COMMONWEALTH OF THE BAHAMAS

SUPREME COURT

FAMILY DIVISION

2018/FAM/div/605

BETWEEN:

SELVIN O'BRIAN SMITH **PETITIONER**

AND

PHILLIPPA ANN SMITH (NEE) LAING **RESPONDENT**

BEFORE: **THE HONOURABLE MR. KEITH H. THOMPSON**

APPEARANCES: **Mrs. Cheryl Bazard of Counsel for the Petitioner**
Ms. Travette Pyfrom of Counsel for the Respondent

HEARING DATES: **31st May, 2019**
13th June, 2019
04th July, 2019

DECISION

[1] This is an application pursuant to the Petitioner's Notice of Application for Ancillary Relief seeking a declaration that the Respondent is not the owner of the matrimonial home situate at Lot 133, Munnings Drive, Southern Heights Subdivision, Nassau, Bahamas.

[2] The Parties could not arrive at a consent position and have asked the Court to make a decision on the only matrimonial asset.

CASE FOR THE PETITIONER:

[3] The Petitioner cites Section 29(1), (a) through (g) as a starting point and in particular Section 29(1), (b) which provides;

29(1), (b) -

29 (1) **"It shall be the duty of the Court in deciding whether to exercise its powers under Section 25(3) or 27(1), (a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say.**

(b) **The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future..... and so to exercise those powers as to place the parties, so far as it is practicable and, having REGARD TO THEIR CONDUCT (our emphasis) just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other."**

[4] It is not denied by the Respondent that she left the matrimonial home and has not returned up to the time of this hearing. The Petitioner cites the case of MILLER V. MILLER, McFARLANE V. McFARLANE [2006] UKHL 24, wherein at paragraph 53 LORD NICHOLLAS OF BIRKENHEAD stated;

> **"Wall J agreed that the reasons for the break down of the marriage were relevant in this case. His perception of the award overall was strongly influenced by the size of the husband's wealth. The husband was a very rich man."**

[5] At paragraph 61 of the MILLER Case Lord Nicholls cited Lord Denning in WATCHTEL V WATCHTEL [1973] FAM 72, 90 where Lord Denning led the way by confirming relevant conduct to those cases where the conduct was "OBVIOUS and GROSS".

[6] The court is reminded that the Respondent left the matrimonial home sometime in 2004 to live with another male. After remaining there for a few months, she returned and did not work for ten (10) years. During this time the Petitioner paid all of the bills inclusive of but not limited to the mortgage, utility bills and school fees.

[7] The conduct of the Respondent is set out in the Petition under the rubric "PARTICULARS OF CRUELTY." In a – j and I now set them out.

(a) **"The Respondent left the matrimonial home sometime in 2004 to live with another male. After remaining there for a few months, she returned and did not work for 10 years. During that time, the Petitioner paid all of the bills inclusive of but not limited to the mortgage, utility bills, and the children's school fees.**

(b) **In 2017, the Petitioner received a telephone call from a female and based on the call he confronted the Respondent. Despite the Respondent's denial, on or about the 30th August, 2018, the Petitioner saw the Respondent driving in the car he purchased for her with the male that he confronted her about in the passenger seat. The Respondent and the male were coming out of Rupert Dean Lane where the male operates a body shop.**

(c) **Owing to what he saw, the Petitioner telephoned the Respondent and said that he wanted a divorce. The Respondent advised the Petitioner to do what he "have to do".**

(d) **The Respondent goes to work for a 9:30 a.m. to 5:30 p.m. shift but does not arrive home until 11 p.m.**

(e) **When the Petitioner asked the Respondent as to her whereabouts, she sucks her teeth.**

(f) **In 2017, the Respondent persuaded the Petitioner to remortgage the home that he paid for solely. The Respondent promised to contribute $100 per week to the mortgage.**

(g) **That since the remortgaging of the house, the Respondent has not made one contribution to the payment of the mortgage. In fact, the Respondent withdrew the proceeds of the loan from the joint account held with her and the Petitioner and none of it was applied to the renovation of the house except for the purchase of some of the material. The Petitioner was left to pay for the construction of the wall and the cabinets as well as for labour.**

(h) **The Respondent does not contribute to any of the expenses of the marriage or family.**

(i) **For the last two years, the Respondent withdrew from the marriage bed and went to sleep in the adult son's bedroom. There has been no sexual relations between the parties for this period.**

(j) **The Respondent has caused the Petitioner much stress, anxiety, distress and unhappiness because of her actions during the marriage.**

[8] The Petitioner alleges that he has bore the greater part if not all of the financial responsibilities. The Respondent is seeking 50% of the matrimonial asset. However, the Petitioner says that she is not entitled to anything at all because of the conduct of the Respondent which has resulted in the Petitioner being left to continue to be responsible for debts which the Respondent incurred during the marriage and the mortgage, utilities and the financial responsibilities.

CASE FOR THE RESPONDENT:

[9] The Respondent says that there is no formula which the court is obligated to use when deciding what remedy is appropriate on an application for ancillary relief. The court disagrees with this position. However, the court agrees that the matrimonial Causes Act of 1973 lists the various matters to which regard should be had. The Respondent cites the case of **PIGLOWSKA V. PIGLOWSKA [1999] UKHL 27**, wherein **LORD HOFFMAN** referred to a number of cases in which the court had underlined the importance of providing both parties with a home.

[10] While that may be so, it has to be considered on a case by case basis. This position by Lord Hoffman was primarily in situations where there were young children involved. In the instant case, the children are now adults. I am of the considered opinion that the PIGLOWSKA Case is not one to be applied in the circumstances.

[11] In the case of **WHITE V WHITE [2000] UKHL 54 LORD NICHOLLS OF BIRKENHEAD** at paragraphs 24 and 25 states;

> **"Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart {1996}* 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principal of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order to the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f); '.... The contribution which each has made or is likely to make ..... to the welfare of the family, including any contribution by looking after the home or caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earned and against the home-maker and the child-carer. There**

are cases, of which the Court of Appeal decision *in Page v Page* (1881) 2 FLR 198 is perhaps an instance, where the court may have lost sight of this principle.

25. A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."

[12] The Respondent seeks to persuade the court that it should not depart from the equal sharing principle. However, the evidence of the Respondent does not support her proposition.

[13] In the case of **WHITE V WHITE [2001] 1 AC 596 LORD NICHOLLS OF BIRKENHEAD** said at paragraphs 26 - 36;

"Equality:

26. This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognize and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness. Today there is greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved but much sustained hard work over may years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills. In Porter v Porter [1969] 3 All ER 640, 643-644, Sachs LJ observed that discretionary powers enable the court to take into account the human outlook of the period in which they make their decisions'. In the exercise of these discretions 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought.'

27. Despite these changes, a presumption of equal division would go beyond the permissible bounds of interpretation of section 25 which differs from the applicable law in Scotland. Section 10 of the Family Law (Scotland) Act 1985 provides that the net value of matrimonial

property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances. Unlike section 10 of the Family Law (Scotland) Act 1985, section 25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.

28. It is largely for this reason that I do not accept Mr. Turner's invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division.

Financial resources and financial needs:

29. **I turn next to a point where the current state of the law is not altogether satisfactory. That this is so emerges clearly from the decision of the Court of Appeal in Dart v Dart [1996] 2 FLR 286. The point concerns the relationship of paragraph (a) and paragraph (b) in big money cases. Paragraph (a) concerns the available financial resources of**

each of the parties. Paragraph (b) is concerned with the 'financial needs, obligations and responsibilities' of each of the parties. In practice, paragraph (b) seems to have become largely subsumed into a wider, judicially-developed concept of *'Reasonable requirements'*. This wide concept appears, in turn, to have displaced consideration of the parties' available resources as a factor in its own right.

30. This development had its origins in a decision of the Court of Appeal in *O'D v O'D [1976]* Fam 83 where the alluring phrase 'reasonable requirements' was coined. In that case Ormrod LJ considered the wife's position, 'not from the narrow point of "need", *but to ascertain her reasonable requirements.'* A similar approach was adopted a few years later, in Page v Page (1981) 2 FLR 198, 201. This was a case where there was enough capital to provide adequately for both husband and wife. Not surprisingly, the court held that when considering the need and obligations of the parties a broad view could be taken. Ormrod LJ, whose judgments are a valuable source of much of the jurisprudence in this area of the law said:

> "In a case such as this "needs" can be regarded as equivalent to "reasonable requirements", taking into account the other factors such as age, health, length of marriage and standard of living."

The third case in this trilogy of cases where resources exceeded financial needs is *Preston v Preston* [1982] Fam 17. Ormrod LJ set out a list of general propositions. His second proposition was as follows;

> "…. The word "needs" in section 25 (1), (b) in relation to the other provisions in the subsection is equivalent to "reasonable

requirements", having regard to the other factors and the objectives set by the concluding words of the subsection ..."

31. Rightly or wrongly, these passages have been understood as saying that reasonable requirements is a more extensive concept than financial needs. This seems then to have led to a practice whereby the court's appraisal of a claimant wife's reasonable requirements has been treated as a determinative, and limiting, factor on the amount of the award which should be made in her favour.

32. The soundness of this approach was considered by the Court of Appeal in *Dart v Dart* [1996] 2 FLR 286. Thorpe LJ, who has much experience in this field, gave the leading judgment. He sought to reconcile the existing practice with the statutory provisions: see page 296 f-h. Reasonable requirements are more extensive than needs. What a person requires is likely to be greater than what that person needs. The objective appraisal of what the applicant requires must have regard to the other criteria of the section, including what is available, the parties' accustomed standard of living, their age and state of health and 'perhaps less obviously' the duration of the marriage, contributions and pension rights. Thorpe LJ said:

> **'Used thus the consideration of needs ceases to be paramount or determinative but an elastic consideration that does not exclude the influence of any of the others ... in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to *require* what might be even an equal share.' (my emphasis).**

This conclusion, I have to say, seems to me worlds away from any ordinary meaning of financial needs. Moreover, this conclusion gives an artificially strained meaning to reasonable requirements, the more especially as this phrase was adopted originally as a synonym for financial needs.

33. **The other two members of the Court of Appeal were more doubtful. Peter Gibson LJ, at page 302, questioned the correctness of an approach which determines the quantum of an award by reference only to the reasonable requirements of the applicant. Butler-Sloss LJ. with her immense experience of family work, shared Peter Gibson L.J's doubts: see page 305. She wondered whether the courts may not have imposed too restrictive an interpretation upon the words of section 25 and given too great weight to reasonable requirements over other criteria set out in the section. She considered that if spouses are in business together, the traditional 'reasonable requirements' approach to a wife's application for ancillary relief is not the most appropriate method to arrive at the post-divorce adjustment of family finances.**

34. **Subsequently this question arose again, in *Conran v Conran [1997]* 2 FLR 615. Wilson J was of the view that, notwithstanding the observations of Thorpe LJ in the *Dart* Case, one could not sensibly fit an allowance for contribution into an analysis of a wife's needs. That would do violence to language and to section 25(2), where contribution and needs are set out as different matters to which the court is required to have regard: see pages 623-4.**

35. **Thus, as matters stand, there is a degree of confusion. I venture to think this has arisen because the courts have departed from the statutory provisions. The statutory provisions lend no support to the idea that a claimant's financial needs, even interpreted generously and called reasonable requirements, are to be regarded as determinative. Another factor to which the court is bidden to have particular regard is the available resources of each party. As my noble and learned friend Lord Hoffmann observed in Piglowska v Piglowski [1999] 1 WLR 1360, 1379, section 25 (2) does not rank the matters listed in that subsection in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is actually the wife. Hence the importance of the check against the yardstick of equal division.**

36. **There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression 'reasonable requirements' in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognized, there is some overlap between the factors listed in section 25 (2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is; only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme."**

[14] **LORD COOKE OF THORNDON** stated at paragraph 62:-

62. **"In the present case, bearing in mind that it was a marriage of more than thirty years, that there were three children and that the wife was an active partner in the farming business as well as meeting the responsibilities of wife and mother, the only plausible reason for departing from equality can be the financial help given by the husband's father. I agree, however, that the significance of this is diminished because over a long marriage the parties jointly made the most of that help and because it was**

the payment of that loan despite committing to pay One Hundred Dollars ($100.00) per month. The Respondent then withdrew the remainder of the Seventy Thousand Dollars ($70,000.00) for her personal use by depositing the remainder into an account on which she could sign alone. The principle balance remaining as of April 3rd, 2019 is some Sixty-Two Thousand Eight Hundred and Twenty One Dollars and Seventy-One Cents ($62,821.71).

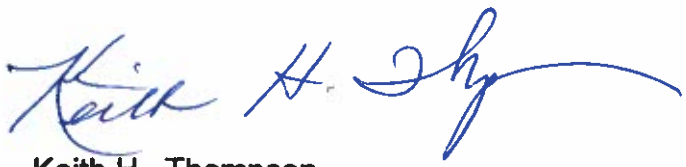
[18] The Respondent is seeking a 50/50 division of the matrimonial asset. However, in the case of EDWARD MUNROE V AVIS LOISE MUNROE SCCIV APP No. 120 of 2018 the Honourable Sir Michael Barnett J.A., who delivered the decision stated at paragraph 12:-

> **"However, it is clear that not every case requires an equal division of assets. There may be good reasons to depart from an equal division. Equality should be regarded as an aid not a rule of law. The objective is fairness."**

[19] The evidence in the instant case as to contributions dictate that there are good reasons to depart from equal division. In fact, the evidence and the circumstances which existed between the parties dictate that the Respondent should receive no more than 10%of the last appraisal of the matrimonial property for the reason that the court accepts that she hardly contributed to the home if at all and that both the Petitioner and the Respondent co-parented the children of the marriage who are now all adults.

[20] Therefore, I order that the wife should be paid 10% of $342,200.00. This translates to $30,798.00. This takes into account that the marriage was for some Twenty-Three (23) years, with little to no contribution by the Respondent. I so order.

Dated this 4th day of March A.D., 2019.



Keith H. Thompson
Justice