

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

2013/FAM/div/FP/00005

BETWEEN

TM

Petitioner

AND

SM

Respondent

BEFORE: The Honourable Justice Petra M. Hanna-Weekes

APPEARANCES: Mr. J. Kwasi Thompson for the Respondent
Mrs. Lillith E. A. Smith-Mackey for the Petitioner

HEARING DATE: December 7, A. D. 2016

JUDGMENT

Hanna-Weekes, J

INTRODUCTION

1. The Parties were married on November 8, 2008 in the City of Freeport, on the Island of Grand Bahama. The Petitioner was 35 years old and the Respondent was 32 years old. There are no children of the marriage. The parties both reside in the City of Freeport aforesaid.
2. The Decree Nisi was granted herein on April 17, 2013 by Her Ladyship The Honourable Justice Estelle G. Gray Evans on the ground that since the celebration of the marriage the Petitioner and the Respondent had treated each other with

mutual cruelty and the Certificate of Making Decree Nisi Absolute was filed on November 5, 2013. The parties were married for almost 5 years. The Notice of Intention to Proceed with Application for Ancillary Matters was filed by the Respondent on March 2, 2016. A Summons asking the Court to dismiss the Respondent's application for ancillary relief was filed by the Petitioner on November 23, 2016. The Parties rely on Affidavit evidence and neither party was cross-examined.

3. The Respondent relies on her Affidavits filed on December 3, 2015 and December 6, 2016. The Petitioner relies on his Affidavits filed on November 23 and December 7, 2016.
4. The Respondent's application is for an Order that there be a property settlement in respect of the former matrimonial home situated at Lot 19, Williams Road, Coral Harbour, in the Western District of New Providence, Bahamas ("**the former matrimonial home**"), in particular that the Respondent is entitled to an interest in the former matrimonial home. Further, that the Petitioner pay the Respondent for the interest determined in the former matrimonial home or in the alternative that the former matrimonial home be sold, and the Respondent be paid the percentage of her interest.
5. The Petitioner's application is for an order that the Respondent's application for an interest in the former matrimonial home be dismissed and that the Respondent pay the Petitioner's costs herein.

STATEMENT OF FACTS

6. The **Respondent's** evidence is that prior to the marriage, while they were dating, she and the Petitioner discussed and agreed that they would purchase a house to live in as their matrimonial home in New Providence. That he informed her that it would be the marital property and that they would build the marital home. That the former matrimonial home was purchased during their engagement. She pointed out that the Conveyance is dated May 18, 2007 and they were engaged in November of 2007. It was agreed that once they were married the Respondent

would move in and begin contributing funds to the property. That she contributed significant funds to the construction of the home before and after the marriage.

7. The Respondent's evidence is that her direct financial contribution was as follows:
- (1) she took out a loan at FirstCaribbean International Bank in the sum of \$41,150.00 to complete the construction;
 - (2) she and the Petitioner both contributed to the loan payments;
 - (3) out of the total construction costs of \$22,000.00 her contribution was approximately \$18,000.00;
 - (4) she contributed \$5,848.55 to the construction from her fixed deposit;
 - (5) she contributed \$7,694.34 towards the construction from her Savings Plan at Commonwealth Bank;
 - (6) she contributed \$5,000.00 to replace stolen material from a trailer in New Providence;
 - (7) she later in 2008 sold her 2003 Nissan Altima for \$7,500.00 to purchase items for contribution to the former matrimonial home;
 - (8) she contributed the sum of \$2,000.00 towards the landscaping and she exhibited a receipt in her name from CCM Construction & Maintenance.

8. The Respondent's evidence is that the Petitioner owes her the following:

(1) CCM Construction and Maintenance	\$2,000.00
(2) Rent over No. 28B Ludford Court, Lincoln Green	\$3,750.00
(3) Funds for Success Training College	\$5,265.00
(4) Funds for the sale of her vehicle	<u>\$6,700.00</u>
	\$17,715.00

Her evidence is that the Petitioner offered to pay her \$27,604.61.

9. That the construction of the former matrimonial home was completed in November 2008, not in August 2008. The Respondent further stated in evidence that the Petitioner had access to her ATM card and that she would give him funds as he requested to pay workers and purchase building materials. She explained that the receipts are in his name as she gave him the funds and he paid the workers and purchased the supplies. That she personally contributed to the actual construction

side by side with the Petitioner, specifically helping to lay tiles, paint, sand walls and clean grout, install the garage door and landscaping.

10. That in January 2008 during their engagement, despite her advice not to do so, the Petitioner left a container at the matrimonial home and that the same was broken into and materials were stolen. That she saw the property as their home and she borrowed money to replace the stolen materials and that she did not consider the money to be a loan to the Petitioner.
11. That she moved to Nassau in July of 2008 before the wedding in November 2008 and that the Petitioner moved in with her and she was responsible for all expenses while he lived with her.
12. That when they married in November 2008 she and the Petitioner moved into the former matrimonial home after the honeymoon and the house had no fridge, stove, no hot water heater, washer, dryer, nor was the master bedroom completed.
13. The Respondent disputed the financial responsibility as set out in the Petitioner's spread sheet exhibited to his Affidavit of November 23, 2016 as being accurate because she contributed and she pointed out that the Petitioner acknowledged that she contributed to the bank loan that paid for the building materials in the trailer.
14. That in December 2008 just after the wedding she took out a loan in her name and consolidated her existing loans and the Petitioner's credit card which was used to buy materials. This was not denied by the Petitioner. Funds were also used to purchase appliances and furniture for their home.
15. In March 2009 money in her Saving's Plan was used to pay the following:-
 - (a). Complete master bedroom and bath
 - (b). Finish door frames
 - (c). Complete some of the floors
 - (d). Complete closets
 - (e). Complete front wall.
16. That the Respondent denied that she could not pay her bills when she was unemployed because she was receiving \$1,000.00 from National Insurance and assistance from her aunt when she needed help. That she insisted that the

Petitioner apply for a job in Freeport. That she began working in August 2009 and contributed \$1,000.00 per month to paying bills and her loan. That because they were better financially the Petitioner suggested that she leave her job and concentrate on her studies at Success College. Her evidence is that any funds deposited to her account by the Petitioner were payments to her loan and that she never received money personally. That the Petitioner left the apartment that they shared in Freeport and began supporting another woman and abandoned the marriage.

17. The Respondent's evidence is that that the Petitioner at all relevant times told her that the house would be their home and that he said he did not put her name on the house because he could not afford the legal fees, however she had an interest in the home. Further, that the Petitioner has failed to disclose that he is earning rental income from the former matrimonial home.
18. The **Petitioner's** evidence is that former matrimonial home is owned exclusively by him. That the property was purchased by him on May 18, 2007 for the sum of \$125,000.00, prior to the marriage to the Respondent. That the Petitioner's evidence is that the purchase of the property and construction of the home thereon was financed through Scotia Bank Bahamas Ltd., which was serviced through the Petitioner's personal bank account. In addition to the mortgage the Petitioner used his personal savings to assist with the construction of the home. All of the receipts from 2007 to 2008 for work done on the property exhibited to his Affidavit filed November 23, 2016 are made out to him.
19. The Petitioner's evidence is that materials were stolen from trailer at the former matrimonial home and that the Respondent who was his girlfriend at the time obtained a loan for \$5,000.00 encouraged by her aunt and without his knowledge to assist him. That he deposited this money to his account. That his mortgage with the Royal Bank of Canada ("**RBC**") was \$250,000.00 and that the monthly loan payment was \$1,621.50. His evidence is that all withdrawals were made from his RBC account and paid into his Scotia Bank account and at no time did the Respondent assist him with paying the mortgage or any of the household bills.

20. That in November of 2008 the Respondent and Petitioner were married and a few weeks later moved into his home, where they resided for about 8 months before moving to Freeport, Grand Bahama, where they rented an apartment. That his salary was \$37,050.00 and the Respondent's salary was \$36,000.00 and they kept separate bank accounts. The Petitioner set out the household expenses in an excel spread sheet indicating each parties' financial responsibility for the period December 2008 to April 2011.

21. The Petitioner's evidence is that in December of 2008 the parties consolidated their loans at FirstCaribbean International Bank borrowing the sum of \$41,250.00 as follows with a monthly payment of \$850.00:

Respondent's personal loan	\$12,688.31
Respondent's loan to Petitioner	\$ 5,617.44
Legal fees	\$ 2,095.25
Bank fees	\$ 619.00
Petitioner's credit card	\$ 7,000.00
Respondent's Credit Card	\$ 3,000.00
Petitioner's Furniture Plus loan	\$ 7,131.35
Funds for parties personal use	\$ 3,098.00

22. The Petitioner's evidence is that in March of 2009 the Respondent lost her job and received severance pay of \$7,694.34 but that the joint fixed deposit that the sum was put on had been broken by the end of March 2009 so that the Respondent could pay her portion of the bills. That these funds ran out by the end of June 2009. That the Respondent started to collect \$400.00 from National Insurance in June of 2009 but that this was what she used to pay her cell phone bill and other personal items. That in July of 2009 he got a job in Freeport and the Respondent got a job paying \$250.00 per week, therefore, the burden of bill paying was on him. That in February 2010 he sold his vehicle for \$6,500.00 of which \$2,000.00 was paid towards his credit card and \$500.00 towards the Respondent's credit card. He split the balance between the two of them keeping \$1,750.00 and giving the Respondent \$1,750.00. That in March 2010 the Respondent started to contribute

to the following bills in Freeport; her cell phone bill, GB Power Electric Bill, cable Bahamas and the BTC phone bill.

23. That the Respondent enrolled in Success Training College and although he agreed to assist her with her school fees after a few months he could not afford to. That although he was strapped for cash himself, he made deposits to her account in 2010 and 2011 to assist her with paying her insurance, loan payment and credit cards. That the parties separated on March 22, 2011 and as of June 2011 the Petitioner had no choice but to pay the FirstCaribbean International Bank loan by himself as the Respondent stopped paying her portion. As at the date of his affidavit the balance was \$22,956.91 and the monthly payment of \$821.67 and the insurance payment of \$91.00 are deducted from his salary.
24. The Respondent's evidence is that he never agreed to reimburse the Respondent for any items mentioned in her affidavit nor does he owe her any of the moneys claimed in her affidavit. That she would often say that she was not going to put money in a home which was not hers.

SUBMISSIONS

Respondent

25. Mr. J. Kwasi Thompson of Counsel for the Respondent submits, in part, that the Respondent has obtained a beneficial interest in the former matrimonial home and therefore entitled to be paid for her interest. The relevant law can be found in **Cowher v Cowher 1972 1 ALL ER** and the Bahamian Case of **Moss V Moss D&M No. 524 of 1999.**
26. Mr. Thompson submitted that in the **Moss** case Sr. J Osadebay reviews the law in the Bahamas with respect to a husband and wife who owned property where only one party held the legal title and the other party wishes to establish some interest in the property. He reviews several English cases in particular, he expresses at page 17 what the test is for establishing an interest in the property. He examines Lord Bridges' judgment in **Lloyds Bank plc v Rosset (1990) 1 ALLER 1111,** where his Lordship stated that the first question to be applied is whether at any time prior to the acquisition or exceptionally at some later date the parties had an

agreement, arrangement or understanding that the property be shared beneficially. If this is established, it will only be necessary for the party to show they acted to their detriment or significantly altered their position and this would give rise to a constructive trust. Further, these cases were followed by Justice Estelle Gray Evans in her 2010 ruling in **AD v TD 2001/Fam/div/FP148.**

27. The Respondent submits that there was an arrangement or understanding between the parties as husband and wife. Both parties knew and accepted that the Petitioner contributed financially and otherwise to the construction and they would be joint owners. The Respondent according to her sworn evidence, submits that it was accepted verbally and by the conduct of all parties involved that both parties had a beneficial interest.
28. Mr. Thompson submits, alternatively, that if there was no arrangement or understanding (which the Respondent does not accept) the second question is whether there were direct financial contributions to the purchase price and/ or construction cost of the property. The Respondent has established by her affidavit that she jointly contributed to the construction, made mortgage payments, made significant personal contributions and made it possible for the Petitioner to make his contributions by taking care of the household expenses and taking in the Petitioner during the construction phase. The Respondent also states that she did actual work on the construction along with the Petitioner. The Petitioner concedes that funds which he received from the Respondent went towards paying for construction material stolen from a trailer.
29. The Respondent therefore submits that she has made significant **financial** contributions to the construction of the matrimonial property, she paid household expenses, paid mortgage payments and made contributions as a good wife. She has provided evidence that she made contributions and the Petitioner has conceded receiving funds from her.
30. The Respondent therefore submits to the court that she be awarded an interest in the former matrimonial home. Further, that she be paid 50% of the appraised value or 50% of the proceeds of sale. In addition, that she be paid her interest in all

rental income from the said property to present. The Respondent also requests that the Petitioner pay the costs of these proceedings.

Petitioner

31. Mrs. Lillith Smith-Mackey of Counsel for the Petitioner submits, in part, that the Respondent has produced no evidence of any contributions direct or indirect towards the construction, maintenance and upkeep of the home or the household expenses in any substantial form. That the Respondent has failed to show proof that she has made any contributions towards the Petitioner's home. The Respondent has failed to exhibit any paid bills, receipts or invoices in her name or otherwise in relation to the home. That the Respondent's assistance was so minimalistic during the course of the short marriage that whatever undocumented contributions the Respondent might have made is hardly sufficient for the court to award the Respondent 50% of the equity in the Petitioner's home.
32. That the Respondent in her affidavit indicated that she was responsible for the payment of the Furniture Plus loans. The Petitioner was able to produce in his affidavit filed on the December 7, 2016 that he took out the loan and paid it in its totality (**see exhibit TDM1-3 at paragraph 5**).
33. Mrs. Smith-Mackey submits that the Petitioner has been able to discredit the Respondent's accretions that she made substantial contributions through his evidence produced in both of his affidavits. Further, the parties shared a relatively short marriage with the Respondent having met the Petitioner with his property and a home thereon. In fact, the Respondent's during the short marriage was without employment which rendered her unable to support herself, much less the expenses of the home in New Providence and or the apartment in Freeport. The Respondent simply failed to make any substantial contributions to the home and showed no interest in the upkeep or maintenance and always maintained that that the home in New Providence was the Petitioner's home and she wanted nothing to do with it. That for the greater part of the marriage the Respondent did not work and relied heavily on the Petitioner for support when she was no longer eligible for

National Insurance benefits. Although strapped financially he paid her personal expenses until he could no longer do so.

34. Mrs. Smith-Mackey submits that the court has an unfettered discretion and **MUST** exercise its “**discretion according to the particular circumstances of the case in so far as they show to what matters the Court had regard in the exercise of its discretion**”. as per Scarman J. In *Kirke v Kirke 1961- 1 WLR 1411 at 1412-1413.*

35. Mrs. Smith-Mackey further submits that the Court must have regard to Section 29 of the Matrimonial Causes Act (“**MCA**”) when the Court is deciding how to exercise its discretion with respect to the ancillary relief orders pursuant to Section 25, 27 and 28 of the MCA. Mrs. Smith-Mackey submits that **Section 29 (1) (a) - (g)** outlines five factors which must be balanced by the Court “**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 party discharged his or her obligations and responsibilities towards the other**”. These factors must be considered and weighed by the court on the instant application as follows:

- 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:** Both parties are relatively young. The Petitioner and Respondent both have great prospects in the 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:** The Petitioner is obligated to the mortgage for the home which he has been paying from the inception of the purchase without the Respondent's assistance.
- c. **The standard of living enjoyed by the family before the breakdown of the marriage:** The Petitioner and Respondent both

enjoyed their lives separately for most of the marriage. At one point the Respondent moved out of the home and never returned.

- d. The age of each party to the marriage and the duration of the marriage:** The marriage lasted no more than 6 years however the Respondent moved out of the home for 9 months and then returned to live in separate bedrooms. Both are over the age of 40.
- e. Any physical or mental disability of either of the parties to the marriage:** No.
- 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:** There are no children of the marriage.
- g. In case of the proceeding for divorce or nullity of the marriage, their value to 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 the party will lose the chance of acquiring.**

36. Mrs. Smith-Mackey submits that the Court's jurisdiction on the instant application is a discretionary one and must be exercised so as to "**do justice**" between the parties in the context of their financial position." That these assets must be divided in strict accordance with the statutory requirements laid down by **Section 20 of the MCA.**
37. Mrs. Smith-Mackey submits that Section **40 (1)** outlines the factors which must be balanced: the Court on granting a divorce if it is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home (whether in the form of money payment, or services, or prudent management, or otherwise howsoever), may if it thinks fit, on the application of either party made before the decree of divorce is made, make in lieu of any other under section 25 (3) affection the matrimonial home for an order:-

- (a) **Subject to subsection (2) directing the sale of the home (including the land on which it is situated and such other land appurtenant thereto as the court directs) and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the court thinks fit; or**
- (b) **Directing that either party pay to the other such sum, either in one sum or instalments and either forthwith or at a future date and either with or without security, as the court thinks fair and reasonable in return for the contributions made by that other party;**

38. Mrs. Smith-Mackey referred the Court to **Wachtel v Wachtel 1973 1 ALL ER 829 at 838 – 839** where the Court made it clear that a wife/husband who looks after the home and family contributes as much to the family as the wife/husband who goes out to work and therefore the jurisdiction of the Court is applied in both cases. She submits that this principle should not be applied in this case. That these parties have no children and from the evidence produced the Petitioner made a greater contribution. Further, that this is a short marriage therefore the Respondent could not rely on this principle.
39. Mrs. Smith-Mackey also referred the Court to the modern approach found in the cases of **Charmin v Charmin (2007) EWCA Civ . at 503**, **White v White (2002) UKHL at 54**, and **Miller v Miller (2005) EWCA civ. At 984**. She submits that the starting point in dividing up matrimonial assets, in this case the matrimonial home, is usually 50/50 when the property is owned by each of the parties jointly. She submits that this is not the case regarding these parties. That the property is owned solely by the Petitioner. That the Petitioner provided countless receipts from mortgage payments, utility bills and other related expenses which are all exhibited to the Petitioner's affidavits filed with respect to this matter. That the Courts are always concerned about the contribution to the property acquisition and the maintenance of the property. That in this particular case the

Respondent shows no proof of her contributions, whatever minute contributions were made, and such contributions are not sufficient to suggest that the Respondent is entitled to a 50% interest. Mrs. Smith-Mackey submits that in this case it would be fair for the Court to depart from the principle of equal sharing based on the contributions of the parties of the marriage and more particularly the Respondent's lack thereof. Further, Mrs. Smith-Mackey refers the Court to the case of **A v B (2008 Fam/Div/132 Supreme Court Unreported)** where it was held that the modern approach to a division of property in a marriage is that fairness is an equal sharing of property **unless there is a compelling reason to depart from equality**. She submits that the compelling reason in this case is that the Respondent has failed to show any consistent and meaningful contribution towards the family and the home owned by the Petitioner.

40. Mrs. Smith-Mackey referred the Court to a line of cases in support of her arguments. In the case of **Pettitt v Pettitt 1969 2 ALL ER page 385** the former home was in the name of the wife alone. The Court found that the husband did not acquire an interest in the home because his contributions were not substantial. In the case of **Gissing v Gissing [1971] A.C. 886** the matrimonial home was conveyed into the name of one spouse only, there was no agreement or understanding or expression of intention that the other spouse, though she had contributed, should have a beneficial interest therein. It was held that it was not possible to draw an inference that there was any common intention that the wife should have any beneficial interest in the matrimonial home. (See also **Hargrave v Newton [1971] 1 W.L.R. 1611**). That in the case of **T v P 2010/FAM/Div/216** The court ruled that the husband had no interest in the home of the wife due to the short marriage and there was no view that the contributions made by the husband were with the view of giving him an interest. That in the instant case the Respondent's contributions were very minor if any at all were made towards the home. Additionally, there are no children of the marriage for the court to even consider that the Respondent contributed indirectly towards the family.

THE ISSUES

41. The Court must determine whether the Respondent acquired an interest in the former matrimonial home and if yes, the Court must quantify that interest.

ANALYSIS AND CONCLUSIONS

THE LAW

42. Sections 25 and 28 of the Act, empowers the Court to make property adjustment orders.
43. Section 28 (1) (a) of the Matrimonial Causes Act empowers the Court to order one party of the marriage to convey or transfer to the other any property to which **"the first mentioned party was entitled, either in possession or by reversion."**
44. Section 29 of the Act provides that in exercising its powers under Section 28 the Court must have regard to certain factors "...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 responsibilities towards the other."
45. Section 40 of the Act provides that the Court, on the granting of a decree of divorce, if it is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever), may, if it thinks fit, direct that the matrimonial home be sold and the net proceeds of sale be divided between the parties in such proportions as the Court thinks fit.
46. Section 46 of the Act defines "matrimonial home" as being:
"any dwelling being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of divorce is or has been granted, in any case where – (a) either or both of the parties or the personal representatives of one of them (i) owns the dwelling..."

FINDINGS OF FACT

47. I am not satisfied on the evidence adduced by the Respondent that at any time prior to the acquisition or exceptionally at some later date the parties had an

agreement, arrangement or understanding that the property would be shared beneficially. I am not satisfied that the loan of \$5,000.00 to replace the stolen materials or the \$2,000.00 expenditure establishes that the Respondent acted to her detriment or significantly altered her position so as to give rise to a constructive trust. There is no evidence that the parties had an agreement prior to the marriage to build the former matrimonial home on the property purchased by the Petitioner alone in 2007 for the sum of \$125,000.00 and mortgaged by him alone for \$250,000.00. I am not satisfied on the evidence adduced by the Respondent that, save for a contribution of \$5,000.00 given to the Petitioner up on the theft of the building materials and the \$2,000.00 paid to CCM Construction & Maintenance, there is credible evidence of any other substantial contribution to the construction of the former matrimonial home or to the payment of the mortgage. I am satisfied as argued by the Petitioner that this contribution was "set off" by the payments made by him to the joint consolidation loan from June of 2011 to the present and I am mindful that he still has an outstanding balance on the same. No beneficial interest or entitlement to real property arises from the payment of ordinary household expenses as was the case here.

48. The marriage was a very short one. The parties separated after approximately 2 short years of marriage although they did not obtain the Decree Absolute until almost 3 years later. The Court tries in such cases to achieve a clean break between the parties. There are no children to concerned about and the parties are young with no physical disabilities and are both in a position to "start over".
49. Both Counsel referred the Court to the leading and relevant case law applicable to the circumstances of this case, namely **Lloyds Bank plc v Rosset**, **Wachtel v Wachtel**, **Pettitt v Pettitt**, **Gissing v Gissing** and the modern approach in **Miller v Miller (2005)**, to name but a few, and to the relevant sections of the Matrimonial Causes Act and I thank them for assisting the Court in this thorough review of the case law and the Act.

DISPOSITION

50. Having considered all of the affidavit evidence filed, all of the oral representations made by Counsel, all of the relevant statutes and case authorities, having read the submissions laid over by both Counsel carefully and having accepted the submissions of Counsel for the Petitioner, the Respondent's application is dismissed.

COSTS

51. There shall be no order as to costs.

Dated this 30th day of March A. D. 2017



Petra M. Hanna-Weekes
Petra M. Hanna-Weekes
Justice