COMMONWEALTH OF THE BAHAMAS **2017/FAM/div/00005**

IN THE SUPREME COURT

FAMILY DIVISION

BETWEEN:

LEVETTE SUBRINA DAMES (NEE SCOTT)

PETITIONER

AND

SHERWIN ANTHONY DAMES **RESPONDENT**

BEFORE: **HIS HONOUR MR. JUSTICE KEITH H. THOMPSON**

APPEARANCES: **Mrs. Kathleen Johnson-Hassan of Counsel for the Petitioner**

Mrs. Gia Moxey-Lockhart of Counsel for the Respondent

HEARING DATES: **November 21st, 2018;**

December 14th, 2018;

February 05th, 2019;

July 16th, 2019;

August 12th, 2019;

October 15th, 2019;

December 12th, 2019;

January 29th, 2020;

March 11th, 2020;

June 19th, 2020;

July 13th, 2020;

July 14th, 2020

[1] The parties were joined in Holy Matrimony on August 06th, 2005. After the marriage the Petitioner and Respondent lived and cohabited at Bacardi Road, New Providence until on or about April 2014 and later on in Durham, North Carolina U.S.A. in or about April 2014 until in or about August, 2015.

[2] Prior to the marriage, in or about October 18th, 2000, the Petitioner purchased lot #20 Block #27 in a subdivision called and known as Venice Bay. At the time the Petitioner did not know the Respondent. The conveyance and mortgage relative to the property are both in the name of the Petitioner.

[3] Lot #20 Block #27 is the only asset which is in question. The Petitioner constructed a duplex on the said lot and upon completion the Petitioner moved into the back unit and rented the front unit. After the parties married in August of 2005 the Respondent moved into the back unit with the Petitioner.

[4] In or about 2008, the marriage began to break down. The parties continued living in the back unit until in or about April 2014 when they moved to the United States where the Petitioner found employment. Upon this happening, the back unit was also rented out.

[5] By 2015, the marriage had broken down to such a point that the Respondent deserted the Petitioner and returned to the Bahamas and resided at an address in the Bahamas for approximately six months.

[6] Reconciliation was attempted by the parties in or about May 2016. Upon this attempt at reconciliation, the Petitioner allowed the Respondent to move into the front unit of the duplex. Reconciliation was not successful and the parties never resumed cohabitation. The Petitioner therefore asked the Respondent to vacate the front unit but the Respondent has refused and is still residing therein.

[7] There are no children of the marriage but there were attempts. In or about 2008 the Petitioner was diagnosed with ectopic pregnancy. A few months later after an ultra sound scan the Petitioner was diagnosed with blocked tubes. This however, is not the issue to be decided. It is the interest in the duplex which has to be decided.

[8] The Respondent is claiming an interest in the duplex. The question would be; on what basis? The Petitioner filed an affidavit of means on September 27th, 2018. She is employed as an Assistant Professor at North Carolina Central University and earns a monthly salary of $5,175.25. She also earns $850.00 from the rental of one of the units of the duplex. She alleges that the Respondent literally made little to no contributions to the maintenance/upkeep of the duplex. In fact she alleges that during the entire marriage the Respondent was only gainfully employed for three (3) years.

[9] The Respondent alleges that he owns a 2005 Chevy Colorado Truck which the Petitioner claims they both purchased. However, the Respondent claims to have purchased it by himself from his friend Daniel Johnson by way of a personal loan. According to the Respondent and contrary to what the Petitioner has sworn, the truck has not been sold and is in no condition to be sold.

[10] The Respondent also alleges that the Petitioner is still holding some of his personal belongings in North Carolina. The Respondent further alleges that over several years the mortgage payments were deducted from a joint account at RBC by direct debit and deposited to the Petitioner's savings account at FINCO. He says that the joint account was serviced by the joint income of the parties.

[11] The Respondent says that he assisted with major repair work and construction on the duplex to the tune of $30,000.00 - $60,000.00 of which they only paid a fraction because of special relationships he shared with persons and the sweat equity he poured into keeping the duplex in good substantial repair.

[12] The Petitioner went off to school between 2009 and 2012. She sustained herself by way of a full scholarship from the government and a full scholarship from the University of South Carolina. She also worked as a graduate assistant and on breaks would return home to work as a registered nurse.

[13] When she started her Master's Degree, she took out a loan with Bank of The Bahamas. The Master's Degree took one and a half (1½) years. She was also in school before she got married. When they got married in 2005, the Respondent wasn't working. However, in 2006 he landed a job with the Mortgage Corporation. He then found employment with the Mail Boat in December 2007 until May 2011. His other source of income was training student athletes which he was still doing up to the time of the breakdown of the marriage.

[14] The duplex unit had hurricane damage during hurricane Matthew and that damage was repaired by Mr. Daniel Johnson, who was paid via insurance proceeds. The Respondent did assist with the repairs.

[15] The Petitioner accepted that during the time the Respondent was working with the Mail Boat his salary was being deposited to the joint account at RBC, which was opened before she went to school in 2009. However, she did not accept that the Respondent's salary went to pay the mortgage as the account was also used to pay utility bills, gas and repairs to the duplex.

[16] There was also a COD account at Commonwealth Bank in the amount of approximately $18,370.00. The COD account was joint funds and came from his mother's death and none of it was used for the functioning of the family.

[17] There was a Chevy 4 door truck that the Petitioner was driving in 2009 which was purchased from a Danny Johnson on a payment plan, which was paid jointly. The truck was in both names. The vehicle which the Petitioner drives in North Carolina was purchased with some of the money she received from the government.

[18] There is an allegation of meter tampering for the apartment the Respondent is presently in for which there is an outstanding balance. There was also a credit card which was used by the Petitioner, Respondent, a Ms. Bannister and the Petitioner's mother. A loan was obtained to pay that credit card off in the amount of $21,000.00 with $5,600.00 paying of the card and a further portion for IVF treatment and the remainder for incidentals relating to the IVF.

[19] In August 2015, the Petitioner received a letter from Higgs & Johnson regarding the arrears on the duplex. As they were about to foreclose on the duplex she obtained several loans to prevent that. The Respondent did not help with any arrears.

[20] A Ms. Nadeen Eugene came to give evidence from BPL on the meter tampering whose evidence I accept. Likewise a Mr. Nimoy Russell, a Meter Inspector came and gave evidence on the meter tampering and I also accept his evidence. The problem is that no one can say or has said who is responsible for the tampering. I take special note that the Respondent resided there and if no utilities were being paid to BPL then he must have known that something was wrong. The electricity had been terminated previously. Mr. Russell explained the process he went through to determine meter tampering.

[21] Mr. Daniel Johnson, Louis Telson and Illioner Tibot all came to give evidence of certain repairs they allegedly carried out on or to the duplex. They provided letters, however, the letters contain no specifics and can only be looked at as opinions of ball park figures of proposed works. They do not assist the Respondent very much. In fact, Mr. Telson said from the witness box that Mr. Dames gave him the figures. Mr. Telson also admitted that he didn't write the letter.

[22] In all honesty I find it difficult to accept the evidence of Mr. Telson.

[23] Mr. Daniel Johnson, as did Mr. Telson said that he hand-wrote the letter and Mr. Dames typed it for him. At one point, Mr. Johnson was shown the subpoena and it was put to him that it required him to bring with him all documents and evidence relating to any work he would have done for the parties inclusive of receipts. Mr. Johnson nor Mr. Telson had any evidence whatsoever to show they carried out any works to the duplex. The Respondent's attorney asked Mr. Johnson who was present when he signed the letter and he said he and Mr. Dames were driving together.

[24] All of the relevant documentation was filed in particular:

1. **Affidavit of Means of Levette Dames filed September 27th, 2018;**

2. **Affidavit in response to Affidavit of Means of Sherwin Dames filed April 25th, 2019;**

3. **Supplemental Affidavit in Response to Affidavit of Means of Sherwin Dames filed April 25th, 2019;**

4. **Second Supplemental Affidavit of Means of Sherwin Dames filed July 16th, 2019 and**

5. **Affidavit of Nadeen V. Eugene filed December 10th, 2019.**

[25] The Respondent has filed the following in support of his case.

1. **Affidavit of Means of Sherwin Dames filed December 12th, 2018 and**

2. **Supplemental Affidavit of the Respondent filed April 26th, 2019.**

[26] The Petitioner is seeking the following:

1. **A declaration that the Respondent has no interest in property situate at Lot No. 20 Block No. 27. Venice Bay Subdivision, New Providence, Bahamas.**

2. **That the Respondent gives up vacant possession of the said property within fourteen (14) days.**

3. **That the Respondent pays all utility bills incurred on the unit in which he has been residing without the Petitioner's consent**

since the filing of the Petition herein, namely since December, 2016 to date of vacant possession.

4. That the Respondent pays the BPL bill associated with the illegal electricity connection found in the unit in which he has resided without the Petitioner's authorization or consent.

5. That the Respondent pays to the Petitioner half of the following debts incurred during the marriage at their value in the Petition filed in December, 2016.

   (i) Commonwealth Bank Loan – Pay off of joint credit card and Invitro Fertilization (IVF);

   (II) Credit One Credit Card – Joint Credit Card.

   (iii) Time Finance Loan – Joint Expenses while parties lived in USA.

   (iv) Lendmark Loan – Joint Expenses while parties lived in USA.

   (v) Walmart Credit Card – Joint Expenses while parties lived in USA.

   (VI) State Employer Credit Card – Joint Expenses while parties lived in USA.

   (VII) BPL Electricity Bill – incurred during the marriage.

6. That the Respondent pays to the Petitioner half of the Petitioner's travel expenses incurred in attending the hearings associated with these ancillary applications.

7. **That the Respondent pays to the Petitioner rent for the unit on the said property in which he has resided without the authorization or consent of the Petitioner to the exclusion of the Petitioner since the filing of the Petition herein, namely from December 2016 to the date of vacant possession, at the appraised rental income of $1,100.00 per month.**

8. **That the Petitioner and the Respondent bear their own legal costs of these proceedings.**

[27] The Defendant claims in his Affidavit of Means:

"1. A declaration of a (40%) per cent ownership in the former matrimonial home as a result of his contribution to the support of the family.

2. An Order that the Petitioner be made to return his personal belongings that were shipped to North Carolina in October 2016 and that his furniture, appliances and other personal items be returned to storage at the Petitioner's expense".

THE LAW:

[28] It is now trite, that these cases are to be decided on their own peculiar fact and circumstances.

[29] In this regard, the criteria to be considered is to be found in Section 29 (1) of the Matrimonial Causes Act, Chapter 125, which includes how the Court should exercise its powers under Section 27 (1), (c).

Section 27 (1), (c) provides:

> **"On granting a decree of divorce ... the court may make any one or more of the following orders, that is to say:**
>
> **(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified:"**

Section 29 (1) reads as follows:

> **"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 -**
>
> **(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.**
>
> **(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;**

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties of the marriage;

(f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

And so to exercise those powers 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 if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

[30] In this case, there are no children of the marriage. However, there is one main asset, the duplex which falls to be considered by the Court.

[31] The Respondent is seeking a 40% (percent) interest in the duplex. This is just 10% (percent) less than a 50% (percent) interest. However, in the case of JUPP V. JUPP SCC App No. 37 of 2011, Mrs. Justice Allen, President as she then was stated at paragraph 9.

> **"9. It must be remembered that authorities from the United Kingdom cannot trump what the statute law of The Bahamas says. It is only if these cases are consistent with the statute law can they apply. Section 29 is very clear as to what a judge must take into consideration when considering whether to exercise her powers under section 27 or 28 or even section 25 of the Act. Any sharing principle enunciated by case law must be construed in this light. The statute requires that you look at all the circumstances and you make the order which puts the parties in the financial position so far as it is practicable that they would have been in if the marriage had not broken down. The division of the assets must be fair in its entirety. It is not the role of the trial judge to list the assets of the family and to divide them one by one. The trial judge must look at the circumstances on the whole, examine the entire context of the case and make an award accordingly, stating sufficient reasons for the same."**

[32] At paragraph 8 of the JUPP case the learned President states:

> **"In her ruling the learned trial judge correctly stated the law and referred to numerous cases from the United Kingdom which she deemed applicable. Her main focus was the case of Charman v. Charman (2007) EWCA Civ 503 in which the court emphasized that,**

"property should be shared in equal proportions." The court there further described the evaluation process a distributing court should undertake when determining what share of matrimonial assets a party should receive. In the eyes of the court in Charman it is a two stage process, the first stage being computation, the latter distribution. Distribution should take place around three distributive principles that of need, compensation and sharing."

[33] It is therefore clear to me that sections 27 and 29 are critical in the circumstances of this case.

[34] In considering section 29 and the matters to be considered, it would appear that initially the intention of the parties was that they would reside after getting married in one side of the duplex and rent the other side. I take special note of the fact that the Petitioner built the duplex before marrying the Respondent. She provided all of the funds for the purchase of the land and the construction of the duplex.

[35] The evidence is that the Respondent only worked for periods of time at various places. He also apparently coached athletes. However, the evidence is such that the income of the coaching was hardly able to make any substantial contribution to anything. The witnesses who spoke to contributions by the Respondent were not believable and I find it difficult to accept their evidence. An example would be the fact that the Respondent drafted the letters and inserted the figures. This is totally unacceptable and is obviously self-serving.

[36] The modern approach to be applied to the division of matrimonial property is found in the English Court of Appeal decision of WHITE V WHITE [2001] 1 A.C. 596 and calls for an equal sharing of property UNLESS THERE IS A COMPELLING

REASON TO DEPART FROM EQUITY. This principle therefore permits a departure from equal sharing if the circumstances are justified.

[37] The House of Lords in **MILLER V MILLER; MCFARLANE V MCFARLANE [2006] UKHL 24** has sought to explain the rationale behind the sharing principle and its qualifying phrase **"UNLESS THERE IS GOOD REASON TO THE CONTRARY."** In this case it was said that the **"YARDSTICK OF EQUITY"** should be applied **"AS AN AID and NOT A RULE**, which could be departed from for good reason. **LORD NICHOLS**, in this case addressed the sharing principle thus:

> **"This 'equal sharing' principle derives from the basic concept of equality permitting a marriage as understood today. Marriage, it is often said, is a partnership of equals ... The parties commit themselves to sharing their lives. They live and work together. 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. But I emphasise the Qualifying phrase: "unless there is a good reason to the contrary" The yardstick of equality is to be applied as an aid, not a rule. This principle is applicable as much to short marriages as to long marriages. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will effect the quantum of the financial fruits of the partnership. [Emphasis mine.]"**

[38] The principle that the yardstick of equality should be applied as an aid and not a rule was also addressed by CHARLES J. in the English High Court Case of H V. H [2007] EWCH where he emphasized that:

"The time to determine the value of the matrimonial assets was at the point when the mutual support ends, as this represents when the bread down occurred."

[39] I hasten to repeat that the Petitioner had already constructed the duplex prior to marrying the Respondent.

[40] Special note is taken of the ending of section 29 which provides:

"and so to exercise those powers 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 if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other."

[41] In the case of **GV V. VB [2018] 1 BHS J. No. 87** Mr. Justice Winder stated at paragraph 22:

"According to the authorities, the time for the valuation of the Husband's interest is the date when the marriage broke down and the mutual support ended. The mutual support of the couple therefore broke down in September 2005 at which time the condominiums were not constructed. Following the guidance of H V. H, I find that the value of the assets should be determined as at September, 2005 exclusive of the 12 condominiums. A contemporary appraisal was prepared by Mr. Robert Brownrigg of Bahamas Realty on 24 August 2006. The entire property was then valued at $4,000.00."

[42] The question to be asked and answered is; "when did the marriage breakdown according to the evidence"? The evidence indicates that the marriage breakdown occurred around 2015, when the Petitioner asked the Respondent to vacate the duplex. This marriage lasted some ten years. I am of the view that the mutual support factor ceased to exist from 2015.

[43] I am reminded that the Respondent is seeking a 40% (percent) interest in the one alleged primary asset, the duplex. However, I have heard no evidence to suggest that the Petitioner ever intended to consider the duplex as a matrimonial asset. I am of this view because you should not draw inferences when no facts are given or if the facts are vague and/or inclusive. (See COLLIE V. COLLIE and another [2005] 1 BHS J. No. 122 at page 6 paragraph 42). The Respondent has not met the standard required to persuade this court that he is entitled to a 40% (percent) interest in the duplex.

[43] Counsel for the Respondent says that by virtue of the evidence of the Petitioner and Respondent and the Respondent's witnesses, it was accepted in its entirety that both parties contributed to the mortgage, upkeep maintenance and expertise over the former matrimonial home.

[44] This I find difficult to accept. What I do accept is that there were some contributions. However, that contribution was not substantial at all.

[45] In the case of **EDWARD MUNROE V. AVIS LOISE MUNROE SCCIVAPP NO. 120 of 2018**, Sir Michael Barnett J.A. 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."**

[46] The evidence is very clear. The Respondent hardly worked a real job for any extended period of time. However, in paragraph 19 of the Petitioner's Affidavit in response to the Affidavit of Means of Sherwin Dames filed April 16th, 2019, wherein the Petitioner says:

> **"19. That in all the circumstances set out in this Affidavit of Means, the Petitioner prays that the court orders that the Respondent has a maximum entitlement interests in the said property of Fifteen (15) percent AFTER DEDUCTION OF THE CURRENT OUTSTANDING BILLS left by the Respondent to be paid by the Petitioner."**

[47] Paragraph 19 – I consider to be an acceptance of some interest. However, based on the evidence and the legal principles which indicate that fairness is not the same as equality, I am declaring a 10% interest in the duplex after deduction of any and all bills incurred for the duration of the Respondent's stay in the duplex. Additionally, I order that the Respondent is to vacate the duplex within Thirty (30) days of this decision.

[48] The Ten (10) percent is to be based on the agreed appraisal which was prepared by Appraisal Services, Wilshire Bethel stating the value as being $245,000.00.

[49] All outstanding bills accrued by the Respondent while occupying the duplex to be to the exclusion of the Petitioner are to be assessed before the expiration of the Thirty (30) day period so as to facilitate the payment to the Respondent after deduction.

[50] Each party shall bear their own costs associated with this matter.

I so order.

Dated this 19th day of April A.D., 2021.

Keith H. Thompson

Justice