

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

2021
FAM/div/00253

Family Division

BETWEEN

N.B.

Petitioner

AND

C.B.

Respondent

Before: The Honourable Madam Justice J. Denise Lewis-Johnson
Appearances: Mr. Bjorn Ferguson for the Petitioner
Mr. Kevin Farrington and Ms. Flويدira Collie for the Respondent
Hearing Date: 25 August 2022

RULING

LEWIS-JOHNSON J:

1. The parties were married on 16 July 2008. There is one child of the marriage, a ten-year-old male.
2. A Decree Nisi was granted on 26 October 2021 on the ground that since the celebration of the marriage the Respondent has treated the Petitioner with cruelty.
3. On 28 March 2022, the Petitioner filed a Notice of Hearing of an Application for Ancillary Relief. The Petitioner seeks the following relief:
 - i. **The Petitioner and the Respondent share joint custody of the minor child with primary care and control to the Petitioner, liberal access to the Respondent;**
 - ii. **The Respondent pay to the Petitioner \$478.00 per month for the maintenance of the child until the child attains the age of 18 years or completes tertiary education, whichever is later, but in any event not later than the age of 21;**
 - iii. **That the Petitioner and the Respondent shall each pay 50% of the co-pay (\$100) attached to the medical insurance that the child is covered under at**

- the Royal Bahamas Police Force due to the Petitioner's employment. That the Petitioner and the Respondent be equally responsible for all dental and optical doctor visits and/or dental and optical insurance for the Child and that both parties shall pay equally the deductibles of his said health expenses until he shall attain the age of 18 years or completes tertiary education, which is the later but, in any event, no later than the age of 21;
- iv. That neither the Petitioner nor the Respondent shall leave the jurisdiction with the said child without first informing the other party and that all expenses related to the vacations involving the said child will be borne solely by the party enjoining the vacation access with him;
 - v. That there be a Property Adjustment Order relative to the matrimonial home situate at Block #27 Lot #1 Harmony Drive situate in Serenity Subdivision on the Western District of the Island of New Providence of The Commonwealth of The Bahamas and that the Respondent be ordered to relinquish any and all interest in the property; and
 - vi. That each party bear their own costs.
4. The Respondent seeks an Order that:
- i. The parties share joint custody of the child of the marriage, with the Petitioner having primary care and control and the Respondent having liberal access;
 - ii. The Respondent pay \$200.00 per month to the Petitioner for the maintenance of the Child, until the later of his attaining majority or completing secondary school;
 - iii. The Respondent also pay to the Petitioner the additional sum of \$120.00 each July to assist with the back-to-school expenses and clothing;
 - iv. The parties shall share equally the Child's remaining educational expenses (in particular uniforms, schoolbooks, and national examination fees), until the Child completes secondary school;
 - v. There be a declaration that the parties each have an equal interest in the matrimonial property and the Petitioner be given the option to purchase the Respondent's interest in the matrimonial property, failing which the matrimonial property be sold and the net proceeds of the sale (after satisfaction of the mortgage and payment of legal fees related to the sale, stamp duty, real estate commission and real property taxes) be shared equally between the Petitioner and the Respondent.
5. The parties have reached an agreed position as to custody of the minor child. Accordingly, the only issues left to be determined are in relation to:
- i. The maintenance of the minor child; and

- ii. The disposition of the matrimonial property.

The Petitioner's Evidence

6. The Petitioner's evidence is contained in her Affidavit of Means filed 23 March 2022. She is employed as an Administrative Inspector by the Royal Bahamas Police Force and earns a monthly salary of \$3,612.50. Her monthly expenses total \$4,432.95.
7. Based on her monthly expenses, after deductions the Petitioner experiences a shortfall of \$820.45. She claims that occasionally she receives additional monthly income of approximately \$800.00 from supplemental employment through the Police Staff Association, this assists with the shortfall between her income and monthly expenses.

The Respondent's Evidence

8. The Respondent's evidence is contained in his Affidavit of Means filed 31 May 2022. He is self-employed as a Fine Artist. The Respondent indicates that on average he earns approximately \$2,083.33 per month. He stated that since 2020 he has also operated a mobile carwash business in which he earns an additional \$1,500.00 per month.
9. The Respondent's monthly expenses total \$2,032.21.
10. Based on his monthly expenses the Respondent has a surplus of \$1,551.12 at his disposal after deductions. However, if the mobile carwash business is suspended the Respondent also experiences a surplus of \$51.12.
11. On 16 May 2022, the Respondent was ordered to vacate the matrimonial home on or before 25 May 2022. He claims that since that date he is presently living out of his vehicle and will be required to secure rental accommodations for himself. He anticipates that this expense will cost an additional \$700.00 to \$800.00 per month.

The Law

12. The authority to make 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")**.
13. **Section 29 (1) of the Matrimonial Causes Act, Chapter 125 of the Statute laws of The Commonwealth of The Bahamas ("the MCA")** provides the considerations to which the Court must have regard. **Section 29 (1) of the MCA** states:-

"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.”

14. When making an order for maintenance for the children of the marriage on the dissolution of a marriage, the Court is guided by the considerations laid out at **Section 29(2) of the MCA** which provides:

- (2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that it to say —**
- (a) the financial needs of the child;**
- (b) the income, earning capacity (if any), property and other financial resources of the child;**
- (c) any physical or mental disability of the child;**

- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

The Matrimonial Property

15. In *A v B* 2010 2 BHS No.19, Barnett CJ proclaimed:

"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 a compelling reason to depart from that equality."

16. The authorities establish that the Court's overriding objective in these matters 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."

17. It is accepted that there should be no bias in favour of the greater earner if each party contributed equally to the welfare of the family.

18. 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."

19. I am of the view that the binding principle is as stated in **Jupp v Jupp SCCrApp No.37 of 2011** where 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."

20. The matrimonial property was conveyed jointly to the parties on 20 November 2008 and is situated at Block #27 Lot #1 Harmony Drive in Serenity Subdivision in the Western District of the Island of New Providence. The matrimonial home was completed in 2014. Presently there is an outstanding mortgage over the property in the amount of \$255,533.41. It is noted by both parties that the Respondent's prior personal loan was consolidated with the mortgage.

21. The initial agreement between the parties was that both parties were to contribute equally to the mortgage payments.

22. What is in conflict between the parties is the extent of the Respondent's contribution to the mortgage payments over the years.

23. The Petitioner claims that after the Respondent lost his job in 2014, she became responsible for the mortgage payments, the Homeowner's Association fees, utilities and the welfare of the minor child. She contends that it was not until she left the matrimonial home in March 2021, that she ceased paying utilities.

24. She indicated that in 2017 the matrimonial home was almost repossessed, as the Respondent failed to pay his share of the monthly mortgage payments, as agreed between the parties. The Petitioner argues that the Respondent deducted monies from the mortgage account as opposed to making payments toward the outstanding loan.
25. The Petitioner stated that the reason the matrimonial home was remortgaged in 2019 was due to the Respondent's nonpayment of his portion of the mortgage. She claims that in an effort to ensure that the matrimonial home was not repossessed, she paid a deposit of \$20,000.00.
26. She further claims that the Respondent left the matrimonial home in an unlivable state after he was ordered to vacate the premises. The home is now being repaired at her expense.
27. The Petitioner submits that there are compelling reasons for the Court to depart from the equal division of the matrimonial home and order that the Respondent relinquish all interest to her in the matrimonial property.
28. The Respondent stated that he made consistent contributions to the mortgage for six years while employed. After the Respondent lost his job in April 2014, he was able to continue making payments for four months thereafter.
29. He claims that it was at this point the parties agreed that it was appropriate for the mortgage payments to be paid by way of salary deduction from the Petitioner's salary, and his salary was used to pay the Homeowner's Association fees, utilities, purchase groceries and furnish the matrimonial home.
30. In 2018, he was advised by the Petitioner that she was moving the mortgage from FINCO to the Law Enforcement Credit Union. He claims that unknown to him, the documents presented by the Petitioner for his signature authorized the removal of his name from the mortgage loan.
31. Nonetheless, the Respondent maintains that he was responsible for the completion and improvements to the matrimonial home, which includes, tiling, painting, purchasing of the air conditioning units and construction of the patio. He estimates that he spent approximately \$20,000.00 to furnish the home.
32. The Respondent submits that during the marriage the parties arranged their financial affairs to achieve equality. Having regard to their conduct, neither party ought to receive a greater share of the family assets than the other. The Respondent further submits that he is entitled to 50% of the value of the matrimonial property.

Decision

33. I am bound by **Section 29 of the MCA**, as stated by former President of The Court of Appeal of The Bahamas Justice Anita Allen, in **Jupp v Jupp SCCrApp No.37 of 2011** and must consider various factors as stated by the Act. The object is to do what is fair in all the circumstances of this case.
34. The parties are the joint owners of the matrimonial home, which was acquired during the marriage. The outstanding mortgage loan is predominantly being serviced by the Petitioner. There is no evidence before the court to suggest that either party own any other real property.
35. The Petitioner's monthly expenses are almost twice as much as the Respondent's. I accept that her financial needs are greater, as she is tasked with satisfying personal loans, the outstanding mortgage, the minor child's welfare and tuition payments as well as the costs associated with the maintenance of the home.
36. The Respondent has expenses for rent, utilities, groceries and maintenance of the minor child.
37. The Petitioner and the Respondent lived in an upscale gated community for approximately seven years before the breakdown of the marriage. The child attends private school. The parties maintained a middle-class standard of living.
38. The Petitioner is now 42 years of age and the Respondent 40 years of age. The parties were married for 13 years. There is no evidence to suggest that either the Petitioner or the Respondent suffer from any physical or mental disability.
39. The Petitioner maintains that she was responsible for the majority of the expenses during the course of the marriage inclusive of mortgage payments, utility payments, upkeep and maintenance over the matrimonial home, school fees and other expenses for the child of the marriage. The Respondent contends that although he was not always a man of great means, he did his best given the circumstances.
40. The objective of this Court is to do what is right and just in an effort to achieve a fair outcome for all involved.
41. I accept that there were unequal payments of the mortgage loan between the parties. However, during the marriage, the parties operated as a union for the benefit of the family. Oftentimes that happens within a marriage where one party is considered the breadwinner and ultimately contributes more financially. However, the authorities indicate that the

breadwinner cannot be favoured in these circumstances. I wish to distinguish this from circumstances when there is no agreement between the parties as to their roles within a happy marriage, and the breadwinner is not to be favoured from when a party refuses to carry their share of the responsibility, be it financial or otherwise, resulting in a greater contribution by one party. This shifts the scale in favour of that party.

42. The Petitioner requested a deviation from the equal sharing principle, as her contributions to the mortgage and welfare of the family was greater than those of the Respondent throughout the marriage. From the evidence presented and taking into consideration all of the factors mentioned above, I accept the Petitioner's evidence as presented. I do believe that a greater burden was placed upon her to sustain the family, and by extension, the matrimonial home for a long period of time, especially after the breakdown of the marriage. This is complicated by the fact that the Petitioner remained responsible for maintaining the matrimonial home and the wellbeing of the child while the Respondent had sole occupation of the home. The evidence shows that for more than five years the Petitioner paid the mortgage by salary deduction.
43. I do not accept the Respondent's evidence that he spent approximately \$20,000.00 to furnish the matrimonial home. He provided no evidence to support this, and his stated income makes it virtually an impossibility.
44. Although the Respondent does not consider himself a man of great means, I do believe that a greater effort could have been exercised during and after the breakdown of the marriage in ensuring that there was an equal distribution of responsibility between the parties. The Respondent demonstrated a blatant disregard for the maintenance of the home as he made no contributions to the mortgage despite occupying the home. It was the Petitioner who, while living in alternative accommodations, ensured that payments were being made on the mortgage loan.
45. The matrimonial home was appraised at \$327,000.00 in February 2022. For all of the reasons above, the Petitioner is entitled to 65% interest in the matrimonial home and the Respondent is entitled to a 35% interest.

Maintenance of the minor child

46. The Petitioner seeks an Order that the respondent is to pay \$478.00 per month for the maintenance of the Child or alternatively, the Petitioner can pay the Child's tuition fees and the Respondent can be fully responsible for the child's educational expenses, inclusive of but not limited to school supplies, school uniforms, schoolbooks and national examination fees.

47. The Respondent argues that maintenance should be set at \$200.00 per month and that the parties should share equally in the remaining educational expenses. He claims that during the marriage, he has always contributed to the maintenance of the child of the marriage, so far as his means would allow. Since the separation of the parties, the Respondent claims that he continues to contribute towards the child's well-being on a weekly basis when the child spends weekends with him. This is unacceptable as the child's complete well-being must be considered, daily sustenance and not only on weekends. The child is to be housed in a home where utilities are to be paid.

48. The Respondent submits that he is unable to assist with the tuition fees for the minor child as it is 'unreasonable, unfair and not supported by law'. He states that the parties did not agree on how the child should be educated, that is, whether by attending a public or private school. He further alleges that the decision to enroll the child in a private, fee-paying institution was made by the Petitioner without any reference to or consultation with the Respondent. This is disputed by the Petitioner who claimed the child spent one year in public school and was in a home school program during the pandemic.

49. The Respondent indicates that his financial instability is a hindrance on the possibility of him being able to contribute to private school fees.

50. It is on this basis that the Respondent submits that the financial means of the parties and the absence of consent of a parent to contribute towards the private school fee of the child should be of consideration to the Court as highlighted in the case of **Thurston v McKenzie 2011/App/Mag/0001**.

51. In **Thurston**, Barnett CJ expanded on this and stated:-

"55. No doubt a court would take into account a number of factors including (inter alia) the ability of the parents to pay; whether the children were attending private school prior to the divorce whether there was any prior agreement between the parties as to the education of the child; the religious background of the parties, if the private school is affiliated with a particular religion; any special needs of the child that can only or can be better met at a private school and past attendance of the parents at private schools."
[Emphasis added]

52. Hall CJ in **K v O 2008 3 BHS J No. 5** stated -

"When considering the reasonable maintenance of children, the court can never assume the correctness of the view common in this society that schooling at a private, fee-paying school is superior to that offered by publicly

funded institutions. It would be impossible for the court, the judicial arm of state authority, to presume the inadequacy of the educational system which the state, in another manifestation, sustains from the taxes which support other institutions of state, including the courts. The adequacy, or otherwise, of a particular school - public or private - would have to be established by evidence in any case in which the issue became relevant. Moreover, experience does not support the popular fallacy of the inherent superiority of fee-paying schools. Accordingly, the court cannot compel a parent to contribute to the payment of school fees in the absence of evidence that such a parent can afford to do so and that it is unreasonable for him not to contribute having regard to the needs of the children, notwithstanding the necessity to re-order priorities following the breakdown of the marriage. More so, when the custodial parent, as does K in this case, include items such as "piano lessons" and "vacation", in calculating the maintenance needs of the children, the court would regard these as extraordinary expenses, luxuries, which, if the parent is able to afford them, so be it, but to which the other parent should not be compelled to contribute."

53. The Respondent asserted that having regard to the current and future expenses enumerated in his Affidavit of Means, he simply does not have the means to pay for private school tuition.
54. In considering the maintenance of the child of the marriage the court has to take into consideration the provisions of **Section 29 (2) of the MCA**.
55. The minor child is ten years old and is in the fifth grade at St. John's College. Presently, the child has medical insurance covered under the Royal Bahamas Police Force due to the Petitioner's employment as well as Life Insurance. There is no evidence before the court that the child suffers from any physical or mental disability.
56. The parties are in conflict as to whether it was a mutual decision to enroll the child in private school. There is no evidence of any extra-curricular activities or mention of any plans for tertiary education.
57. In considering the maintenance of the child, the court also considers the income and earning capacity of the Petitioner and the Respondent. While balancing the needs of the minor child against the respective means of the parties, I believe that maintenance should be paid by the Respondent in the amount of \$350.00 per month. I understand the desire of the Petitioner to provide an opportunity for the child to receive a private school education, however, given the parties income, I do not believe that either party can afford private

school tuition at this time. It is clear from the evidence before the Court that the respondent cannot afford it.

Conclusion

58. After considering the factors as laid out in Section 29 and all the circumstances of the case, the Court makes the following order:

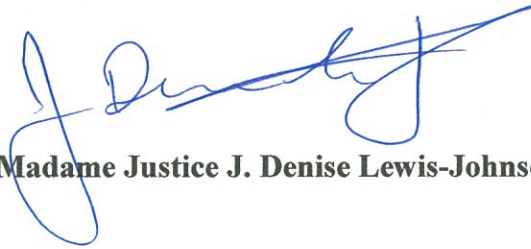
- i. The Petitioner and the Respondent shall have joint custody of the child of the marriage with primary care custody and control to the Petitioner and liberal access to the Respondent,
- ii. The Respondent shall contribute to the Petitioner the sum of \$350.00 per month toward the maintenance of the child until the child attains the age of 18 years or completes tertiary education, whichever is later;
- iii. The Respondent shall pay to the Petitioner the additional sum of \$250.00 in the month of July to assist with back-to-school expenses and clothing;
- iv. The parties shall share equally the child's remaining educational expenses (including but not limited to uniforms, supplies, schoolbooks and national examination fees) until the Child completes secondary school;
- v. The Parties shall share equally all medical, dental and optical expenses of the said child including but not limited to the co-pay and insurance premiums for the child until he shall attain the age of 18 years or completes tertiary education, whichever is the latter;
- vi. Neither the Petitioner nor the Respondent shall leave the jurisdiction with the said child without first informing the other party and that that all expenses related to such travel must be borne solely by the party traveling with the child;
- vii. The Petitioner shall be awarded 65% equity in the home and the Respondent 35% equity. The Petitioner has the option to purchase the Respondent's interest in the matrimonial home within six (6) months 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 mortgage and payment of fees associated with the sale) are to be shared between the parties based on their respective interests.

59. A Declaration is granted, pursuant to Section 73 (1) (b) (i) of the Matrimonial Causes Act, that arrangements have been made for the welfare of the minor child and they are the best that can be devised in the circumstances.

60. The parties have liberty to apply.

61. Each party is to bear its own costs.

Dated this 3rd day of March 2023



Hon. Madame Justice J. Denise Lewis-Johnson