

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION
BETWEEN**

2017/Fam/div/00489

H.M

Petitioner

AND

J.P.F.M

Respondent

AND

K.A.O

Woman- Named

Before: The Hon. Madam Justice G. Diane Stewart
Appearances: Mrs. Marylee Braynen Symonette for the Petitioner
Mrs. Cathleen Hassan with Mrs. Khadra Sawyer for the Respondent
Ruling Date: March 8th, 2023

RULING

Background Facts

1. The Petitioner, H.M filed a Notice for Ancillary Relief on 13th July, 2021. The parties were married in April 1995. A Decree Nisi was granted to the Petitioner on the 12th May 2020 dissolving their marriage on the ground of adultery of the Respondent.
2. There are four children of the marriage all of whom are sui juris.
3. A Certificate making the Decree Nisi Absolute was issued September 29th, 2020 and filed on October 2nd 2020.

4. An Interim Protection Order, was made on 11th September 2017 restraining the Respondent from entering in or remaining at or being on the premises of the matrimonial home and from coming within 500ft of the Petitioner until further order.
5. The court further ordered on the 11th September 2017 that the Respondent, his servants or agents be restrained until after judgment in this action or until further order from disposing of or dissipating the assets of the marriage, namely, the removal of the 30" Johnson 200HP speed boat called "Free Willy: from the jurisdiction; any and all furniture in the matrimonial home; and the proceeds of his bank account held with Scotia Bank.
6. By order made on 2nd December 2020, the restraining order against the Respondent personally was extended until determination of the ancillary issues.
7. By Notice for Ancillary Relief the Petitioner sought the following:
 - i) The Respondent to transfer to the Petitioner all his right title and interest in and to the former matrimonial home;
 - ii) The Respondent do pay all arrears owing The Bahamas Government for real property taxes on the matrimonial home up to the date of the Order being made;
 - iii) The Petitioner do transfer to the Respondent all her right title and interest in and to the boat "Free Willie"
 - iv) The Respondent do pay costs of the transfer of the former matrimonial home and the boat;
 - v) The Respondent do pay the Petitioner periodical payments of \$1,000 per month for the remainder of her life or such payments to cease in the event of her remarriage;
8. The Respondent by his affidavit filed June 6th, 2019 sought the following orders;
 - i. The Petitioner contribute \$100,000.00 towards the maintenance for E.
 - ii. The Petitioner pay \$3,000.00 per month for the occupancy of the house since August 2017.
 - iii. The matrimonial home, the furniture and the Hyundai car be sold and shared equally.
 - iv. The Petitioner reimburse him \$150,000.00 of the \$300,000.00 she removed from the joint account at Corner Bank.
9. By the Respondent's subsequent affidavit filed June 9th 2021, and submissions he further sought that in addition to the previous relief sought that:-
 - i. He be allowed to live in the matrimonial home to the exclusion of the Petitioner.
 - ii. The matrimonial home be rented and the net proceeds divided equally between the parties;
 - iii. The Petitioner be made to pay the Respondent the cost of these proceedings to be taxed if not agreed;
 - iv. The Court make a declaration that the Petitioner and the Respondent each hold 50% interest in the matrimonial home

- v. The Petitioner shall pay the Respondent the following within ninety days:
 - a) 50% of the net proceeds of all income earned from the use or rental of the matrimonial home between August 2017 to the date of the Respondent's joint use of the matrimonial home or release of his interest, inclusive of but not limited to the earnings from Airbnb and Steve As' tenancy;
 - b) 50% of the money that the money that the Petitioner took from the joint account at Corner Bank without consent in the sum of \$153,395.69;
 - c) 50% of the value of the family jewelry in the sum of \$32,500.00;
 - d) 50% of the value of the furniture and appliances in the sum \$27,500.00;
 - e) 50% of the tertiary expenses of the parties' youngest child in the sum \$146,447.00; and
 - f) 50% of the Bahamas Realty Appraisal in the sum of \$1,701.21
- 10. By an order for mutual discovery made 7th July 2020 and filed 30th July 2020, both parties were ordered to produce affidavits providing particulars and evidence of matrimonial assets. This order was not complied with by either party within the time mandated.
- 11. Numerous affidavits were filed by each of the parties in support of their respective claims and they were extensively cross-examined on the same.
- 12. By an order made the 30th March, 2020, the injunction issued in September 2017 was varied to release the speed boat to the Respondent with an order that the boat be sold after obtaining court approval for the sale and the proceeds be retained by the Respondent. It was further ordered that the proceeds would factor in the settlement of the ancillaries.
- 13. An interpreter was approved by the court to assist with the translation of the proceedings into French on behalf of the Petitioner, whose native language is not English. Both parties are French and speak French fluently but the Petitioner acknowledged her hesitancy with the English language.
- 14. During the hearing of the ancillaries, subpoenas were issued to three banking institutions to produce account information of the parties. Affidavits in compliance were duly filed by Corner Bank, First Caribbean Bank and Scotia Bank.

Petitioner's Evidence

- 15. The Respondent is a lawyer by profession and was admitted to the French Bar in or about 1986. He operated his own practice and from about 1990 to 2012 when the parties left France, the Petitioner worked in his law firm as inter alia his receptionist.
- 16. The parties migrated to The Bahamas in August, 2012 with the intent to reside here permanently. In anticipation of their permanent move to The Bahamas the parties in or

about August, 2011 purchased a home in Palatial Estates Subdivision on Paradise Island. "The Matrimonial Home" The conveyance of the matrimonial home was to a company "Open Wind Limited which is beneficially owned equally by the parties.

17. The Respondent became a Permanent Resident of The Bahamas in October 2014. The Petitioner and E were endorsed on the Respondent's Certificate of Permanent Residence without the right to work. The Respondent could work once he obtained a work permit.
18. The marriage lasted 24 years. E as a minor lived in the Bahamas with the parties.
19. In December, 2020 the Respondent married his current wife JP-K, a Bahamian and Canadian citizen with rights in both jurisdictions. By virtue of this marriage, the Respondent has a Spousal Permit 'with the right to engage in gainful employment' in The Bahamas.
20. The matrimonial home was purchased for \$900,000.00. The speed boat 'Free Willy' was purchased in the sole name of the Respondent for the benefit of the family and subsequently sold for \$18,000.00.
21. The Petitioner maintains that she is unable to work in The Bahamas as she is currently residing as an endorsee on the Respondents PR Certificate which prohibits her from working. Her only source of income is derived from rentals by AirBnB of rooms in the matrimonial home. She is without any further source of income. The Respondent has an unrestricted permanent residency in the Bahamas as well as a spousal permit and is also a resident of Canada with a right to work in both jurisdictions.
22. Throughout the marriage the Respondent was the main income earner and the Petitioner, although she worked at the Respondent's law firm, earned considerably less than he did and since 1990 has been totally dependent on the Respondent as she did not work while living in France and had been unable to work since moving to the Bahamas.
23. The Respondent has engaged in several business enterprises in the Bahamas including chartering the boat Free Willy, and also a liquor sales business.
24. The Petitioner has only engaged in Air BnB rental so as to earn an income since the breakdown of the marriage. Prior to the breakdown the parties also engaged in Air BnB rentals of the matrimonial home.
25. Throughout the marriage, the assets of the marriage were used for the benefit of the family and sale proceeds of assets were shared equally except the proceeds from the sale of the last condominium in Florida where she received less than one half of the net proceeds.
26. The Respondent purchased most of their assets through companies which he incorporated.

27. The Petitioner's monthly expenses are:-

a. Electricity	\$550.00
b. Water	\$250.00
c. Cable and internet	\$130.00
d. Phone	\$70.00
e. Yard Maintenance	\$300.00
f. Pool Maintenance	\$200.00
g. A/C Maintenance	\$150.00
h. House Maintenance	\$300.00
i. Real Property Tax	\$583.33
j. House Insurance	\$583.33
k. Grocery (\$150 p/w)	\$600.00
l. Health Insurance	\$450.00
m. Medication & Treatment	\$200.00
n. Gas & Car maintenance	\$400.00
o. Car insurance	\$75.00
p. Clothing & Grooming	\$60.00
q. God food, Vet & Treatments	\$191.67
r. Travel expenses	\$416.67
<u>TOTAL</u>	<u>\$5,510.00</u>

28. The Petitioner also has a 40,000.00 loan from monies borrowed from a friend.

29. It is approximated that \$40,000.00 is owing on the real property taxes for the matrimonial home.

30. The Respondent agreed to pay the youngest child of the marriage's tuition and all costs associated with the child attending the most expensive university in Europe despite the Petitioner advising that she could not afford the fees and that she should attend college in France which is free. .

31. Save for shares in Open Mind Ltd, the Petitioner has no other assets besides the matrimonial home.

32. Prior to the breakdown of the marriage, the funds generated from AirBnB were deposited into the parties' joint bank account at Scotia Bank. During the months of December 2017 to March 2020, the proceeds from AirBnB were \$85,170.00.

33. The Petitioner gave their youngest child the gold ring, gold earrings, necklaces and bracelets which had been given to her by the Respondent. The diamond ring which the Respondent gave the Petitioner was sold in 2017 for \$3,000.00.

34. Free Willie was sold for \$18,000.00 in 2020.

35. Under extensive cross-examination the Petitioner averred that she stopped working for the Respondent when their daughter was born in 1992. They had lived together prior to

their marriage.

36. Her working duties included invoicing the Respondent's clients and some book keeping. She also would prepare dinner for clients of the Respondent's firm whom he would invite to their home. She worked there until 2010. She was not the sole employee of the firm.
37. The Respondent's work included setting up companies for clients in different countries.
38. The title to one of the condominiums owned by them was held in a company St. Lambert Investments. It was sold in 2011/2012.
39. During the time that she worked for the law firm she had a housekeeper who took care of the children.
40. Previous homes were purchased in both their names. Whenever the Respondent asked her to sign something, she did without paying any attention. When she asked for an explanation, she never got an answer.
41. She signed documents for ACIL Recruitment and was a signatory on the account. The Respondent introduced her to the beneficial owner of ACIL who was a client of the firm.
42. She established a website called Happy Open Mind which was created for persons to conduct small psychological tests and was nothing serious. It only stayed operational for three to four months.
43. The Respondent was mean to her and very nasty to the children calling them names and as a consequence she sometimes gave in to his demands. She denied being nasty to the Respondent. She denied sending emails accusing him of money laundering or calling him a criminal.
44. She admitted to sending an email to the ex-husband of the Respondent's present wife but denied sending him a copy of the French court judgment granted against him by Mrs. L. They were released from the judgment because there was no evidence against them in 2018.
45. Their matrimonial home was rented by both of them as an Air BnB until 2017. As a result of her cancelling two bookings, she was prohibited from renting the matrimonial home as an Air BnB for another year as a penalty. As a result Mr. & Mrs. A transferred their Air BnB account to her to run their account. This started in December 2017.
46. The monies for the rentals were deposited on her First Caribbean bank account.
47. She did not recall sending the various WhatsApp messages shown in evidence to the Respondent's present wife but admitted when faced with the documents that she probably did send them.

48. Mr. S.A. communicated with the Air BnB tenants for her when she was away.
49. She admitted that the income from the Air BnB belonged to both herself and the Respondent.
50. She was challenged on various items of expenses which she averred were incurred to maintain the house and paid out of the rental proceeds.
51. The As were her friends and lived in the matrimonial home for a period in 2018 and she rented them two of the bedrooms and she lived in the third. They also stayed in the home when she was arrested in Prague. When she returned to the Bahamas they lived in the home with her.
52. The As paid her cash for the use of the home.
53. She and the Respondent held a joint account with Capital One. She denied that the proceeds of the sale for the last condominiums in Florida were deposited in her sole bank account.
54. She did not have any Air BnB rentals for 18 months during COVID and the only income was from the As. The first guests after COVID was in March of 2021.
55. She admitted to having a personal bank account with Corner Bank in addition to the parties' joint account. The joint account however was opened first.
56. There was an agreement to divide the funds in the joint account as they were both pursuing different businesses. She was running a café and bar business while the Respondent was running a helicopter business. She was not involved in the helicopter business, only the Respondent managed his business. The person operating the helicopter lost his lease and her business was evicted from the shared premises. The business only lasted approximately six months.
57. The funds were transferred from Yellowbird which was the joint account with Corner Bank to her personal account called Postgraduate with Corner Bank. The funds were used for the café business. After the business collapsed she moved the funds to First Caribbean Bank.
58. She did not produce any bank records because she did not have them.
59. She never had any documents for her business which collapsed. She never applied personally for a liquor licence but they had one. Her partner took 60 to 70% of the proceeds because he was bringing in the business.
60. The Air BnB business started in 2016 and it was a joint business with the Respondent.
61. The funds in the joint savings account came from the proceeds of the sale of one of the condominiums and which was transferred from Postgraduate account to First Caribbean

Bank.

62. She has no other bank accounts.
63. The funds divided were not intended to be used for E's tertiary education. E initially started studies in Canada but she did not know what she wanted to do. She did not want to go to school in France where education was free but wanted to go to a private school in Switzerland. She told E that it was expensive and that she could not afford to pay for it. She went to the private school as the Respondent agree to pay for it.
64. In re-examination, the Petitioner confirmed that when E completed high school they were living in the Bahamas and she had no separate income.
65. The fees for the University in Canada came from their joint account.
66. She did not pay for any shares in Ms. L's company.
67. The Respondent would have received the payment from the ACIL work. She did not receive any remuneration for the administrative work she did for ACIL. She stopped performing any services for ACIL in 2011 when Ms. L's and the Respondent became embroiled in a hostile situation where Ms. L accused him of stealing her money and giving her bad advice. She was unaware of what had transpired as the Respondent never told her.
68. All of the properties owned by them were in joint names from 2012 to 2017 or in companies owned by them. The company Our Family was incorporated and their home was sold to this company by way of a bank loan. The loan proceeds were sent to their bank account in Switzerland. The bank loan was not repaid and the bank obtained a judgment against the company in 2010/2011. All of the condos in Florida were purchased through loans and held in the names of different companies. All of the four condos and homes were sold at various times.
69. The proceeds of sale of the last condo were sent to the Capital One joint account and used for living expenses in the Bahamas. Monies were moved by her from Capital One to First Caribbean Bank. She claims that she did not have the banking information to send them to Scotiabank. She moved \$170,000.00 as it was agreed between them that they would leave only a little in the account and move the majority for living expenses in the Bahamas.
70. After the Respondent attacked her because the funds were transferred to First Caribbean instead of Scotia, she gave him \$80,000.00 from those proceeds.
71. She only received \$122,000.00 from the sale proceeds of another condominium which was less than half.
72. When she was arrested in Prague she thought that the Respondent would come to save her. When he came to Prague he was like a stranger. KO forwarded her a copy of a

message from the Respondent to her telling her that he was sending to her account \$130,000.00 so that they could buy a house together.

73. The As were friends of both herself and the Respondent. Mr. A and the Respondent spent considerable time together until they had a disagreement over his using Mr. A property without permission. The Respondent then accused her of having sex with Mr. A. She and Mr. A never had an intimate relationship.
74. The monthly income from the Air BnB rented before COVID was \$3,500.00 to \$4,000.00 a month but after COVID it was around \$500.00 per month.

Respondent's Evidence

75. The Petitioner removed funds from their joint bank account at Corner Bank in the amount of \$300,000.00 without his knowledge. He did not know what she did with the funds as it was against his consent. The Petitioner transferred these funds from their joint account named "Yellowbird" to her account named "Postgraduate" which is solely controlled by her.
76. Throughout the divorce proceedings he had nothing, no bank account, no funds, no house and he was mentally lost.
77. The Petitioner and the Respondent both travelled to Miami, Florida to collect the balance of the proceeds of sale from the last Florida condominium and after disbursements the final amount received was approximately \$330,000. This entire sum was to have been deposited into the joint account at Capital One Bank. Prior to leaving Florida, the Petitioner however had the entire amount transferred to her personal account at Capital One, then transferred to her personal bank Account at First Caribbean International Bank in The Bahamas.
78. Further, the Respondent found that the Petitioner again transferred \$170,000.00 from their joint bank account without his consent. After meeting with lawyers, the Petitioner agreed to return \$82,475.00.
79. The Respondent maintains that he borrowed \$40,000.00 to pay the tuition and living expenses of the youngest child of the marriage.
80. He avers that he does not have in his possession any family jewelry purchased between 2010 and 2020. However, the Petitioner has the following family jewelry purchased by him and which was intended to become a Meunier Family Heirloom that would be passed on to the Respondent's daughter. It was not to be a gift to the Petitioner from the Respondent nor used for her sole benefit:-
 - i. 18 karat white diamond ring which was appraised on 27th July 2016 and valued at \$36,500.00
81. The Petitioner also has in her possession jewelry purchased by the Respondent valued in excess of \$50,000.00:-

- i. 2 karat diamond ring valued at approximately \$8,000.00
- ii. Chaumet Watch valued at approximately \$9,000.00
- iii. Chaumet necklace valued at approximately \$3,000.00
- iv. Bvlgari necklace valued at approximately \$10,000.00
- v. Bvlgari "Monete" Bracelet valued at approximately \$10,000.00

82. He did not unilaterally decide to send the youngest child of the marriage to university. Both parties agreed to financially support their children through university. The cost of the tertiary expenses for her were in excess of \$292,894.00 inclusive of tuition, food, housing, health expenses, supplies, travel and clothing expenses.

83. The Respondent reiterates that he owns no company either wholly or partly nor does he have any interest in any business despite his attempts to do so.

84. The Petitioner has been able to continue to live a very comfortable lifestyle. She has been able to maintain her health insurance, continue to enjoy regular yard, pool and air conditioning maintenance. She even enjoys the luxury of being able to travel. The Respondent on the other hand describes that he has no access to his home, he is unable to pay rent for an apartment of his own. He has had to rely on the generosity of persons he knows. He does not own a vehicle.

85. Both parties are in the same position as it related to employment as he cannot operate as an attorney in The Bahamas which has been his only profession. The only property which the Respondent owns is the matrimonial home.

86. Under vigorous cross examination he maintained that he resigned from the French bar in 2012 because he was moving to the Bahamas and no longer wished to practice law anymore.

87. The Petitioner was also responsible for the family expenses because she worked. Both of them earned money. She was the office manager in his law firm for more than 20 years. She had initially consulted him but she found another lawyer when they started living together.

88. He has not been disbarred.

89. The Petitioner was paid every month that she worked in his law firm. His income went into their joint account and it paid the expenses of the family.

90. The family's income averaged between \$50,000.00 and \$500,000.00 per year. The Petitioner planned the spending and they both provided the funds.

91. All the purchases of property were bought together and both names were on the deeds. The funds came either from the joint account or a bank loan.

92. The Petitioner had previously worked for a mechanical firm which made offset printers for a newspaper. She also provided translations for a company which was also a client

of their law firm. While working for this company she continued to work for the law firm but she received money directly from that company.

93. The company incorporated to hold the deed for the house in Enghien was called MESS which was an acronym for the children's names. It was incorporated by the Petitioner. The purchase was accomplished by a deposit and a loan. The deposit was paid from their joint account. The company was owned by the four children, the Petitioner and the Respondent.
94. The loan proceeds stayed in the bank to guarantee the loan. They had no right of access to the loan. There was no lien on the house. The loan was repaid by the company. This house was subsequently sold and the proceeds went to a joint account owned by both himself and the Petitioner.
95. The property in Belgium was held in a company called St. Mechelle Investments. It was purchased by a loan and the property guaranteed the loan. Upon the sale, the loan was repaid.
96. His main practice was in Belgium, but they also kept an apartment in Paris because the children were in school there. He also had a practice in Paris as well.
97. He had savings of 900,000.00 to 1,000,000.00 Euros.
98. In the Bahamas he imported champagne through GC's firm and they sold it. He also had proposed to invest in another house or condo on Paradise Island and do short term rentals.
99. They owned four condominiums in the United States in Florida. He did not recall the exact dates when each was sold. The proceeds from the sale of the condo which was sold in 2016 for \$340,000.00 were deposited in the Petitioner's personal bank account at First Caribbean Bank.
100. He denied instructing the Petitioner to fly to the bank to sign the wire instructions neither did he instruct her to wire the funds to Scotiabank. He only discovered that the funds were gone when he attempted to access the ATM to get money for food.
101. He admits to receiving around \$80,000.00 which was not exactly one half the money removed.
102. He admits to taking K. O away and spending time with her in Georgia.
103. The proceeds from the sale of the condominium in 2017 were divided equally. The lawyer gave each of us a half of the net proceeds.
104. The bank accounts in Belgium and France were all closed as they had no more use for the accounts. The funds from the bank in Switzerland were transferred to the Bahamas,

then it was closed.

105. He did not work or engage in any gainful employment in the Bahamas. The boat Free Willy was used to conduct tours but it was sold for \$15,000,000.
106. He moved to Canada in July of 2021. He recalled that \$50,000.00 either francs or US dollars were transferred to Corner Bank from Switzerland. Apart from those transfers, he does not recall any other funds being transferred.
107. Postgraduate was opened for E's college fees and nothing else.
108. He denied removing \$370,000.00 from the account.
109. His personal account is with Ansbacher. He acknowledged receipt of two cheques which funds were placed in the joint account.
110. He admitted to paying for E's college. They also paid for S and M university costs from the joint account. The university in Paris was not free.
111. His present wife is a Bahamian citizen and he has permanent residency in the Bahamas. She has a place in the Bahamas and a place in Canada. He currently lives in Canada.
112. The only companies incorporated were Open Mind for the matrimonial home, Pitstop was the trading name for the wine distribution company, Free Willie Inc. was a fake incorporation name. There was no record of the company ever being incorporated even though the lawyer gave him that name.
113. The company incorporated with GC was a shell company called Strategic Advising Services International Ltd. He was in partnership with GC. He is a signatory on the company's bank account.
114. His Ansbacher account was used as an escrow account for a friend. He was not paid for this service. No other funds were received in this Ansbacher account. It was simply a transit account to ScotiaBank. The Ansbacher accounts were closed.
115. He was not a 50% shareholder in the company because as a foreigner he was not allowed to have shares in a business conducting wine sales. He was a Director of that company.
116. Free Willie was sold to a company called Blue Compass. He did not receive all of the monies for the sale.
117. Sea Savannah tours was a business that K.O wished to start but never in fact started to conduct tours on the Free Willie.
118. He signed a document as a representative for the Chs as their friend.

119. He is a permanent resident of Canada with the right to work which he obtained in June 2022, but he is 60 and does not work. The house in Canada is owned by his wife and then he stated that it was his father-in law's home.
120. His wife owned a houseboat in Nassau where he spent 2 months. They live in the back of the restaurant "La Petit Gourmet" when in Nassau. He accepts that he signed as a co-owner with her on its sale and used the money's to pay a part of E's school fee. It was sold for around \$70,000.00.
121. In re-examination he averred that the lease agreement signed by him was on behalf of his friend who was not on the island when it was executed and that he did not own the property.
122. The advertisement for the tours on the Free Willie were not generated by him. The cell numbers are not his. Blue Compass has nothing to do with him.
123. His partnership with GC only lasted for a few months. There was a problem with the accounting.
124. His wife agreed to give him a portion of the proceeds from the sale of the houseboat as he had performed work to rebuild it. His portion was used to pay E's fees for one term.
125. The Petitioner was the managing director of Expert Mind, and Happy Open Mind which was a psychological business to find out the type of persons involved in recruitment. She was also involved in ACL. BE which was a business which recruited pharmacists for pharmacies and which also sold medicine abroad in the French West Indies. The money earned went to her personal expenses and her account.

Petitioner's Submissions

126. **Sections 27 and 28** of the Matrimonial Causes Act ("**MCA**") confer the jurisdiction to make financial provision and property adjustment orders. Section 27 provides:-
"27. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say-
(a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
(b)
(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;...."
127. Section 28 provides:-
"28. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say –

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion”

128. On deciding the issue of financial provision orders and property adjustment orders, the Court must carefully consider **Section 29 of the Matrimonial Causes Act** which provides:-

“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 to 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 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 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.”

129. By the tail section of Section 29, Parliament mandated the objective of the Court when exercising its discretionary powers in deciding financial and property issues following the dissolution of a marriage.

130. The Petitioner contends that the equal sharing principle established in this jurisprudence cannot be applied in opposition to, nor can it trump the ‘tail piece’ of section 29. The approach was explicated by Crane- Scott, JA., in the Court of Appeal case **Guthrie v Guthrie SCCivApp. No. 13 of 2015** where she stated:-

“ 31. While the provisions of the Bahamas MCA are clearly not on all fours with the UK MCA, it is perhaps in the area of financial provision and property adjustment orders ancillary to divorce, nullity or judicial separation, that the similarity between the Acts is most evident. As a review of Bahamian case law in the area of ancillary relief will confirm, it is mainly to UK authorities that Bahamian courts look for guidance in approaching applications for ancillary relief following divorce. See for example: *A v. B* [2010] 2 BHS J. No. 19; *Missick v. Missick* [2012] 3 BHS J. No. 75; *P v. T* [2013] 2 BHS J. No. 97; *Johnson v. Johnson* SCCivApp No. 20 of 2015; *Sawyer v. Sawyer* SCCivApp No. 134 of 2014; *Collie v. Collie* SCCivApp. No. 19 of 2015.

32. That having been said, President of this Court Madam Justice Anita Allen (as she then was) delivering the decision of this Court (differently constituted) in *Jupp v. Jupp* SCCivApp No. 37 of 2011, nonetheless sounded the following note of caution:

“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 you to look at all the circumstances and you make the order which puts the parties in the financial position so far as it is practical 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.” [Emphasis added]”

131. On a proper consideration of the factors laid out in Section 29, together with all the circumstances of the 27 year marriage, the law and authorities support a finding that the only fair, just or equitable order available is an order in the terms sought by the Petitioner.
132. The Petitioner submits that the Court ought to reject the evidence of the Respondent and give consideration to Section 29 of the Matrimonial Causes Act. The Respondent has not filed an Affidavit of Means in these proceedings and nor has he disclosed what his means are in any of the six Affidavits filed in compliance with Rule 45(2) of the Matrimonial Causes Rules.
133. The Petitioner has no income or earning capacity consequent on her immigration status in The Bahamas. The Petitioner is an endorsee on the Respondent's Certificate of Permanent Residence having a legal right to reside in The Bahamas but not having any legal right to work. She does however, have financial resources available to her, and has continued to rent two of the vacant bedrooms in the former matrimonial home as a host on AirBnB. The Petitioner also maintains another resource of income to be providing accommodation to a family whenever they are visiting for which she received \$1,000.00 compensation per month.
134. Throughout the marriage the Petitioner worked in the Respondent's law firm which involved working with his clients as directed. She states that she did not receive a salary as she had access to funds in the parties joint bank account.
135. Her only financial obligations and responsibilities are her own basic needs. During the marriage, the Petitioner was solely financially dependent on the Respondent. She is now totally responsible for herself in a country where she has no right to work. The Petitioner also contends that she had enjoyed a wealthy and lavish lifestyle while married to the Respondent.
136. The Petitioner has also presented evidence that she has been diagnosed as having a trauma bond to the Respondent. The Petitioner also suffers from tremendous pain in her

shoulder, sleep deprivation, nightmares, anxiety attacks and disassociation resulting in post-traumatic stress disorder from a brutal arrest and rape which occurred while the Petitioner was visiting Prague.

137. The Petitioner is seeking an order that the Respondent transfer all his right and interest in the matrimonial home to the Petitioner. In A v B 2008/Fam/DIV/132, the Learned Chief Justice, Sir Michael Barnett determined what is reasonable and fair in a property adjustment order.

“18. The objective of the Court is to be fair.

19. In my judgment the modern day approach to a division of property in a marriage is that fairness is an equal sharing of property unless there is compelling reason to depart from that equality.”

The need principle is the overwhelming reason to depart from the equality principle enunciated by the Chief Justice.

138. Given the Petitioner's immigration status in The Bahamas, her eligibility to obtain permanent resident status is provisional on retaining the former matrimonial home.

139. In B v B (ancillary relief) (2008) 2 FLR 1627 the Court of Appeal enunciated the principles laid down in Charman v Charman (2007) 1 FLR 1246 held:-

“24. We have been taken helpfully to the landmark cases of White v White [2001] 1 AC 596 and Miller v Miller; McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618. These cases do not establish any rule that equal division is the starting point in all cases. On the contrary, the starting point in all cases is the financial position of the parties and section 25 MCA 1973: see Sir Mark Potter P in Charman v Charman [2007] EWCA Civ 503, at paragraph 67. And in all cases the objective is fairness, which requires an individual assessment of each case: see White per Lord Nicholls at 604...

....

53. Moreover, as Lord Nicholls himself acknowledged at the outset of his speech in Miller/McFarlane:

[4] Fairness 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.”

54. One of the frustrations of family law, as well as one of its fascinations, is that no two cases are ever the same. Since the essence of any judicial discretion lies in its application to particular facts, and since each case requires its own particular resolution, the concept of fairness becomes, essentially a matter of judgment. In this context I am reminded of the wise words of Ormrod LJ, in Martin v Martin [1978] Fam 12 at 20; words spoken more than 30 years ago on 10 March 1977, but still, in my judgment, as applicable today as when they were first uttered:

“..... I only want to add one or two observations arising out of Mr. Aglionby's submissions. I appreciate the point he has made, namely, that it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973. It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore, it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word. There is bound to be an element of uncertainty in the use of the wide discretionary powers given to the court under the Act of 1973, and no doubt there always will be, because as social circumstances change so the court will have to adapt the ways in which it exercises discretion. If property suddenly became available all over the country many of the rationes decidendi of the past would be quite inappropriate.”

140. Further in *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, Baroness Hale stated:-

“138. The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in *White*: see pp 608g to 609a). This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.”

141. In *JT v GT and SH 2013/Fam/div/0084* Hanna-Adderley J., held:-

“40. I accept that the "equal sharing" principle as set out in *Chaman v Charman, White v White, Miller v Miller; McFarlane v McFarlane* (supra) is the correct starting point for consideration of the division of the matrimonial assets in this case but I also accept that due to the [wife's] age, her current handicap on the labour market having been a home maker for most her adult life, her inability to work without a work permit should she stay in the Bahamas, that she and NT need a roof over their heads, she requires more than a 50% split of the assets to get on her feet

and survive, and that these are good reason to depart from the equal sharing principle..

44. Having considered all of the affidavit evidence filed herein, the oral evidence, all of the relEnt statutes and case authorities, having hear Counsel and having read their submissions I make the following Orders:

(1) The [husband] shall convey his interest in the Matrimonial Home....to the [wife] and the reasonable cost of the transfer shall be borne by the [husband] so that upon the sale of the matrimonial home the [wife] should be able to purchase suitable living accommodations for herself....”

142. In Julius Dianza Chisholm v Ophelia Arnette Chisholm, 2018/FAM/div/00015

Thompson J., held:

[57] This is a unique case in that the parties are not young people who are marketable in the job market. There is no question in my mind that the husband is in a better financial state than the wife. The evidence bears out the fact that the only two source of income for her are funds generated from the Lodge and her pension.

[58] I think the cases cited in this judgment are clear and dictate that what is to be looked at in these particularly peculiar circumstances. The wife has worked very hard alongside her husband for some twenty (20) years and relied on his promise to take care of her financial, emotional and spiritual needs. She, as any wife ought to, did everything to advance her husband.

[59] The husband was well aware that the wife gave up her several means of income to take up the duties as 'WIFE'...Thus in these circumstances, it is not so much the housing needs of the parties but more importantly, their income needs. The wife obviously needs consideration that would put her in a position to meet her financial needs and her obligations.

[65]Having regard to all of the circumstances of the case and the peculiar circumstances of the parties themselves, I order the following:

a. The husband do forthwith transfer to the wife all his right title and interest in and to the property situate Chester's Bay, Acklins, together with the business Chester's Highway Inn Bone Fish Lodge..

143. On the appeal in Chisolm v Chisolm by the husband, the Court of Appeal referred to Jupp v Jupp SCCrApp No. 37 of 2011, where the court reminded itself that the entire objective division of property upon the dissolution of a marriage is to achieve fairness. It stated:-

"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 if the marriage had not broken down. The division of the assets must be fair in its entirety.

37. In the result I understand what the judge was trying to achieve. He took account of assets acquired before the marriage to assist in determining what income was available to the parties in order for them to live in the twilight of their years. He found that the wife was wholly dependent on the income from the Lodge but that the

husband had available to him other assets which would generate income to enable him to live.

38. It must be recalled that the court must address the needs of the parties before determining the division of assets.

44. I have considered whether the judge's objective of providing an income to meet the wife's need could be accomplished without requiring the husband to transfer his half legal interest to the real property upon which the Lodge was operated. I am satisfied that the judge's decision is a proper exercise of his discretion..... In the circumstances I will not disturb the order of the judge requiring him to transfer his interest in the bonefish lodge to the wife."

144. In the Chisholm appeal, Crane-Scott, JA, in agreeing with the decision of Sir Barnett, P., added:-

"74. After considering the respondent/wife's submissions justifying her needs and obligations, the learned judge ultimately made various property adjustment, financial provision and other orders in the light of all the circumstances" and having regard to "the peculiar circumstances of the parties" as he had found them....

75. As appears from the perfected Order...the learned judge ordered the appellant/husband to transfer to the respondent/wife his interest in the property situate at Chester Bay, Acklins which they had acquired during the marriage together with the Chester's Highway Inn and Bone Fish Lodge business...

78. It is evident that what the learned judge was essentially doing was making "property adjustment orders" on a "clean-break" basis to ensure that the respondent/wife's future needs were met from an income-earning asset which had been acquired during the marriage...."

Respondents' Submissions

145. The Respondent submits that the Court's discretion should be exercised within the guidelines as set out in Section 29 of the MCA.

146. The division of matrimonial property follows the equal sharing principle, particularly where property is owned jointly, unless there is a compelling reason to depart from the same as enunciated in White v White [2000] UKHL 54, [2000] All ER (D) 1546.

147. In P and L [2011] 2 BHS J. No. 89, Justice Bernard Turner cited A v B, 132 of 2008 and stated:-

"18. It is accepted that the equal sharing principle applies to property acquired during the marriage. Whether or not it should apply to other property as well is not a matter that I need consider in this judgment. In the present case, the matrimonial home must be considered property acquired during the marriage....

I accept that it is more likely than not that the Husband made a greater financial contribution than the wife to the acquisition of the home. His income was higher than that of the wife and I accept that the wife probably used a significant part of her income to assist in the maintenance an education of her younger siblings. Notwithstanding those factors, in my judgment these are not compelling reasons to move too far away for the principle of equal sharing."

148. Further Justice Turner referred to LKW v DD No 16 of 2008 (2010) HKEC 1727 where it stated:-

“The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.... in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.”

149. DD v. LKW (2008) 2 HKC 134 (the Court of Appeal of Hong Kong) provides as follows:-

“On marriage the parties commit to sharing their lives. It is a partnership of equals. The husband may work while the wife may stay at home to take care of the family. Their contributions are nonetheless equal....On divorce the principle and spirit underlining the union should be reflected in the division of the family assets. The division should proceed on the basis of fairness and this necessarily means there is no room for discrimination between husband and wife. The starting point is equality in division unless there is a good reason to depart from it”

150. In V and D [2011] 1 Bhs J. No. 71, Justice Turner held:-

“The Petitioner having indicated a desire to retain the properties, and the Respondent having requested that his interest in the properties be bought out, I will make, in particular circumstances of this case, the following orders:

i) ... The Petitioner pay to the Respondent one half of the appraised value of the property, after deduction of the cost of appraisal and any outstanding loans or other charges against the property, within sixty days of the appraisal and simultaneously with the Respondent conveying, at his expense, his interest in the property to the Petitioner. If the Petitioner fails to purchase the Respondent’s interest in the property, then the property is to be sold and the proceeds of the sale are to be shared equally, after the payment of any expenses related to the sale including any outstanding loans or other charges against the property.”

151. In S v R [2007] 5 BHS J. No. 15 Justice Estelle Gray-Ens states:-

“63. In a marriage one would expect that when the parties pool their resources no one should be able to go back into the pool and identify which portion belongs to which contributor. But that is frequently what the court is asked to do.

67. In any event, the court is more concerned with what is just and fair than what each person has contributed, having regard to the matters set out in section 29 of the Matrimonial Causes Act, and I am guided by the judgment of Ormrod, J. in the case of P v P [1978] 3 All ER 70 referring to the matters set out in section 29, in which he said:

“For my part I do not find it particularly helpful to try to ascertain and quantify his so-called interests. It is useful to ascertain these interests in a broad way so that one can see the justice of each side’s case, but I would prefer to avoid quantifying or seeking to quantify these rights in terms of figures because the moment one quantifies them people begin to do arithmetic with the figures and it is a well known statistical fallacy that if you start with an estimate and you multiply and divide it you multiply and divide the error as well.”

Paragraph 69 stated:-

“At the time the matrimonial home was acquired, it was no doubt the intention of the parties that they should own the property equally and I do not think it is fair now for the court to allow either of them to deviate from that intention. In the circumstances, not only do the parties own the property in equal shares, but I find also that each of the parties is entitled to one-half net interest in the property.”

152. The manner in which the parties and family lived together is not a compelling reason to depart from the equal sharing principle. The marriage is intended to be a sharing of resources and a commitment /agreement that when married they are partners. Such sharing of resources cannot be used against a party to validate that one partner's lifestyle is more important than the other.
153. The Respondent submits that when dealing with joint assets, namely the matrimonial property and bank accounts, the Court in applying **Section 29 of the Matrimonial Causes Act** should find that there is no good reason to depart from the equal sharing of the assets.
154. The Respondent further submits that the parties jointly own the company Open Mind Ltd. which is the registered owner of the property. The ownership of the property contends that the parties intended to each own 50% of the property.
155. Regarding a joint bank account at Cornerbank, the Petitioner became trustee of 50% of the funds in the joint account. Therefore, it is the Respondent's submission that 50% of the money that was taken from the joint account is the also the property of the Respondent.
156. The Respondent contends that had the marriage not broken down as it did, the parties would have continued to equally share assets and resources. This has only ended since the breakdown of the marriage and in 2017 when the Petitioner unilaterally deprived the Respondent of his use of the joint assets.
157. The Respondent's submission is that the parties knowingly and willingly retired and moved to The Bahamas knowing that they could not become employed based on their immigration status.
158. The Respondent's submission is that the fourth child of the marriage's tertiary education would have been paid out of the parties joint funds, accordingly it is just and equitable for the Court to order that the Petitioner reimburse the Respondent 50% of the said expense as she removed the joint funds out of the joint account and closed the account without consent.

DECISION

159. **Section 28 of the MCA** enables the Court to make property adjustment orders in divorce proceedings. There is one matrimonial property in question, several bank accounts, jointly and individually owned, as well as family jewelry. The matrimonial home is a house situated on Paradise Island which is owned by a company Open Mind Ltd. the shares in which are held equally.

160. Both parties are seeking financial provision orders.

MATRIMONIAL HOME

161. The starting point in making property adjustment orders is the equal sharing principle unless there exists a compelling enough reason to depart from the same. The Court must however consider the guidelines established in **Section 29 of the MCA** as well as the final part of the section when making these orders.

162. **Section 29** provides:-

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 to 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 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 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.

163. The objective of the Court in these proceedings is to achieve a fair result between the parties having considered Section 29.

164. The equal sharing principle as established in **A v B [2010] 2 BHS J No.18**, which reaffirmed the English authorities is not an immoveable or inflexible principle. There may, be a departure from this principle in order to ensure that the assets are distributed between the parties based on their respective needs, contributions to the marriage and most

importantly based on what is fair in the circumstances having regard to the financial positions they would have been in if the marriage had not broken down and each had discharged his or her obligation to each other.

165. As set out in Jupp v Jupp SCCRApp No.37 of 2011, a Judge must consider section 29 when exercising his discretion.

“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 required 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 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 reason for the same.”

166. In White v White [2001] 1 All ER Lord Nicholls stated:-

“Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. States in the most general terms, the answer is obvious. Everyone would accept that the outcome of these matters, whether by agreement or by court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone’s life is different. Features which are important when assessing fairness differ in each case. And sometimes different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eyes of the beholder.”

167. In Miller v Miller; McFarlane v McFarlane (2006) 3 All ER 1 the House of Lords stated:-

“This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs, taking into account wide range of matters such as the parties ages, their future earning capacity, the family’s standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.”

168. In considering the statutory guidelines and determining what is fair and just in the circumstances, I accept the following:-

- i) The parties were married for twenty seven years. This was a relatively long marriage. Both parties were 58 at the dissolution of the marriage and are now 60.
- ii) There is evidence that the Petitioner suffered some trauma from the breakdown of the marriage and from a sexual assault when arrested in

- Prague for which she is receiving treatment. There is no evidence that the Respondent suffers from any disability, either mentally or physically.
- iii) As of 18th September 2020, the matrimonial home was valued at \$930,000.00. There is no documentary evidence of the value of the furniture in the matrimonial home.
 - iv) The parties are both immigrants to The Bahamas. The Respondent has permanent residency and is not prohibited from working. The Petitioner is only an endorsee on the Respondent's permanent residency certificate and she has no right to work.
 - v) The parties prior to the breakdown enjoyed a relatively affluent lifestyle and once they moved to the Bahamas lived off of their savings and income derived from short term rentals of their home and tours conducted on their boat Free Willie.
 - vi) There were entrepreneurial attempts by the Petitioner partnering with a third party which failed and another by herself and it failed. There were several entrepreneurial ventures by the Respondent partnering with third parties, all of which he stated never succeeded as he withdrew from all of them.
 - vii) The Respondent owns shares and is a director in various companies which were used as vehicles for his investments and ventures. The Petitioner owns equal shares with the Respondent in Open Mind Ltd which owns the matrimonial home.
 - viii) Even though the company which owns the matrimonial home is beneficially owned equally and was used to obtain permanent residency status, only the Respondent was granted permanent residency and the Petitioner was only endorsed on his certificate. This was a discriminatory result which needs to be regularized.
 - ix) The parties have given contradictory evidence regarding their sources and modes of income during the course of the marriage. The parties have also given contradictory evidence regarding the funds which have been moved to and from the various bank accounts, both jointly and individually owned. The parties are in agreement that during the course of the marriage there were joint accounts which were utilized to maintain the home and family.
 - x) There is no evidence that any pension or retirement fund is available to either party. There is no documentary evidence of the value of the jewelry.
 - xi) The Respondent has since remarried and currently resides in another jurisdiction with his new wife. Meanwhile the Petitioner currently resides in The Bahamas and lives in the matrimonial home which she uses to generate revenue for herself. There is no evidence of income from the assets and the business of the new wife which is supporting the Respondent.
 - xii) Both parties contributed equally to the welfare of the family during the marriage. The Respondent was the main wage earner and the Petitioner assisted him until the last child was born and then raised the children and looked after the home while still entertaining the Respondents clients.
 - xiii) The children are all sui juris and no longer live in the Bahamas.

- xiv) Despite the manner in which the Respondent gave his evidence during the proceedings, I am not satisfied that it reached the standard where his behavior would factor in to the decision which the court should make.

169. Having heard evidence of both parties I prefer the evidence of the Petitioner as to the facts relating the family monies and their movement in and through the various bank accounts. Throughout the cross examination of the Respondent I found him to give blatant contradictory evidence. He was at times deliberately obfuscating the issues and simply ignored the truth and stubbornly maintained his "script" despite the documentary evidence before the court. He did not assist himself or the court.

170. I am also satisfied that the Petitioner has a greater need for a home than the Respondent. In his evidence he stated that he has a place in the Bahamas and in Canada. He has the right to work in the Bahamas and in Canada, whether he chooses to or not is a matter for him. The Petitioner at the moment does not have a residence to live in other than the matrimonial home. She is presently unable to work.

171. I am also satisfied that upon the breakdown of the marriage the Petitioner continued to support herself by renting out rooms in the matrimonial home. Her need for the matrimonial home is greater than the Respondent.

172. I am cognizant however of the Respondent's considerable interest in the same but based on the facts, fairness dictates that I depart from making a decision which gives the parties an immediate clean and equal break by this ruling.

173. As stated in LKW v DD 16 of 2008 (2010) HKEC 1727:-
"Fairness has a broad horizon"

174. By virtue of S. 28 of MCA, the court is empowered to make various types of orders which include ordering a party to relinquish his or her interest to the other or postponing the sale of a matrimonial home until certain events occur as in a Mesher Order. There is also the Martin Order which is similar to the Mesher Order but applicable when there are no children and where the order for sale is postponed until a certain event occurs. In Martin v Martin (1977)FLR Rep 444 Lord Justice Omrod stated:-

"While it is difficult for practitioners to advise clients where the court is entitled to exercise a very wide discretion, the essence of such discretion is that the court should preserve the utmost elasticity to deal with each case on its own facts. Decisions in this area are not precedents in the strict sense, but more in the nature of guidelines. Whenever it is to be argued that the wife can find alternative accommodation for herself out of her share of the equity or obtain council accommodation, evidence to the effect that should be put before the court, or it will be assumed that it is not possible. The practice ordering sale of the matrimonial property on the children reaching the age of eighteen is not to be treated as rule of thumb, it is a matter of balancing hardship to the parties. Each individual case is to be weighed on its merits, considering each sides' resources and trying to ensure that neither party is rendered homeless."

175. On the facts of this case, were the court to make a Martin Order, the Respondent would still need to be involved in regularizing the Petitioner's immigration status on the basis of the full value of the home. Obviously this is not appropriate as there would be no clean break. The Petitioner needs to own a property which meets the requirements in order to qualify for permanent residency status in her own right. In order to achieve this, the property must be released into her sole name. The Respondent must give up his interest to her. That is only fair in the circumstances. He has status, she does not.
176. If however, the Respondent is not compensated in some form this would be unfair to him as by both parties uncontradicted evidence, they shared equally the interest in all their various properties.
177. Accordingly, I hereby order that the Respondent transfer to the Petitioner on or before 30 days from the date hereof all his estate, interest in the company Open Mind which owns the matrimonial home, subject to a formally drawn charge in the following terms in favor of the Respondent to protect his interest.
178. The property shall stand charged for the sum of 50% of the present appraised value of \$930,000.00 of the Property namely \$465,000.00 and shall not be enforceable until the happening of the first of the following:-
- i. The death or remarriage of the Petitioner.
 - ii. The Petitioner vacating the property for more than 6 months.
 - iii. The Petitioner selling the property.
 - iv. Any adult person other than the Petitioner, a housekeeper and the children of the family occupying the matrimonial home for a period whether continuous or cumulative in excess of six months in every year save with the written consent of the Respondent or order of the court.
 - v. Further order of the court.
- The said sum shall accrue interest annually at 1.5%. Upon the occurrence of the first of any of the above events, the matrimonial home shall be sold and the Respondent's share with all accrued interest shall be paid from the net proceeds.
179. Upon the transfer the Petitioner shall be responsible for all the ongoing taxes on the same. Any real property taxes outstanding as at the date of this judgment shall be born equally by both parties and shall be deducted from the Respondent's chargeback if not settled by him prior to the enforcement of the same.
180. The Petitioner shall reimburse the Respondent 50% of the cost associated with the appraisal of the matrimonial home.
181. I make no order for alimony as the Petitioner will receive the full value of the matrimonial home and the Respondent's interest has been postponed to recognize the Petitioner's greater need for both a home and income which the home is being used to generate.

182. The Petitioner will be able to utilize the matrimonial home to regularize her permanent residency status which should have been granted when the Respondent obtained his.

FREE WILLIE

183. The boat was released by order of the court and the Respondent sold the same for \$18,000.00. The Petitioner's interest in the same of \$9,000.00 will be deducted from the Respondent's interest if any in the bank accounts as hereinafter set out.

SHORT TERM RENTAL INCOME

184. I am satisfied that the income derived from the short term rentals was used firstly by both parties and then by the Petitioner alone to support herself. She could not work and, the Respondent could but was not supporting her. To determine whether there is income to be shared as was the previous conduct, a review of the accounts must be had in order to ascertain the amounts derived to the benefit of each party since the breakdown of the marriage.

BANK ACCOUNTS CORNER BANK

185. After an extensive review of the documents produced by Corner Bank, I am satisfied that the Yellow Bird account was a joint account in which each party had equal interest.

186. I am also satisfied that there was no misappropriation of funds from the Yellow Bird account by the Petitioner to the Postgraduate account. Based on documents exhibited in the affidavit of MC of Corner Bank there is clear irrefutable evidence that the Respondent instructed Corner Bank to divide the funds and transfer one half to the Petitioner's account and one half to his account as the parties were separating. There was no indication in these instructions that the funds were to be used for E's school fees.

187. The claim for reimbursement for E's school fees contradicts the documentary evidence of Corner Bank, which I accept, unreservedly. Whatever was the reason for naming the Petitioner's account as Postgraduate does not negate the fact that the Respondent had instructed the bank to put the funds in separate accounts as the parties were separating.

188. I also accept the evidence that E could have attended university where her tuition would have been free as advised by her mother. The Respondent chose to pay for the private school. There is no legal obligation for the Petitioner to pay for tertiary education when she claimed that she financially was not able to and where a more reasonable alternative was available.

189. The authorities are replete on this issue and I adopt the following findings of my colleagues.

190. In **Jewel Smith v Smith SC 2019/FAM/div/00185 19th May 2021 (unreported)** McKay J had to consider whether to make an order for the respondent to pay the tuition of private school fees for the **eldest** child of the marriage. She held that in the absence of evidence that the

parent can afford to pay such fees, it would be unreasonable to order that parent to do so. She states:

"61. As Barnett CJ (as he then was) submitted in Henry Thurston v Mornette McKenzie (supra) and I accept, the Court cannot compel a parent to contribute to the payment of school fees in the absence of evidence that the parent can afford to do so. In the instant case, it would be unreasonable to order that the Respondent should contribute to the payment of the private school fees as he is not in a financial position to do so. Additionally, it was not the status quo prior to the breakdown of the marriage."

191. Further as Hall CJ in Brown v Brown 2004 D & M 416 of 1991 stated:-

"However, while the court has jurisdiction to make the award prayed for, I am not persuaded that the court should, in this case, do so. Without gainsaying the inestimable value of a tertiary education which all parents having the means to do so should morally afford their children, the expense of such education, which can prove unpredictable, cannot be legally fixed on a parent according to the arbitrary choice of the other parent or a child who is of full age unless there is the clearest evidence that the parent against whom an order is sought is in a position to do so and it is right for the court to so order. Here, the circumstances of this family where such as that none of the children was afforded a tertiary level education, yet the respondent paid for the further education of E beyond the age specified in the extant order of court, until he had obtained his associates degree. I am of the view that it would be unfair to the respondent to legally require him to do more. It is a matter for him according to his conscience to decide the extent to which he will further assist E but I am unable to order him to do so merely because E and the petitioner so desire."

The Petitioner is not liable for reimbursing any fees for E's tuition.

CAPITAL ONE BANK

192. The joint account at Capital One Bank was closed after the sale of the last condominium. The Respondent received his half of the funds transferred from the account.

FIRST CARIBBEAN BANK

193. The Petitioner held three accounts with First Caribbean Bank. The accounts were opened as follows:-

- i. June 2013 and closed in November 2016
- ii. Opened June 3rd 2015
- iii. Opened April 10th 2017

ACCOUNT I

194. This account was opened as a US account with proceeds from the sale of one of the condominiums in Florida. It was closed in November of 2016 while the marriage was subsisting.

ACCOUNT II

195. The second account was a Bahamian checking account which was opened with a \$12,363.50 check. Deposits made to the account from July 2017 were as follows:-

Air BnB	\$103,466.73
Transfers	\$98,350.00

Other Deposits	\$96,807.08
Total	\$298,623.81.

ACCOUNT III

196. This account was opened as a business account for Marianna's Bar as a savings account. The account was funded with transfers from Account number II. The credits in the account represent interest earned and transfers from account number II and insurance proceeds which total approximately \$129,045.82.

SCOTIABANK

197. The Respondent maintained 4 accounts with Scotiabank. The first two accounts were opened in 2012 and closed in August of 2019. The third account was opened in August 2019 and remains open. The fourth account was opened in April 2017 and was closed in October 2018.

198. The Respondent was also a co-depositor on another account with E.

ACCOUNT I

199. Upon a review of this account from August 2017 until it was closed, the Respondent received credits as follows:-

Short Term Rentals	\$2,993.93
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ACCOUNT II

200. This account revealed the following credits for the same period.

Forex Credit	\$36,739.04
Transfer	\$1,625.00
Other Deposit	\$49,747.76
Short Term Rentals	\$6,919.82
TOTAL	\$95,031.62

201. Account III revealed the following credits during the same period:-

Forex Credit	\$23,046.00
Transfers	\$1962.00
Other Deposits	\$46,615.09
TOTAL	\$71,623.09

Out of this account, \$55.050 had been transferred to KO.

202. Account IV account which was operational from April 2017 to 31st October 2018 revealed credits during the same period as follows:

Forex Credit	\$2400.00
Other Transfers	\$16,560.00

Other Deposits	\$16,429.20
TOTAL	\$35,389.20

203. The Respondent was also a co-depositor on an account in the name of E. Transfers were made by the Respondent to this account. . The Petitioner also transferred \$492.12 to this account.

ANSBACHER

204. The Respondent referred in his affidavit evidence to an account in his sole name with Ansbacher Bank and referred to attached statements which he did not produce despite giving an undertaking to the court to produce.

205. When the amounts of the various accounts are compared during the same period, the Petitioner would have received a total of \$427,669.63 and the Respondent would have received a total of \$205, 037.84. The differential would be \$222,631.79 and when divided equally would give each party \$111,315.90. Out of the Respondents share the sum of \$43,641.75 will be deducted to reflect reimbursement to the Petitioner of one half of the documented expenses incurred for the matrimonial home, the sum of \$27,525.00 representing one half of the funds transferred to KO and the sum of \$9,000.00 representing the Petitioner's interest in Free Willie leaving a balance of \$31,149.15. As the Respondent failed to produce his bank statements from Ansbacher Bank, I am unable to determine what credits were made to this account during the appropriate period if any. I am therefore unable to determine whether or not there were ultimately more credits to the Petitioner's accounts than the Respondent. Accordingly, I make no order that the balance aforesaid be paid to the Respondent. His failure to produce the documents which were initially referred to by him prevents the court from making any order in his favor. Hereafter all, funds derived from the Air BnB rental of the matrimonial home shall be the Petitioner's and all income of the respective parties shall be the separate property of each of the parties.

206. I am aware that the Respondent is married again to a lady who has a business and properties from which he can benefit. No evidence was produced by either side of the income of the new wife or the values of the properties owned by her, but I accept that he will benefit in some form from the assets of his new wife and most particularly he has a place to live and income to support him.

FAMILY JEWELRY

207. I accept that the Respondent had purchased jewelry for the Petitioner throughout the course of the marriage. While the Petitioner contends that they were never intended to be family jewelry but gifts to her personally, she has given most of the jewelry to their youngest daughter. The Petitioner has averred that she sold the diamond ring for \$3,000.00 despite the contention that the ring would be a long term investment for the family. There has been no evidence of the value of any of these items "save for the parties say so." Based on the evidence presented, it is ordered that the Petitioner reimburse the Respondent for half (50%) of the purchase price of the diamond ring, being \$1,500.00. As the remainder of the jewelry has been given to the daughter, as it

was intended, there should be no issues to –be resolved.

208. I conclude by noting that these proceedings were unnecessarily protracted by both sides due to the animosity of the parties and involved matters which were not necessary to determine the issues which this court had to resolve.

209. Despite this, I am not minded to penalize any side by making orders for costs and shall order that each party bear their own costs.

CONCLUSION

210. The Respondent shall transfer all his rights and interest in the matrimonial home to the Petitioner subject to a formally drawn charge in favor of the Respondent for the payment of \$465,000.00 with annual interest of 1.5% which shall not be enforceable until the first occurrence of any of the events stated in paragraph 178 hereof. The documents evidencing the charge shall be agreed by both sides, failing which the court will decide the ultimate form of the charge.

211. Upon the occurrence of any of the above events, the matrimonial home shall be sold by a licensed agent agreed by both sides inclusive of the Petitioner's estate upon her death and the Respondent is to receive his sum as ordered from the net proceeds of the sale.

212. The parties shall share the costs of the appraisal obtained for these proceedings equally.

213. The Petitioner shall reimburse the Respondent \$1,500.00 representing one half of the proceeds from the sale of the ring.

214. The Parties shall be at liberty to apply to give effect to this ruling.

215. Each party shall bear their own costs.

Dated this 8th day of March 2022



The Hon. Madam Justice G. Diane Stewart