

COMMONWEALTH OF THE BAHAMAS

2020

IN THE SUPREME COURT

FAM/div/No. 00349

BETWEEN:

J. A. JOHNSON (nee C)

Petitioner

AND

M. E. JOHNSON

Respondent

**Before:** The Honourable Justice C.V. Hope Strachan, Justice of The Supreme Court of The Commonwealth of The Bahamas.

**Appearances:** Marylee Braynen-Symonette for the Petitioner/Applicant  
Quentin Percentie for the Respondent

**Hearing Date:** The 18<sup>th</sup> day of March, 2024

*Matrimonial Causes –property adjustment-calculating interest in matrimonial property – Releasing interest in matrimonial property-Government exemption on release- variation of consent order - enforcement of arrears*

## JUDGMENT

### INTRODUCTION AND BACKGROUND

1. This decision relates to an application brought by the Petitioner (“the wife”) seeking certain reliefs which ostensibly amount to a variation of a court order dated the 6<sup>th</sup> day of January, 2022 wherein the court ordered the sale of the matrimonial home situate Golden Meadows off Golden Isles Road and thereupon that the net proceeds of the sale be divided between the parties herein on the basis of Sixty-five (65%) per centum to the wife and Thirty-five (35%) per centum to the Respondent(“ the husband”). More than Two (2) years later the property which consists of a triplex, has not been sold. The wife’s request for a variation is to find a resolution to the non-sale of the property in an effort to

finalize the outstanding issue in the divorce bearing in mind that a Decree Absolute has already been obtained since 22<sup>nd</sup> May, 2022. The wife also seeks, out of the net value of the transaction she is now pursuing, payment from the husband, of all arrears owed to her by the husband under the maintenance order she obtained from the court on 7<sup>th</sup> December, 2021.

2. The documents submitted for consideration in this application are as follows:
  - 1) Summons of the wife filed 6<sup>th</sup> December, 2023
  - 2) Affidavit of the wife filed 6<sup>th</sup> December, 2023
  - 3) Affidavit in Reply of the Husband on 11<sup>th</sup> March, 2024
  - 4) Affidavit of the wife filed 10<sup>th</sup> April, 2024
  - 5) Affidavit of the Husband Filed 15<sup>th</sup> April, 2024

### **THE APPLICATION and EVIDENCE GIVEN BY THE PARTIES IN SUPPORT OF THEIR POSITIONS**

3. The wife's application came by way of Summons filed 6<sup>th</sup> December, 2023 the terms of which are set out hereunder:
  - a. The Respondent's 35% interest in the net proceeds of a sale of the former matrimonial home by Order dated 6<sup>th</sup> January, 2022 be declared at \$18,133.66.
  - b. Within 60 days of the Order to be made the Petitioner pay to the Respondent a lump sum of \$18,133.66 the equivalent of his 35% interest in the net sales proceeds and thereafter the Respondent to forthwith vacate the matrimonial property.
  - c. The Respondent within 30 days of the Order to be made to transfer to the Petitioner all his right title and interest in and to the matrimonial property and should the Respondent fail and/or refuse to do so, the Registrar of The Supreme Court is appointed to execute the Conveyance on his behalf.
  - d. The Respondent do from his portion of the net value pay to the Petitioner all arrears owing under the maintenance Order, dated 7<sup>th</sup> December, A.D. 2021.

### **THE EVIDENCE OF THE WIFE AND REBUTTAL BY THE HUSBAND**

4. In support of her application the wife filed an Affidavit on 6<sup>th</sup> December, 2023, wherein she states that after the court order to sell the property was made she obtained the services

of a Real Estate Company to sell the property at the appraised value of \$240,000.00. That the property was advertised for sale but to date there have been no serious offers. A reduction of the price to \$230,000.00 still did not yield any positive results. She exhibits a copy of an advertisement placed in the local newspaper to that effect.

5. The wife goes on further to state that the husband continues to reside in a unit attached to the former matrimonial home (presumably on the property) but does not assist in the maintenance and upkeep of the property. Consequently the mortgage of the property is in arrears in the sum of \$3,837.08 and lawyers for the Mortgagee have written them demanding payment of the sum of \$7,617.34 and threatening foreclosure and sale of the property unless the mortgage is brought current. This letter is exhibited to the wife's affidavit and clearly states that the sum demanded is made up of principal, accrued interest, late fees and administrative costs.
6. The wife continues that the husband has also failed and/or refused to discharge his financial obligations to the child of the marriage pursuant to an order of the Court dated 7<sup>th</sup> December, 2021. The relevant terms of the order which is also exhibited to her affidavit are as follows:

***“2. The respondent do pay to the Petitioner the sum of \$400.00 per month towards the financial needs of the child, such payments to commence on the 28<sup>th</sup> day of December, A.D., 2021 and shall continue thereafter on the 28<sup>th</sup> day of each succeeding month until the child attains the age of 18 or completes tertiary education whichever is the latter.***

***3. The Petitioner and the Respondent do share equally all educational expenses for the child of the marriage, up to and including tertiary to a Bachelor's Degree.***

***4. The Petitioner and the Respondent to share equally all medical, dental and optical expenses for the minor child until he attains the age of 18 years or completes tertiary education up to a Bachelor's degree, whichever is the latter.”***

7. According to the wife's calculations, the husband is in arrears relative to the maintenance order dated the 7<sup>th</sup> December, 2022, in the sum of \$6,377.57.
8. The wife goes on to offer that the husband's net 35% entitlement is calculated at \$18,133.66. How she arrived at this amount is extracted from her affidavit as it appears thereon as follows:

	SALE PRICE	\$240,000.00
Less		
1)	Balance owing on Mortgage	\$132,000.00



- (4) The husband denies that he owes the wife any money due under the court order dated 7<sup>th</sup> December, 2022. He says he paid the money to the child and the wife always gave him receipts for those payments until August 2023 when she ceased to do so. Nevertheless he continued to pay the monies ordered to the child. He exhibits receipts each for the sum of \$350.00 for the months March, 2023 to August 2023.
- (5) The husband resists the application for the arrears of maintenance contending that they are not applicable in these circumstances.
- (6) Further the husband objects to the order being sought by the wife but rather although incorrectly expressed is seeking an order to buy the wife out for the sum of **\$36,649.90**.

10. At a hearing of the application on 18<sup>th</sup> March, 2024, given the husband's objections to the wife's application the court impressed upon the parties the need to provide current information for the court's consideration as the figures provided were not up to date.

11. On 10<sup>th</sup> April 2024 the wife, adhering to the court order, filed another affidavit in support of her application. The Respondent also filed an affidavit pursuant to the court order on 15<sup>th</sup> April, 2024. The information given in the affidavits are to update the information regarding the property. Both parties have by those affidavits explained their positions on the calculations that should maintain should the court accede to the wife's application to vary the order. I have set them up in two tables so that the comparison in their positions can easily be discerned:

WIFE			
Appraised Value:		\$240,000.00	
Less;			
a.	Mortgage Satisfaction	\$124,026.59 <u>\$110.00</u>	\$124,136.59
b.	VAT on Conveyance@5%		\$12,000.00
c.	Real Property Tax		\$11,259.43
d.	Real Estate Comm.@6%	\$14,400.00	
e.	VAT on REC@ 10%\$	<u>\$1,440.00</u>	\$15,840.00
f.	Legal Fees @ 2.5%	\$6,000.00	
g.	VAT on LF@10%	<u>\$600.00</u>	<u>\$ 6,600.00-</u>
h.	Total Net Equity		70,163.98
i.	Respondent's portion of Net Equity		<u>    x 35%</u>
			<b><u>\$24,557.39</u></b>

12. The husband sees it differently from his wife and his calculations outlined below excludes many of the associated transactional costs the wife submits are payable should the court accede to her request. He puts it as follows;

HUSBAND	
Appraised Value:	\$240,000.00
Less;	
a. Mortgage	\$124,026.59
b. Real Property Tax	\$11,259.43
Total Equity	\$104,714.00
Respondent Equity	<u>          35%</u> \$36,649.90

13. Additional information given by the wife in her most recent affidavit is that she alone paid for the Real Estate appraisal report at a cost of \$650.00 for which she exhibits receipts. She also goes on to give a breakdown of arrears of maintenance owed to her by the husband pursuant to the maintenance of their son and the order of Thompson J. dated 7<sup>th</sup> December, 2021 which I extracted from her affidavit and particularize as follows;

**2. Over the 9 months (Dec. 2021 to April 2024) by the terms of the said Order the Respondent ought to have paid \$11,600.00 (29 x \$400.00). The Respondent has paid only the total sum of \$6,500.00 as follows:**

<b>2021</b>	<b>December</b>	<b>No payment</b>	
<b>2022</b>	<b>January</b>		<b>350.00</b>
	<b>February</b>		<b>350.00</b>
	<b>March</b>	<b>No payment</b>	
	<b>April</b>		<b>750.00</b>
	<b>May</b>	<b>No payment</b>	
	<b>June</b>		<b>200.00</b>
	<b>July</b>		<b>900.00</b>
	<b>August</b>	<b>No payment</b>	
	<b>September</b>		<b>300.00</b>
	<b>October</b>	<b>No payment</b>	
	<b>November</b>	<b>No payment</b>	
	<b>December</b>		<b>300.00</b>
<b>2023</b>	<b>January</b>		<b>300.00</b>
	<b>February</b>		<b>300.00</b>
	<b>March</b>		<b>350.00</b>
	<b>April</b>		<b>350.00</b>
	<b>May</b>		<b>350.00</b>

	<i>June</i>		<i>350.00</i>
	<i>July</i>		<i>300.00</i>
	<i>August</i>		<i>300.00</i>
	<i>September</i>		<i>300.00</i>
	<i>October</i>	<i>No payment</i>	
	<i>November</i>	<i>No payment</i>	
	<i>December</i>		<i>100.00</i>
<i>2024</i>	<i>January</i>		<i>350.00</i>
	<i>February</i>	<i>No payment</i>	
	<i>March</i>		
	<i>April</i>		
	<i>Total Payments</i>		<u><i>6,500.00</i></u>

3. *The Respondent is in arrears with the maintenance payments in the total sum of \$5,100.00 (\$11,600.00 – \$6,500.00)*
  
4. *Pursuant to the Order of this Honourable Court the Respondent is responsible for one half of our son's educational expenses. From July, 2022 to date our son's school fees were:*

<i>2022</i>	<i>July</i>	<i>1,550.00</i>
	<i>December</i>	<i>1,550.00</i>
<i>2023</i>	<i>March</i>	<i>1,550.00</i>
	<i>September</i>	<i>1,670.00</i>
	<i>December</i>	<i>1,645.00</i>
<i>2024</i>	<i>March</i>	<u><i>1,645.00</i></u>
	<i>Total</i>	<u><i>9,610.00</i></u>
  
5. *That of the fees over the above mentioned period the Respondent and I were and are responsible for one half each or \$4,805.00 each.*
  
6. *Since July, 2022 I have been paying our son's school fees by monthly instalments of \$470.00 together with a payment of \$1,620.00 on 8<sup>th</sup> April, 2024. Over the period of the extant Order of the Court, to date, I have paid the total sum of \$8,200.00.*
  
7. *That to date the Respondent is indebted to me in the sum of \$4,805.00 being his one half of the school fees for our son.*
  
8. *That pursuant to the Court's Order, the Respondent and I were ordered to share equally the medical, dental and optical expenses for our son. The monthly insurance premiums are i) medical \$87.33; ii) dental \$16.40; iii) optical \$6.93; for a total of \$87.33 per month. Over the period of the Order from 28<sup>th</sup> December, 2021*

*to date, I have paid the total sum of \$2,532.57 (29 x 87.33). The Respondent's one half under this head totals \$1,266.29.*

9. *The Respondent's total arrears under the Maintenance Order of this Honourable Court for our son totals \$11,171.29 on the following calculation:*

	\$
<i>i) Maintenance (see parg. 10 above) Issue(s)</i>	<i>5,100.00</i>
<i>ii) School fees (see parg. 14)</i>	<i>4,805.00</i>
<i>iii) Medical Dental and Optical (see parg. 15)</i>	<u><i>1,266.29</i></u>
<i>Total arrears</i>	<u><i>11,171.29</i></u>

10. *That deducting the payments that this Honourable Court ordered the Respondent to contribute towards the maintenance and support of our son, together with one half of the cost of the Appraisal Report, the Respondent would be entitled to the sum of \$13,062.71, calculated as follows:*

<i>Respondent's portion of Net Equity</i>	<i>\$24,559.00</i>
<i>Less:</i>	
<i>½ Appraisal Report cost</i>	<i>\$ 325.00</i>
<i>Arrears of Maintenance</i>	<u><i>\$11,171.29</i></u> <u><i>-\$11,496.29</i></u>
<i>Lump sum due to the Respondent</i>	<u><i>\$13,062.71</i></u>

14. The husband further contended in his most recent affidavit that he in good faith paid the sum of Two Thousand Three Hundred Dollars (\$2,300.00) to RBC Finco (the Mortgagee) on the arrears of mortgage. He exhibits only what purports to be Two (2) receipts for the amounts of \$300.00 both dated 3<sup>rd</sup> April, 2024 and deposited at the same teller. At the least it is one deposit of \$300.00 at the most two deposits at \$600.00.

## **THE ISSUES**

15. The issues to be decided by this court are;
- i. Is the wife's interest in the matrimonial property correctly valued at \$18,133.66?**
  - ii. Whether this court has the power to vary the court order dated 6<sup>th</sup> January, 2022 where the former matrimonial home was ordered to be sold?**



- iii. **Whether the court should vary the said order?**
- iv. **If the court does vary the order whether it should be varied in the manner prayed for by the wife?**
- v. **Does the court find that the Husband owes the wife maintenance for the child of the marriage pursuant to the court order dated 7<sup>th</sup> December, 2021?**
- vi. **If it is found that such arrears are owed does the court have the power on this particular application to deduct from the husband's entitlement interest in the matrimonial property any arrears of maintenance?**

### **THE RELEVANT STATUTORY PROVISIONS**

16. This is the wife's application seeking certain reliefs. Taken in the order of the requests made in her summons she is asking the court to calculate the dollar value of the husband's 35% interest in the subject property, to enable her to pay him out his interest in the property. The court is left to assume it is a prayer for variation of the Court Order dated 6<sup>th</sup> January, 2022. But it is regrettable that the summons filed, failed not only to particularize that relief, nor the provisions of the law which grounds the application. Assuming therefore that a variation is in fact being sought there are specific provisions within the Matrimonial Causes Act, Chapter 125, Statute Laws of The Commonwealth of The Bahamas which empower this court to vary certain orders made in matrimonial proceedings. I have set out hereunder all of the relevant provisions which arise in this application.

17. **Ss. 35 – 37.**

*S. 35.(1) "Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.*

*(2) This section applies to the following orders, that is to say —*

*(a) –*

*(b) any periodical payments order;*

*(c) -*

*(d) –*

*(e) –*

*(f) any order made under section 25(3) for the sale of property.*

*(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.*

(4) -

*(5) No property adjustment order shall be made on an application for the variation of a periodical payments or secured periodical payments order made (whether in favour of a party to a marriage or in favour of a child of the family) under section 27 and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage (whether made under section 27 or under section 31).*

(6) -

*(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.*

## 18. ENFORCEMENT OF ARREARS

*S. 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.*

*(2) The court hearing an application for the grant of leave under this section may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as the court thinks proper, or may remit the payment of the arrears or of any part thereof.*

*(3) An application for the grant of leave under this section shall be made in such manner as may be prescribed by rules of court.*

*S. 37. (1) Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of —*

*(a) a change in the circumstances of the person entitled to, or liable to make payments under the order since the order was made;*

*(4) An application under this section may be made in proceedings in the court for — Orders for repayment in certain cases of sums paid under certain orders (a) the variation or discharge of the order to which*

*this section applies, or (b) leave to enforce, or the enforcement of, the payment of arrears under that order.*

*(5) An order under this section for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.*

## DISCUSSION AND ANALYSIS

19. At her wits end over the couples failure to sell the matrimonial home as ordered by Grant-Thompson J., more than Two (2) years ago, that the mortgage is in arrears, that the husband is still residing in the house, that the husband is failing to pay his portion of the mortgage on time, and that the mortgagee is threatening foreclosure on the home for the delinquency in the mortgage payments, the wife approached the court with a plausible resolution of the dilemma. She is seeking to buy the husband's interest out, but before paying him his already determined percentage interest, she proposes to deduct money he owes for arrears of maintenance, to subtract all associated fees and only after this to pay the husband what is left. The husband, suddenly motivated to resolve the outstanding issue, does not object to the transfer of the property to the wife but he rejects the prospect of any deductions for arrears of maintenance claimed by the wife or any costs attendant upon any transfer of the property to the wife.

## CALCULATING DEDUCTIONS UPON TRANSFER OF THE HUSBAND'S INTEREST

20. Notwithstanding the husband's assertions about payments on the mortgage and the mortgage arrears, both his arguments and the wife's arguments crystalized as follows; neither party is challenging or refuting the distribution of the property on the 65% - 35% sharing ordered by Thompson J., the wife having the larger share. Both parties have accepted the valuation of the property at **\$240,000.00**. They agree the balance due on the mortgage in the amount of **\$124,026.59**. They agree also the amount of Real Property tax owed; **\$11,259.43**. The tables they each proposed I have set out above and demonstrates where the husband and wife depart on the method of calculation. Notably, the wife also deducting Realtor's commission and VAT is firmly grounded in the seminal authority commended to this court by Mrs. Braynen-Symonette, the wife's counsel;

**White v White [2000], per Lord Nicholl's of Birkenhead;**

***“Finally, Mrs. White criticized the use of net values, arrived at after deducting estimate of the costs and capital gains tax likely incurred if the farms were sold. Mr. White still owns and uses the farms. The farms have not been sold. Counsel submitted that the use of net values in this situation should be discontinued. I do not agree. As with so much else in this field there can be no hard and fast rule, either way. When making a comparison it is***

*important to compare like with like, so far as this may be possible in the particular case. In the present case a comparison based on net values is fairer than would be a comparison of Mrs. White's cash award and the value of the farms. Under her award Mrs. White will have money. She can invest or use it as she pleases. Mr. White's equivalent as a cash sum is the net value of the farm's. The farms have to be sold before he can have money to invest or use in other ways...."*

21. Applying the methodology, offered by the wife and using the White authority, the wife's calculation would be correct. However, this particular story does not end there and I refer specifically to the parts of Lord Birkenhead's expose where he says;

*"As with so much else in this field, there can be no hard and fast rule, either way. When making a comparison it is important to compare like with like, so far as this may be possible in the particular case....."*

22. I am of the view that the failure to attract any buyers of the property, presents a different situation than that posed in *White*. There the calculation contemplated an imminent sale of the property while in this circumstance the wife is seeking a variation of the court order where efforts to sell have already been made and have failed, a situation I find difficult to ignore, given the prospect of the variation being sought.

23. Returning to the tables of calculation offered by the parties respectively if the considerations stopped there the equity stated in the husband's statement would hold true, **\$104,714.00**. The husband's equity at 35% would also be as he states; **\$36,649.90**, which he is seeking payment of by the wife. I accept that these initial calculations are proper, accepted deductions in any circumstances. It is also my view that any deductions to be made upon the transfer of the interest to the wife shall be shared equally between the parties.

24. The husband and wife became "*joint tenants*" of the subject property when it was conveyed to them on 8<sup>th</sup> June, 2007. The property was mortgaged on the same date. The wife's proposal involves the husband executing a conveyance in her favour and deducting the VAT of **\$12,000.00** payable on the transfer from the husband's **35% interest**. It is my view that there is more than one way to effect a transfer of the husband's interest in the property to the wife. The conveyance proposed by the wife is one way and I deem say a much more costly way, given the **\$12,000.00** VAT payable. However, another way, a less financially burdensome way, to effect the transfer is by the severance of the joint tenancy between the husband and wife;

*'Halsbury's Laws of England Real Property and Registration (Volume 87 (2022)) Joint Tenancy (C) Severance of Joint Tenancies 205, the general rule.*

*The joint tenancy may be severed either by one joint tenant as to his own share or generally by all the joint tenants.*

25. Severance of a joint tenancy can be effected simply and less expensively by preparation of a Deed of Release wherein the husband shall indicate he is releasing all his right, title and interest to the subject property to the wife. The Release can also be composed to operate to release the husband from the mortgage.

26. The simplicity in employing this method was discussed *Halsbury's Laws of England Matrimonial and Civil Partnership Law (Volume 72 (2019), paras 1–460; Volume 73 (2019), paras 461–940)*.

*Where the property in dispute is land which is held by the parties as joint tenants, a notice of severance may prevent proceedings being taken under the dispute resolution provisions. It has been held that a summons and supporting affidavit under the dispute resolution provisions may operate as the severance of a joint tenancy.*

And in *Re Draper's Conveyance, Nihan v Porter [1969] 1Ch 486, [1967] 3 All ER 853*

*Held, that the wife's summons under section 17 of the Married Women's Property Act, 1882, coupled with her affidavit in support of it, showed an intention inconsistent with a continued joint tenancy and operated to sever her beneficial joint tenancy during the husband's lifetime; and that, the severance being effected by the summons and affidavit and not by any order that was made,*

27. While it is not suggested that the Drapers method should be employed in this instance to sever the joint tenancy thereby effecting the transfer to the wife, the case is illustrative of the point that the simpler, less expensive, method can accomplish the same objective as a conveyance but in a much more economical way.

28. Moreover, this court is mindful of its obligation to ensure that the parties to litigation are protected from the imposition of unreasonable costs and avoid unnecessary costs.

29. A Release of the husband's equity in the matrimonial property, and in the mortgage, to the wife, upon this divorce, and by order of this court, is capable of being submitted to the Department of Inland Revenue, for zero rating, making it exempt from the payment of any VAT at all. This methodology should be employed to save the husband and wife the Twelve Thousand Dollars (\$12,000.00) outlined in the wife's spreadsheet depicting the expenses consequent upon the title transfer. See; The Value Added Tax (Amendment) Acts and regulations, 2019-2023. I have therefore ruled out the Twelve Thousand Dollars (\$12,000.00) as a sum to be deducted from the husband's equitable interest.

30. The difference of opinion between the husband and wife about the deductions to be made from the value of the property, prior to determining the husband's interest, is expected. The fact that the wife is enumerating more deductions than is the husband is also expected. Some of the wife's deductions are immediately accepted as genuine deductions, usual in property transactions

while some are unusual and occur only in certain circumstances. I accept that the **\$110.00** she deducted will be necessary upon the mortgage being satisfied in the event that this court accedes to the wife's request to purchase the husband's interest and the attendant transaction. The husband's portion to be deducted is therefore is **\$55.00**.

31. There is no Realtor involved in the wife's proposal for the transfer of the property to be made to her. I therefore reject her proposal that the sum of **\$15,840.00** should be deducted from the husband's percentage. No deduction is to be made from either party.

32. I accept that the estimated legal fees proposed by the wife are payable at 2.5% in the amount of **\$6,000.00** with the attendant VAT @10% in the sum of **\$600.00** together totaling **\$6,600.00**. The husband's portion would be \$3,300.00.

33. The deductions which should therefore be made from the husband's interest total **\$3,360.00**. This would put the husband's interest at **\$33,289.90**.

34. I turn now to the application made by the wife to enforce arrears. The question is whether the arrears of maintenance for the child, pursuant to the court Order dated 7<sup>th</sup> December, 2021 are payable and whether they should be deducted from the husband's interest.

#### **THE ARREARS OF MAINTENANCE CLAIMED BY THE WIFE**

34. The wife's application for the court to deal with the arrears of maintenance at the same time of deciding the application to vary the order for the disposition of the property is tantamount to an application to enforce the order and is subject to S. 36 (1) MCA. Under those provisions leave is required to enforce any arrears outside of the preceding Twelve (12) month period.

35. The rationale behind the rule was succinctly expounded by **Barnett, CJ in J v G 1993/FAM/div/568** citing **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.”*

36. Barnett CJ then opined regarding the specific circumstances of that case but I accept as applicable generally:

*“An application 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 as oppressively large capital debt has arisen. Maintenance after all is invariably required for current needs and is an obligation which must be viewed within the social context.*

*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.”*

37. The wife offered no explanation, good reason or special circumstances for her failure to enforce the arrears accumulated prior to 6<sup>th</sup> December, 2023, the filing date of the summons for this application.

38. I am also of the view that the application must necessarily have been taken by the wife prior to her application to vary the order seeking deductions of arrears. She failed to do so. Consequently, of the arrears the wife claims, this court is empowered to consider only arrears accumulated between 10<sup>th</sup> April, 2023 and 9<sup>th</sup> April, 2024, according to the wife’s statement of arrears. She calculates that the husband during this period is in arrears of the general maintenance for the child in the sum of **\$2,000.00**. The husband himself in answer to the wife’s allegations, admitted that the last payment he gave directly to the wife was in August, 2023. He claims that the wife suddenly stopped providing him with receipts, therefore he made the maintenance payments due under the order directly to the child of the marriage. This is unacceptable in every way. Firstly the husband offers no explanation as to why the wife would all of a sudden stop providing receipts for maintenance received. The wife ignored his allegation. Without alluding to some event causing the significant change in the wife’s behavior his allegation defies logic. More importantly, it is the policy of the court in matrimonial matters never to have children involved in the litigation taking place between husband and wife. Children should never be put in the position to have to choose between their parents in these situations. I condemn the husband’s behaviour in involving the child in these matters if what he says is true. Thirdly, the husband’s failure to counter the wife’ allegations with his own receipts causes me to prefer the wife’s evidence that specific payments were made at various times and at other times no payments were made at all. I accept the wife’s claim that the husband is in arrears of maintenance for the child. I fine that the sum of **\$2,000.00** is payable by the husband to the wife.

39. The wife has also claimed arrears of school fees and expenses for the minor child. She specifies that the amount of **\$4,805.00** is owed. She exhibits copies of receipts obtained from Aquinas College evidencing her payments. These receipts have not been successfully challenged by the husband. Therefore, I accept that those fees are owed by the husband. I also accept that according to the payment arrangements made by the wife with the school for monthly payments that those arrears accumulated over the Twelve (12) month period immediately preceding her application. Further that her application is within the requisite period permitted in *Russell* supra. In the premises I accept the wife's allegation that those expenses remain unpaid by the husband.

40. The wife also alleges that *"pursuant to the Court's Order, the Respondent and I were ordered to share equally the medical, dental and optical expenses for our son. The monthly insurance premiums are i) medical \$87.33; ii) dental \$16.40; iii) optical \$6.93; for a total of \$87.33 per month. Over the period of the Order from 28<sup>th</sup> December, 2021 to date, I have paid the total sum of \$2,532.57 (29 x 87.33). The Respondent's one half under this head totals \$1,266.29"*.

41. I accept the wife calculations describing the husband's arrears for medical, dental and optical expenses from 28<sup>th</sup> December, 2021 to the date of her affidavit on 9<sup>th</sup> April, 2024. Twelve (12) months at **\$87.33** per month amounts to **\$1,047.96**, a sum payable by the husband.

42. It is appropriate for this court to exercise its discretion in a final determination of this issue. Notwithstanding the statutory provisions as outlined above this court has an overarching discretion with regard to the wife's application.

*Ritchie v. Ritchie [2003] BHS J. No. 137, Copy Citation Bahamas Supreme Court, Divorce and Matrimonial Side, 2000 FP/76, Isaacs J. (Acting)*

*The principle applied in the case of Bellenden (formerly Satterthwaite v. Satterthwaite (1948) 1 A.E.R. applies equally here. It was there stated that:*

*"the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of the parties to the marriage."*

In that case both parties re-married after the divorce, and maintenance for the wife was reduced from 400 pounds sterling less tax per year to 1 shilling, which order was upheld on appeal.

43. Pursuant to the above stated positions and there being no special circumstances to justify departure from the general rule prohibiting enforcement beyond the Twelve (12) month period, I



am satisfied that the husband should pay the arrears outlined herein which together total **\$7,852.00**.

**CONCLUSION**

44. The husband's 35% interest in the net proceeds of a sale of the former matrimonial home by Order dated 6<sup>th</sup> January, 2022 is declared to be **\$33,289.90**.

45. Within Sixty (60) days of the date of this Order the wife do pay to the husband the sum of **\$33,289.00** the equivalent of his 35% interest in the net value or sales proceeds in the matrimonial home situate Golden Meadows, off Golden Isles Road, and thereafter the husband do forthwith vacate the matrimonial property.

46. The husband within (60) days of the date of this Order transfer to the wife all his right title and interest in and to the matrimonial property situate Golden Meadows off Golden Isles Road and should the husband fail and/or refuse to do so, the Registrar of The Supreme Court is appointed to execute the Deed of transfer on his behalf.

47. The husband do, from his portion of the net value of the said matrimonial property situate Golden Meadows off Golden Isles Road, pay to the wife the sum of \$ **7,852.96** representing the arrears owing under the maintenance Order, dated the 7<sup>th</sup> December, A.D. 2021 within Sixty (60) days of the date hereof, failing which the wife shall deduct the said sum from the sum of **\$33,289.00** which is ordered to be paid to the husband.

Dated the <sup>7<sup>th</sup></sup> 10 day of *September* A.D., 2024



The Honourable C.V. Hope Strachan J.

