

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

2006/FAM/DIV/00148

ABC

Petitioner

AND

ECM

Respondent

Before: The Honorable Madam Justice J. Denise Lewis-Johnson
Appearances: Rchetta Godet for the Petitioner
Eugenia Butler for the Respondent
Hearing Date: 3 May 2023

RULING

LEWIS-JOHNSON, J:

Introduction

1. The parties were married on 20 November 1985. There is one child of the marriage, a male, who is now sui juris.
2. On 27 February 2007 a Decree Nisi was granted on the ground that since the celebration of the marriage the Respondent has lived separate and apart from the Petitioner for a continuous period of at least five years immediately following the presentation of the Petition.
3. On 19 May 2009 the Decree was made final and absolute thereby dissolving the said marriage.
4. Pursuant to a Notice of Application of Ancillary Relief filed 13 December 2021, the Respondent seeks an order for the following:
 - a. **That the Petitioner's interest in the matrimonial home namely, Lot 18, Block 9 situate in "Village Estates" Eastern District of the Island of New Providence be relinquished further to the Petitioner being indebted to the Respondent in the sum in excess of \$30,000.00**

representing unpaid maintenance fees for the then minor children of the marriage;

- b. That the Respondent be granted full, unfettered access and ownership of the matrimonial home to the exclusion of the Petitioner;
- c. That the Respondent be granted undisturbed occupancy of the matrimonial home until such time as final determination is derived between the parties and or rendered by this Honorable Court;
- d. That each party is to pay their respective costs; and
- e. Such further and other relief as this Honorable Court deem necessary in all the circumstances of the case.

5. The Notice of Application of Ancillary Relief was supported by an Affidavit of the Respondent filed on 13 December 2021.

The Matrimonial Home

6. The matrimonial home is identified as **“ALL THAT piece parcel or lot of land being Lot No. 18, in Block No. 9 situate Village Estate in the Eastern District of the Island of New Providence.”**
7. The home was purchased by the parties jointly from Joshua Miller Jr. on 25 November 1985 by way of Conveyance and recorded in book 4380 at pages 519 to 521 in the Registry of Records.
8. An Appraisal Report of the matrimonial home dated 23 November 2022 was issued to the Court and confirms an appraised value of \$141,000.00.
9. Neither of the parties currently reside in the matrimonial home. Since 2005 the home has been rented at a rate of \$600.00 per month.

The Petitioner’s Evidence

10. The Petitioner’s case is that the Court should award the parties an equal interest in the matrimonial home.
11. He asserts that when the home was initially bought, he paid the purchase price ‘out of pocket’. He claims that he would give the money to the Respondent occasionally to make the payments on his behalf.
12. When the Petitioner secured a mortgage years later from Finance Corporation of The Bahamas (FINCO), the payments were deducted from his salary monthly.

13. In 2004 after the Petitioner fell ill, he was unable to pay the entire mortgage in the amount required as he was then retired. The Petitioner states that during this time he had no assistance with the mortgage and had to make provisions in order for the home to not be repossessed.

14. It is his contention that since the Respondent left the home in 2004, he has conducted the maintenance of the home as follows:

- a. Replacing the roof;
- b. Rebuilding the meter box rebuilt;
- c. Cleaning of the yard;
- d. Masonry repair to the exterior of the home;
- e. Removal of debris;
- f. Painting;
- g. Tree cutting;
- h. Installation of water tank;
- i. Rewiring of meter box;
- j. Interior wall repair; and
- k. Adding a restroom to the home.

15. The Petitioner originally claimed that during the marriage he carried the full load of maintaining the home by paying utility bills, buying groceries and maintaining the structure of the home. However, his evidence often conflicted as he later accepted that both parties contributed equally to the maintenance and upkeep of the family and home. He explained that it does not matter who paid for what as they both contributed to the household by their joint efforts and therefore, their contributions are equals and both contributions are considered substantial.

16. The Petitioner submits that there is no reason for the Court to depart from the starting point of equality in the division of assets, as it was the Respondent who abandoned the matrimonial home. The Petitioner was left to maintain the home without any assistance from the Respondent.

The Respondent's Evidence

17. The Respondent contends that the Petitioner's interest in the matrimonial home ought to be transferred to her due to the Petitioner's unpaid maintenance fees of \$30,000.00 and for his exclusive rental of the matrimonial home totaling at least \$57,600.00.

18. Prior to the Decree Absolute an Order was made on 23 April 2009 that the Petitioner have full responsibility for maintaining the minor child of the marriage.

The Respondent claims that since the issuance of the Order, the Petitioner has failed and or refused, over the years to maintain the then minor child of the marriage. She asserts the financial responsibility of maintaining the child fell solely on her.

19. Due to her financial hardship, she sought the assistance of the Magistrate court to recover arrears in maintenance payments from the Petitioner. On 27 July 2015 a Magistrate Court Summons was issued against the Petitioner for then total outstanding arrears in maintenance fees in the sum of \$29,180.00.
20. The Respondent further asserts that the Petitioner has failed to comply with the Order of the court issued on 12 September 2020 to remit all rents from the matrimonial home to the Respondent. A further Order was made on 5 December 2022. The Petitioner has since failed and or refused to comply with either of the Orders and continues to be in breach.
21. It is the Respondent's evidence that during the course of the marriage, she worked various jobs such as a straw vendor, caregiver, housekeeper and secretary to meet the financial needs of the family. These needs included assisting with the payments of utility bills and caring for the then six minor children of the family while the Petitioner failed and or refused to hold steady employment.
22. While the Respondent accepts that the mortgage payments for the matrimonial home were deducted from the Petitioner's salary, she explains that this is because the Petitioner was the one with steady employment with the government. She was however, the one who maintained the home by purchasing furniture, ensuring that the house was cleaned, the meals were prepared, and generally ensuring that the home was well kept.
23. The Respondent argues that over the years she has not only been physically, sexually, and psychologically abused by the Petitioner but has also been financially exploited by his lack of assistance with the financial needs of the minor child of the marriage and by him benefitting solely from the rental income of the matrimonial home.

Issues

24. What interest each party is entitled to in the matrimonial home.

The Law

25. The Court's jurisdiction to award orders for financial provision and property adjustment is conferred by **Sections 27 and 28 of the Matrimonial Causes Act, Chapter 125 of The Statute Laws of The Bahamas ("MCA")**.

"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."

26. In determining the appropriate division of assets, the Court is guided by the binding principles stated in **Jupp v Jupp SCCrApp No.37 of 2011**. Former President of The Court of Appeal the Honorable Mrs. Justice Allen stated that:-

“It must be remembered that authorities from the United Kingdom cannot trump what the statute law of The Bahamas says. It is only if these cases are consistent with the statute law can they apply. Section 29 is very clear as to what a judge must take into consideration when considering whether to exercise her powers under section 27 or 28 or even section 25 of the Act. Any sharing principle enunciated by case law must be construed in this light. The statute requires that you look at all the circumstances and you make the order which puts the parties in the financial position so far as it is practicable that they would have been in if the marriage had not broken down. The division of the assets must be fair in its entirety. It is not the role of the 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.”

27. An equal sharing in long marriages for the division of assets between the parties unless there were compelling reasons to depart. In **A v. B [2010] 2 BHS J No. 18** Chief Justice Michael Barnett (as he then was) confirmed the correctness of the equal sharing principle. He stated:

“The modern-day approach applicable for the division of matrimonial property, is an equal sharing of the property, unless there is a compelling reason to depart from equality. The law is perhaps best summarized in the judgment of the English Court of Appeal in Charman v Charman [2007] 1 FLR 1246. “The yardstick of equality of division”, first identified by Lord Nicholls in White at p. 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of “reasonable requirements”. The origins of the yardstick lay in s.25 (2) of the Act, specifically in s.25 (2) (f), which refers to the parties' contributions: see the preceding argument of Lord Nicholls at p. 605D-E. The yardstick reflected a modern, nondiscriminatory conclusion that the proper evaluation under s.25 (2) (f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.....”

28. The authorities establish that the Court's overriding objective is to be fair. In **Miller v Miller, McFarlane v McFarlane 2006 2 AC 618** Lord Nicholls in considering the fairness approach stated –

"This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage give rise to a relationship of interdependence. The parties share the role of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness require that the assets of the parties should be divided primarily as to make provision for the parties' housing and financial needs, taking into account a wide range of matter such as the parties' age, their future earning capacity, the family's standard of living and any disability of either party."

29. It is well accepted that there should be no bias in favour of the greater earner if each party contributed equally to the welfare of the family. In **White v White 2003 3 WLR 1571** Lord Nicholls expanded on this by stating that:

"In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children...as a general guide, equality should be departed from only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."

Decision

30. In considering the division of matrimonial property the court has an obligation to consider the provisions of **Section 29 of the MCA**.

31. The Petitioner and the Respondent are both retired. The Petitioner presently collects the rental income from the matrimonial home and pension benefits from the National Insurance Board in the sum of \$650.00 per month. The Petitioner has suffered two strokes and was diagnosed with debilitating arthritis in the lumbar spine and knees bilaterally. He presently requires the assistance of a cane to walk. The Respondent submits that she is also in a state of fragile health and identifies as financially impecunious. I accept that neither of the parties have a strong earning capacity or are able to gain additional financial resources in the foreseeable future.

32. Given their poor health, it is likely that both parties will face medical care expenses in the foreseeable future. The Petitioner submitted that he currently requires day to day care due to his stroke. The Respondent states that she is in dire need of living accommodations as she does not have access to the matrimonial home. There are no other financial obligations of the parties made known to the Court.
33. Based on the evidence provided to the Court I find that the parties enjoyed a modest standard of living before the breakdown of the marriage.
34. The parties were married for 21 years immediately preceding the presentation of the Petition. The Petitioner is 78 years of age, and the Respondent is 62 years of age.
35. The contribution made by each of the parties to the welfare of the family must also be taken into account. Based on the evidence I accept that both parties, in different ways, contributed to the maintenance and welfare of the family. The authorities establish that the law does not favour the breadwinner. Although one party's contribution may be non-financial, it is not to be overlooked. Maintaining the home and the children is just as a significant responsibility as paying the bills.
36. Pursuant to **Section 36 of the MCA** parties are not allowed to enforce the payment of arrears for maintenance which became due more than twelve months without leave of the Court. The Section provides:-
- “36. (1) A person shall not be entitled to enforce through the court the payment of any arrears due under an order for maintenance pending suit, an interim order for maintenance or any financial provision order without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.”**
37. In dealing with a similar issue Barnett, CJ (as he then was) stated in **J v. G [2010] 2 BHS J No. 16:**
- “Although the Court has a discretion to enforce arrears in excess of twelve months prior to the commencement of enforcement proceedings, that discretion should not be exercised unless there are special circumstances which justify permitting the enforcement of such arrears. A party cannot permit arrears to accumulate for years and then simply come to the Court asking it to enforce those arrears.” [Emphasis added]**

38. Barnett, CJ further highlighted the case of **K v. K [2005] 1 HKC 303** where Hartman J discussed the enforcement of arrears in accordance with Hong Kong legislation. He stated:

“In K v K [2005] 1 HKC 303, Hartman J considered this issue under the relevant provision of the Hong Kong legislation. He said:

8. Section 12 of the Matrimonial Proceedings and Property Ordinance directs that there shall be no entitlement to claim arrears of maintenance which have fallen due more than 12 months before commencement of proceedings unless the court, in the exercise of its discretion, grants leave. In this regard, s 12 reads:

9. Section 12 gives statutory form to a long-standing practice, one inherited from the ecclesiastical courts, that, as a general rule, arrears of maintenance are not to be enforced (by whatever means) if they have remained outstanding for more than 12 months: see, for example, Bernstein v O'Neill [1989] 2 FLR 1 per Ewbank J.

10. As to the reason for the practice, in Russell v Russell [1986] 1 FLR 465, Sir John Donaldson, Master of the Rolls, observed (at 473B) that:

The philosophy underlying the rule must ... have been that if the complainant waited a year to seek enforcement of the order, she did not need the money, or at least had managed well enough without it, and the husband might reasonably regard the liability as something which he could forget about.

11. An applicant must therefore take reasonably timeous steps; that is, within a year, to assert his or her right to maintenance unless there is good reason otherwise. An applicant cannot simply let the arrears accumulate, making do without them, until, with more than a year elapsed, perhaps an oppressively large capital debt has arisen. Maintenance after all is invariably required for current needs and is an obligation which must be viewed within its social context.

12. Accordingly, in giving effect to s 12, our courts must proceed on the general principle that 'stale arrears', as Sir John Donaldson described them, are not to be enforced unless good reason is demonstrated, or special circumstances are shown.

13. What will constitute a good reason or give rise to special circumstances will, of course, depend on the facts of each case. No abstract rule can encompass all possibilities.

14. However, of relevance to the present case, there is authority that doing nothing for more than 12 months because the person liable to make payment is an irregular or reluctant payer will not constitute special circumstances: see Dickens v Pattison [1985] FLR 610.

15. In the present case, the respondent, in an affidavit filed in support of her claim, could only say that she had requested the petitioner to pay the maintenance due to her but he had repeatedly refused. She had therefore taken no action in the hope that he would nevertheless pay, sparing them both the expense and aggravation of litigation. That, in my judgment, in respect of the stale arrears, cannot constitute a good reason for the respondent's failure to assert her rights nor can it give rise to any special circumstances. It may have been different if the respondent, for example, had been able to show that she had been persuaded to withhold action because the petitioner had complained of purely temporary cash flow problems or had misrepresented his true financial position. But she could show nothing more than a failure to act in the face of a refusal to pay."

39. The question before this Court is whether the Respondent should be granted leave to enforce the arrears. The burden rests upon the Respondent to demonstrate to the Court a justifiable reason in her favour to enforce said arrears. It must be noted that the minor child attained the age of majority in 2009.

40. In accordance with the ruling of then Barnett CJ, the Respondent must have demonstrated special circumstances which justify granting her leave for the enforcement of the arrears.

41. The Petitioner only sought the assistance of the Magistrate Court in 2015. No evidence has been provided to the Court as to what transpired in the six-year gap, or a reason for her delay from the date of the Order to the present.

42. I accept that the Respondent has suffered financially due to the Petitioner's non-compliance. However, there are means of redress for parties who are owed maintenance and legal aid clinics. In exercising my discretion, I do not

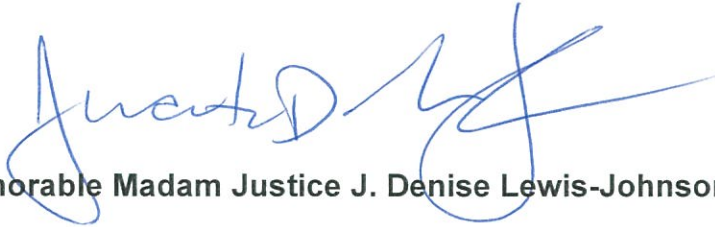
find that the Respondent has provided a satisfactory reason for her inordinate delays in seeking to enforce the Maintenance Orders.

43. The Petitioner's treatment of the Respondent resulted in the Respondent becoming homeless. The matrimonial home was so divided that the Respondent could have been allowed housing there. The Petitioner was cruel, vicious and malicious. He denied the Respondent access to the premises even when ordered by this court.
44. While applying Section 29 of the MCA, I am also guided by principle of what is fair.
45. The egregious conduct of the Petitioner as it relates to the matrimonial property can not go unnoticed. He has acted unfairly to the Respondent in denying her access or an interest in the home. He made all decisions, collected all rental income and denied her access to the premises.
46. The Respondent seeks her interest in the unpaid rental income of \$57,600.00 to be offset against the Petitioner's interest in the home. The Petitioner has not provided an explanation to this Court as to why he has not complied with the 18 October 2022 Order.
47. In applying the factors as mentioned in Section 29 the local authorities suggest that the objective of the Court is to be fair: **A v B 2008/FAM/DIV/132**.
48. From the evidence presented and taking into consideration all the circumstances mentioned above, I accept the Respondent's evidence as presented. Although both parties contributed to the maintenance and welfare of the family, it is clear that after the breakdown of the marriage the Petitioner enjoyed an unfair advantage by collecting rental incomes to the exclusion of the Respondent.
49. Based on the considerations of **Section 29 of the MCA** and the unique circumstances of this case I find as follows:
 - i. The Petitioner is awarded 30% of the equity in the matrimonial home and the Respondent is awarded 70% interest;
 - ii. The Respondent has the option to purchase the Petitioner's interest in the matrimonial home within one hundred twenty (120) days from the date hereof. Should she fail to do so the matrimonial property shall be sold and

the net proceeds of said sale (after satisfaction of the fees associated with the sale) are to be shared between the parties based on their respective interests;

- iii. The Petitioner is to pay the Respondent the sum of \$28,000.00 for her entitled rental income,
- iv. The Respondent is entitled to sums under the October 2022 Order which can be used to set off the Respondent's purchase of the Petitioner's interest.

Dated this day of September 2023



The Honorable Madam Justice J. Denise Lewis-Johnson