

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

**2019/FAM/DIV/No.00191**

**BETWEEN**

**MISKA JOHN CLARKE**

**Petitioner**

**AND**

**DENISE SHIRLEY CLARKE (nee Johnson)**

**Respondent**

**Before:                   The Hon.Madame Justice Donna D. Newton**

**Appearances:                   Darren Bain for the Petitioner  
  Sonia Trinity for the Respondent**

**Hearing Date(s):   19<sup>th</sup> July, 2022; 24<sup>th</sup> April, 2023**

**Decision:               14<sup>th</sup> August 2024**

**RULING**

**NEWTON J:**

***Divorce - Ancillary Relief - Property Adjustment -- Equal Sharing - Departure from the Equal Sharing Principle - Section 29 Matrimonial Causes Act***

### **Background:**

1. This is an application for property adjustment pursuant to the Notice for Ancillary Relief filed on the 7<sup>th</sup> September, 2021. The Parties were married on the 14<sup>th</sup> July 2006, there are two children of the marriage who are both sui juris. The Decree Absolute was granted on the 14<sup>th</sup> January 2022.
2. The Petitioner and Respondent filed their affidavit of means on the 24<sup>th</sup> June 2020 and the 7<sup>th</sup> September 2020 respectively.
3. There are four properties and a 2012 Cherokee Jeep which are the subject of this application, all of them are located in Eleuthera. There is the property located in Rainbow Bay "*Rainbow Bay*" which holds the matrimonial home; there is the property located in Gregory Town "*Gregory Town-1*" which holds a convenience store called "*John Clarke Discount*"; there is also the property located in James Cistern. "*James Cistern*" on which there is a two story structure which houses a Variety Store (*the "JC Store"*) and three two bedroom one bath apartments and there is another property located in Gregory Town which is a vacant lot "*Gregory Town-2*".

### **Petitioner's Evidence:**

4. The Petitioner was employed with BTC (Bahamas Telecommunications Corporation) and held the post of Senior Technical Associate. He said it was during his employment he enrolled in a voluntary contributory pension plan with the BCPOU Pension Management Fund, from which he was able to secure loans against his contributions which enabled him to purchase the properties.
5. Counsel for the Petitioner submitted that the Respondent is not entitled to an equal share of the properties. He further submitted that ***"an award of twenty percent, most specifically- the petitioner transferring his interest in the Rainbow Bay Property and the Cherokee Jeep to the Respondent would be fair distribution of the assets"***.

6. The Petitioner in his Affidavit of Means filed 7<sup>th</sup> September, 2020, provided numerous documents to support his position as to why the court should accede to his request regarding the distribution of the assets.

### ***Rainbow Bay***

7. The Petitioner stated that he purchased this property in 2002 and he obtained a mortgage to construct the home. He said that he made the mortgage payments from his salary with no assistance from the Respondent. This mortgage has been satisfied. He also stated that he paid all the utilities in the home without any assistance from the Respondent. He noted further that after the marriage in 2006 the Respondent moved into the home. The matrimonial home has been appraised at \$297,000 in 2020.

### ***Gregory Town - 1***

8. This property was also purchased before the marriage (in 2004), and was subject to a mortgage which is now satisfied. According to the Petitioner, he alone made all the mortgage payments to this property without any assistance from the Respondent. He said the payments were made from his salary. He explained that the *Discount Store* is located on this property and that he used funds from his personal savings to purchase the stock, furnishings and shelving for the store. However, he explained that the Respondent accommodated him on the trips to the United States to purchase items, which she assisted in selecting, for the store. However he said the costs of the trips were always from his personal savings.

### ***James Cistern***

9. The Petitioner states that this property was purchased in December 2006, after the marriage, in the name of John Clarke Limited (“the Company”). According to the Petitioner, the property was purchased from his personal funds. That each Party holds one share in the Company. Despite the shareholding, the Petitioner said the capital investment in the Company came directly from him. He said that he obtained personal loans from the Pension Fund to support the Company and the stores.
10. He explained that the Company’s mortgage is directly linked to his personal account and that he is a personal guarantor for **“all the mortgage facilities the Company has received”**. This property holds the Variety Sore and the apartment units. It is valued at

11. He stated further, that the Respondent is an employee of the company which fact she has acknowledged. To support this he exhibited a letter written by the Respondent confirming this. According to him, the Respondent has not contributed to the mortgage payments, the maintenance or upkeep of this property, nor has she contributed to the operational costs of the store.

### ***Gregory Town Property 2***

12. The Respondent further explained that from his personal savings he purchased this property in 2016 without any contribution from the Respondent. This property is vacant land.

### **Respondent's Evidence:**

13. The Respondent contends that she should be entitled to a fifty percent share of the matrimonial assets. More specifically she stated that both the *James Cistern* and *Rainbow Bay* properties in addition to the Cherokee Jeep should be transferred to her.

14. The Respondent stated that the reason why the properties should be transferred to her because she managed the stores and that the profits from them were used to repay the mortgages.

### **The issues are:**

- a) *Whether all the disputed properties are matrimonial assets?*
- b) *Whether the parties are entitled to an equal interest the matrimonial property?*

### **Matrimonial Assets:**

15. In **Rossi v. Rossi [2006] EWHC 1482 (Fam)**, Judge Nicholas Mostyn QC provided useful guidance on the distinction between the non-matrimonial and matrimonial property as follows:

- 1). the matrimonial property is likely to be divided equally, although there may be departure if (i) the marriage is short, and (ii) part of the matrimonial property is 'non-business partnership, non-family assets or if the matrimonial property is represented by autonomous funds accumulated by dual earners; and
- 2). the non-matrimonial property is not in fact quarantined or excluded from the court's powers. It simply represents an unmatched contribution by the party who brings it to the marriage. The court must decide whether it should be shared and, if so, the proportions in which it is to be shared.

16. In **Miller v Miller [2006] 3 All ER 1**, the court observed at paragraph 22 that :  
“...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. As already noted, in principle the entitlement of each party to share of the matrimonial property is the same however long or short the marriage may have been.”

17. This position was affirmed by the Bahamian Court of Appeal in **Julius Dianza Chisholm and Ophelia Arnette Chisholm(nee Bateman) SCCivApp.No.127 of 2020** as Sir Barnett, P opined:

18. *“It is not the law that assets acquired before a marriage are irrelevant to determine fairness.”*

19. Therefore, despite the Petitioner having acquired the property prior to the marriage, it may still be determine whether it is matrimonial property. Simply put, it does not matter that the property is owned solely by the Petitioner and the mortgage is solely in his name. I have considered the case of **Chisholm** on this issue where the appellate court also referenced **Miller v Miller**.

20. In **Watchel v Watchel [1973] 1 All ER 113** Lord Denning defined family assets in this way :

*“The phrase ‘family assets’ is a convenient way of expressing an important concept. It refers to those things which are acquired by one or the other or both of the of the parties, with the intention that they should be continuing provision for them and their children during their joint lives and **“used for the benefit of the family as a whole”** . (Emphasis mine)*

1. From the evidence, the parties resided in the *Rainbow Bay Property* where they raised their children from 2006 until the break-down of the marriage in 2017.

In considering the above, I find that the *Rainbow* property on which the home is situated is to be treated as the matrimonial home. Although acquired prior to the marriage, it was used for the benefit of the family as a whole and therefore constitutes a family asset.

2. The evidence also shows that the parties have an equal shareholding in the company John Clarke Limited. That the company purchased the property in James Cistern and established a variety store called “John Clarke Discount”. However, I accept the properties in Gregory Town based on the evidence are

solely owned by the Petitioner and are non-matrimonial. (v) also the Cherokee Jeep was jointly own by the parties and used for the benefit of the family.

### **Equal Sharing:**

3. Sections 27 and 28, of the Act gives the Court the power to make financial provision orders for the parties to a marriage and orders for property adjustment. Section 29 of the Act sets out factors that ought to be considered when determining settlement of property, which include, the income of the parties, their financial needs, their obligations and responsibilities, the age of the parties, and their physical and mental disabilities.

4. In **A v B [2010] 2 BHS J.No.18** Barnett CJ in explaining the court's approach to the property adjustment issue stated that:

*"The objective of the Court is to be fair. In my Judgement, the modern-day approach to a division of property in a marriage is that fairness is, an equal sharing of the property in a marriage unless there is compelling reason to depart from equality."*

5. Also, **White v White [2001] 1 All ER 1** established the 'yardstick of equality' or 'equal sharing' principle between the parties to a marriage. Lord Nicholls said:

*"In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife, or forced upon them by circumstances, fairness required that that should not prejudiced or advantaged either party when considering s25(2)(f) of the 1973 Act."*

*If, in their different spheres, each contributed equally to family, then in principle it did not matter which of them earned the money and built up the assets. It followed that before making an order providing for an unequal division of assets, a judge would be well advised to check his tentative views against the yardstick of equality of division."*

*As a general guide, equality should be departed from only if, and to the extent that, there was good reasons for doing so. The need to consider and articulate reasons for departure from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."*

6. In **Jupp v Jupp SCCrApp No.37 of 2011** then President of Appeal Dame Anita Allen explained that:

*"The statute requires that you look at all the circumstances and you make the order which put 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.”*

7. Having found that the Cherokee Jeep, Rainbow and JC properties are matrimonial properties, I now turn to determine what is a fair division based on the facts and evidence proffered in this case. The Petitioner submitted that the Respondent ought only to be entitled to twenty percent of the marital asset which ought only to include the Rainbow Property and the Cherokee jeep.
8. I consider the marriage a short one, some seven years. I accept the Petitioner's evidence, that throughout the marriage he made all the utility bill payments for the home. Further, that the funding for the establishment of the business were from his personal account and that he was the guarantor for all the loans. I also accept that the Respondent worked in the business receiving a salary. This is evident from a letter produced by the Petitioner confirming that she was hired by the business. I do not find that she contributed evenly to the family assets.
9. In support of the Petitioner's submissions the recent decision of the Court of Appeal, **Sherwin Dames v Levette Dames SCCiv App.No.64 and 65 of 2021** is relied on.
10. In Dames' case the Court awarded the Appellant twenty percent of the equitable value less any mortgage payment as Sir Michael Barnett at para.40 explained that although it is a significant departure from the equal sharing principle, in relation to matrimonial assets, it reflects the trial judge's findings that the husband, during the course of the marriage, did not contribute to the home as would have been expected in a marriage partnership.
11. I find the parties are entitled to share equally in the assets of the Cherokee Jeep , both JC and Rainbow Properties
12. **Disposition:**
13. Considering the Petitioner is willing to relinquish all his interest in the Rainbow Bay property and the Jeep, I order that he does so within 90 days.
14. I make the following orders: -

- (i) That Lot No.16 Block No.52 in Rainbow Bay Subdivision in James Cistern which holds the matrimony home together and Cherokee Jeep are conveyed in the name of the Respondent.
- (ii) That the Petitioner makes a lump sum payment to the Respondent representing her 20% interest in the James Cistern property within ninety days.
- (iii) The Petitioner pays the Respondent the value of her single share in the company, John Clarke Limited.
- (iv) The Respondent relinquishes all rights and ownership in the John Clarke Company Limited.
- (v) Each party to bear its own costs.

**Dated this 14th day of August 2024**



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**Hon. Madame Justice Donna D. Newton**