) weeks maternity leave benefit from the National Insurance Board.

- 5) The funds that the respondent is referring to that I borrowed from his father was some twenty-five hundred (\$2,500) dollars in order to get the respondent outfitted for his new job at Cable Bahamas. The respondent was hired as a line man and the boots alone cost \$700.00; this did not include the other attachments that came with the boots.
- 6) The respondent states that his parents provided the fish needed for the cooking that I would have done on the side, this is not true as I indicated in my affidavit, his brother, Mr. Kent Hodgkins assisted me by providing the fish.
- 7) The respondent further states that we all moved to Freeport together, this is not true as during the time the respondent moved to Freeport, TAH Jr. had just undergone surgery on the 11th October 2003, for the exploration of testis and bilateral orchidopery. More importantly, this was during the time of the missing boys, and my son was around the same age as those being targeted and mutilated. As a matter of fact I had decided not to follow the respondent as he quit his job even though management indicated to him that they would promote him. It was only after some thought and wanting to give my marriage a fighting chance, despite the danger and the fact that I did not know anyone in Freeport, I decided to follow the respondent. As a result when school closed in December of 2003, my son and I joined the respondent in Freeport, Grand Bahama.
- 8) The respondent further states that we both liked the property in Chesapeake Subdivision Lot 63 Block 21; this is not true as he never saw the said property when I purchased it. I asked him to join me at Thompson's Real Estate and sign with me. The respondent and I were estranged from each other at the time. He was flabbergasted and he turned to me and said "I did not think you would let me sign on your property". I responded by saying "I am not like you" and seeing we were still married I asked him to sign. I never dreamt that I would have to later seek a divorce.
- 9) The respondent stated that a significant amount of the funds to purchase the said property was derived from my back pay as though some of the funds came from him. I provided all the funds to purchase the property.
- 10) On May 4th 2004 I received some ten thousand and forty-six dollars and twenty-eight cent (\$10,046.28) in back pay.
- 11) In addition, I requested some fifteen thousand dollars from The Bahamas Law Enforcement Co-operative Credit Union, along with some other funds that I received, they brought the total amount to some twenty-seven thousand, three hundred and twenty-eight dollars and seventy six cents (\$27,328.76).
- 12) These funds were used to purchase the property in Chesapeake as well as bring the structure up to belt course; along with other funds that I borrowed from my brother Vehavilyn Ferguson who presently resides at the home in Soldier Road and my brother Quintin Ferguson. This was on the premise that the Bank Manager of the Bank of the Bahamas Mr.

John Sands would allow me to be the overall contractor. The respondent was instrumental in completing some of the work as I indicate in my affidavit, however, as it relates to the security system this was purchased out of the one hundred and fifty thousand (\$150,000.00) that was borrowed from the bank to complete the structure. Also when we purchased the windows at Lowes Home Improvement in the United States we informed them where we wanted the window screens to be sent.

- 13) In addition to the security system, the respondent installed the camera system, which is presently offline. The respondent solely provided this system; some of these cameras were given to him by companies that wanted him to market their products. Therefore, as a result of the respondent installing paradox products in the home it acted as a showcase for his potential clients. When the respondent left on the 13th of April 2012, he told me that he was leaving the system in place to defray some of the money he owed me.
- 14) Also further the gate was received based on an exchange of services between Mr. McIntosh and the respondent. It is worthy to note however, that the four-way DVR that was purchased by us and was stolen in the United States while we were shopping at Penn Dutch, and we had to find the money to replace it.
- 15) The cabinets were ready-made as they were purchased from Home Ko indicated in my affidavit that his father completed some of the work. In order to complete the kitchen I hired Mr. Dwayne Duncombe to install the under mount sink and the granite countertop. Also, I assisted the respondent with the installation of the wooden floors.
- 16) The respondent stated that Mr. Wayne Reckley's son who is a friend of both of us assisted in placing the base board in the step down dining and front-room area. While they did this I prepared meals for everyone.
- 17) The respondent further stated that during his employment I received all of his earnings. This is not true. After the respondent started working for Chibah Systems for about a year he felt that we ought to pool our resources together. This was short lived as in 2009 the house in New Providence was vandalized and had to be totally gutted. I had to replace everything including the piping. The original pipes were cast-iron. Hence, the bathroom floors including the tubs and vanities, the TV room, utility room including the kitchen had to be gutted. Additionally, some portion of the electrical had to be re-done as well.
- 18) The respondent did not live up to his end of the bargain. As a result, I decided to renovate the house at Ridgeland Park West in New Providence that the respondent said: "let the bank take", because he refused to assist in the refurbishing of the same. The renovations were done by myself so that if worst came to worst I would be able to sell the property so that our child could attend a tertiary level institution.
- 19) The respondent stated that he is unable to assist with our son's education but that he applauds his efforts. He had taken on the responsibility of paying our son's educational fund, which was \$67.38 per month while I continue to pay the respondent's insurance at British

American, which was Eighty-eight dollars and seventy-eight cents per month.

- 20) The above statements are made from the facts and within my own knowledge information and belief.

6. By the date of the hearing, the said child had reached the age of majority so the relief sought at paragraph 1 of the said notice was no longer required. However, as the child is attending college, the application for maintenance and support was pursued.

7. As a general rule, no maintenance orders are to be made with respect to a child after the age of 18 years, unless the child is, or will be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment. See sections 27, 33 and 73 of the Matrimonial Causes Act, chapter 125, Statute Laws of The Bahamas ("MCA").

8. The petitioner is asking for \$300.00 per month maintenance for the said child as well as an order that the husband pay the said child's tuition and book fees. The petitioner's evidence is that the respondent was responsible for paying the sum of \$67.38 per month for their son's educational fund, while she was responsible for paying the respondent's insurance at British American Insurance Company in the sum of \$88.78. However, she says the respondent failed to keep his part of the bargain and it appears that the policy lapsed. According to the petitioner, if the respondent had told her that he could not pay the premium for the educational fund, she would have made the decision to pay that instead of paying the premium for the respondent's policy and then their son would have had funds for his education. The petitioner says that the respondent should, therefore, be ordered to pay for, or assist with, their son's educational expenses.

9. The respondent resists the petitioner's application for him to contribute to their son's educational expenses. He complained that he was not consulted before the child was enrolled in the College of The Bahamas and, that in any event, he says he is presently unable to contribute to the cost of his son's tuition and books, although he "applauds his efforts to better himself".

10. As regards the property adjustment application, notwithstanding the respondent's proposal at paragraph 12 of his affidavit that the matrimonial properties be divided equally between the parties, counsel for the respondent, as I understood him, indicated that the respondent was merely looking for a "reasonable share", although he, nor the respondent, said what that meant.

11. The modern day approach to a division of property in a marriage is fairness, which, according to Lord Nicholls of Birkenhead:

"...is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case."

12. "Fairness", opined Barnett, C.J. in A v. B [2010] 2 BHS J No. 18, "is an equal sharing of property unless there is a compelling reason to depart from that equality". See also White v White [2001] 1 AC 596; Miller v Miller; McFarlane v McFarlane [2006] 2

WLR 1283; Charman v Charman [2007] 1 FLR 1246; Daniels v Daniels [2007] SC(Bcl) 5 Div and LKW v In DD [2010] 2 HKEC 1727.

13. As regards the “equal sharing principle”, Lord Nicholls of Birkenhead in *Miller v Miller* *supra* opined:

“This “equal sharing” principle derives from the basic concept of equality permeating a marriage as understood today...When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less.” [underline added].

14. Barnett, C.J. in *A v. B* *supra* concluded that this should now be the approach in The Bahamas.

15. The matrimonial properties are legally and beneficially owned by the parties as joint tenants. Joint tenancy presumes a 50/50 ownership.

16. The petitioner is asking for an order that the husband transfers his interest in both matrimonial properties to her, subject to the mortgages. She does not offer to pay him any compensation for such interest. The respondent is asking for 50%

17. I am persuaded on the evidence that the petitioner, during the course of the marriage, made significantly more contributions to the acquisition and maintenance of the said property, the mortgages and the welfare of the family generally. However, those contributions, stellar though they may have been, and although they may make a case against equal sharing, they are not sufficient, in my judgment, to deprive the respondent of all of his interest in the matrimonial properties.

18. On the petitioner’s undisputed evidence, the net asset value of the two properties (that is, the parties’ equity of redemption) is approximately \$414,742.46, made up as follows:

Description	Estimated market value	Outstanding mortgage	Equity
Freeport property	\$310,000.00	\$138,127.20	\$171,872.80
Nassau property	<u>\$300,000.00</u>	<u>\$ 57,130.34</u>	<u>\$242,869.66</u>
TOTAL	<u>\$610,000.00</u>	<u>\$195,257.54</u>	<u>\$414,742.46</u>

19. She is currently paying \$1,400.00 per month on the mortgage on the Freeport property in which she and their son now reside. The wife says that the mortgage payments of \$674.00 per month on the Nassau property are in arrears; the property is not currently rented and she has had to expend quite a bit of money on renovations after the property had been vandalized. She said that although the husband expressed the view that the bank “should take the house”, she did the renovations because “if worst came to worst” she could sell the property to raise moneys for their son’s tertiary education.

20. Section 29 of the MCA imposes a duty on the court when making financial provision and or property adjustment orders to take into consideration certain factors and to have regard to all the circumstances of the case, so as to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been had the marriage not broken down and each party had properly discharged their obligations and responsibilities towards the other.

21. Having regard to all the circumstances in this case, I am of the view that there is good reason to depart from the equal sharing principle and I would adjust the beneficial interest in the said properties as to 80% for the wife and 20% to the husband.

22. Using the above-mentioned figures and calculations, 20% of the net asset value, \$414,742.46, is approximately \$82,948.49. I would round that up to \$83,000.00 and order that the wife should pay to the husband the sum of \$83,000.00 for his interest in the matrimonial properties within 120 days of the date hereof, failing which the Ridgeland Park property is to be sold and the net proceeds shared as to \$83,000.00 to the husband and the balance to the wife.

23. I note the husband's claim that he is not "presently" able to assist with his son's maintenance and educational expenses. However, I also note the wife's evidence that the reason the son's education fund policy lapsed was because the husband failed to make the premium payments and did not let her know. In my judgment, if the husband had properly discharged his obligation and responsibilities to his family, he may not now have been required to pay any part of the son's educational expenses. In the circumstances, I would order the husband, commencing 28 August 2013, to pay \$500.00 per month towards the said child's educational expenses.

24. As regards the vehicles, if they have not already done so, the petitioner is to transfer her interest in the vehicle driven by the respondent to the respondent and the respondent is to transfer his interest in the vehicle driven by the petitioner to the petitioner within seven days of the date hereof.

25. In summary the orders are as follows:

- a. The respondent is to pay \$500.00 per month towards the maintenance and support and the educational expenses of the child of the marriage, with effect from 28 August 2013;
- b. The beneficial ownership in the matrimonial properties is adjusted as to 80% to the petitioner and 20% to the respondent.
- c. The petitioner is to pay to the respondent, within 120 days of the date hereof, the sum of \$83,000.00 representing his 20% interest in the said properties.
- d. Upon payment of the sum of \$83,000.00 as aforesaid, the respondent is to transfer his interest in the said properties to the petitioner and the petitioner is to indemnify the respondent against any claims by the respective mortgagees in respect thereto.
- e. In the event the petitioner is not able to pay to the respondent the said sum of \$83,000.00 within the time limited therefor, or other time as may be agreed between the parties, the Ridgeland Park property is to be sold and the net proceeds shared as to \$83,000.00 to the respondent and the remainder to the petitioner.
- f. Each side will pay their own costs.

26. It is hereby declared pursuant to section 73(1)(b)(i) of the MCA that there is one child of the marriage to whom the section applies, namely, TAH Jr., born on 18 September 1994 and that arrangements for his welfare have been made and are the best that can be devised in the circumstances.

DELIVERED this 26th day of April A.D. 2013.

Estelle G. Gray-Evans
Justice