

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

2022

FAM/div/00585

E. K. R. nee S.

Petitioner

AND

E. C. R.

Respondent

AND

UNKNOWN WOMAN

Co-Respondent

Before: **The Hon. Madame Justice J. Denise Lewis-Johnson MBE**

Appearances: Lillith Smith-Mackey of Counsel for the Petitioner
Tanya Wright of Counsel for the Respondent

Hearing Dates: 30th November 2022; 21st February 2023; 13th March 2024; 27th May 2024;
27th June 2024; 1st July 2024; 8th April 2025;

Divorce – Ancillary relief – Property adjustment – Condominium – Matrimonial Causes Act – Non matrimonial property – Property acquired before marriage - Whether the condo owned solely by the Petitioner is to be considered a family asset – Equal sharing principle – Should the court depart from the equal sharing principle – Fairness

JUDGMENT

Introduction and Background

1. E.K.R (“the Petitioner”) and E.C.R (“the Respondent”) were married on 23rd May 2008. The marriage produced three children, L.A.R a female born on 11th December 2008, M.J.R, a female born on 24th February 2012 and K.A.E.R, a male born on 18th May 2017.

2. On 26th January 2023, the court granted a Decree Nisi to the Petitioner on the ground that since the celebration of the marriage the Respondent has treated the Petitioner with cruelty. The Petitioner filed a Notice of Intention to Proceed with Ancillary Relief (“the Notice”) and an Affidavit of Means in support of her application. Both the Notice and the Affidavit of Means were filed on 21st June 2023. Subsequently, the Respondent filed an Affidavit on 20th March 2024.
3. By an Order dated 30th November 2023, the parties reached a consent position regarding the children of the marriage and the matrimonial home situated at Lot Number 2 Deal’s Heights in the Eastern District of New Providence, The Bahamas (“the Deal’s Heights property”).
4. The only issue between the parties is a condominium known as Little Haven Condominium (“the condo”) located Joe Farrington Road in the Eastern District of New Providence, The Bahamas.

Petitioner’s Evidence

5. It is the Petitioner’s evidence that she is employed as a Retail Sales Executive and earns a salary of \$6,865.00 per month. Prior to the breakdown of the marriage, the Petitioner estimated that the Respondent earned approximately \$60,000 to \$80,000 per annum as a Project Manager/Contractor.
6. The Petitioner acquired the condo in 2006, prior to the marriage. In her Affidavit of Means filed on 21 June 2023, the Petitioner stated that it was agreed between her and the Respondent that the condo would not be considered a part of the matrimonial property.
7. According to Petitioner, the condo comprised of 2 bedrooms and 1.5 bathrooms. It was agreed between the parties to purchase a home that would be suitable for their growing family.
8. It is the Petitioner’s evidence that she paid the condo’s mortgage in full except for two years which the Respondent began making payments towards the mortgage.
9. Both parties resided at the condo for a period of 8 years and during the majority of that time the Respondent paid the utilities while the Petitioner paid the mortgage. In 2017, the Petitioner and Respondent purchased the Deal’s Heights property.

Respondent’s Evidence

10. It is accepted by the Respondent that the Petitioner purchased the condo but his evidence is that the date of purchase was sometime in 2007.

11. The parties used the condo as collateral for a loan. The condo was mortgaged to the bank to secure a loan for the purchase price of \$170,000.00. The term of the mortgage was 15 years and the monthly payment was \$1,250.00.
12. The monthly utility bills and household expenses were shared equally between the parties. It is the Respondent's evidence that the condo was intended to be their temporary home, however the condo became their permanent home, until the matrimonial home was constructed. The parties lived in the condo for 11 years with their two daughters until 2018.
13. The Respondent worked as an Information Technology Manager with Credit Suisse Trust Limited Bahamas earning approximately \$77,000 per year. The Petitioner was employed at Solomon Mines as a Buyer. She earned around \$48,000 per year.
14. The parties used the condo as collateral to secure financing for their business, Lullaby Limited.
15. In 2009, shortly after giving birth to the couple's eldest child, the Petitioner lost her job. She was unemployed for a period of 3 ½ years before securing a job with Thompson Trading Co. She worked for a period of 6 to 8 months and became unemployed again for approximately 6 months. During those times when the Petitioner was unemployed, the Respondent says he was solely responsible for paying the mortgage for the condo.
16. Equally, the Respondent admitted that there were times when he suffered financially and the Petitioner would take on the responsibility of the family.
17. In the past the condo was rented for around \$1,100.00 per month. The rental income was used to pay towards the condo's mortgage. Any shortfall from the rent, the mortgage would be paid either by the Petitioner or the Respondent.
18. Presently, the condo is being rented, and the Petitioner receives all of the rental income. It is the Respondent's assertion that the mortgage for the condo will be paid off shortly which will be a source of income for the Petitioner.

Petitioner's Submissions

19. The Petitioner's Counsel submits that the payments made by the Respondent towards the mortgage are not sufficient for him to be entitled to an equitable interest in the condo. Further, the Respondent played no part in purchasing the condo.
20. The Respondent only produced a handful of receipts which he alleged was his money used to pay the mortgage for the condo.

21. The Petitioner accepts that the Respondent made payments towards the mortgage for the condo, however, it is her view that the payments were only made for a period of two years when the Petitioner was unemployed. According to the Petitioner, the Respondent only contributed half towards the household expenses and did not contribute at all to purchasing the condo. The Petitioner paid the mortgage in full in addition to half of the household expenses.
22. Counsel referred the court to **Kirke v Kirke 1961 - 1 WLR 1411** at 1412 – 1413. Scarman J stated that the court must exercise its “*discretion according to the particular circumstances of the case in so far as they show to what matters the Court had regard in the exercise of its discretion.*”
23. The court must also have regard to section 29 of the MCA when exercising its discretion in ancillary proceedings. In relation to s. 29 (a), Counsel submits that the parties still have earning potential. In respect of s. 29(b), the Petitioner had to remortgage the former matrimonial home which has a huge debt to pay, while the Respondent has no debt.
24. Section 40 (1) of the MCA should also be considered by the court in property adjustment matters where substantial contributions have been made by the parties towards the condo.
25. The modern position on the law of property adjustment can be found in **Charmin v Charmin (2007) EWCA Civ at 503** which establishes the principles that judges should apply in applications for property adjustment. See also **Miller v Miller (2005) EWCA civ at 984.**
26. The starting point is a 50/50 division of the assets between the parties which can be varied depending on the parties’ needs and circumstances. The modern approach was discussed by Sir Michael Barnett, as he then was in **A v B (2008) Fam/div/132** where the court awarded an interest in the property to the wife.
27. In **M v T 2008/FAM/div/203 Supreme Court Unreported**, Justice Evans, as he then was, departed from the 50/50 approach because it was considered that the Respondent’s behavior was unfair throughout the marriage. In that judgment, the Petitioner was awarded 80% interest in the property while the Respondent received 20%.
28. In **TM and SM 2013/FAM/div/FP/00005** the wife did not own the property and was not able to show evidence of contributions made, therefore the court did not award any interest in the property to her.
29. Even though a consent order is in place between the parties concerning the children, the Respondent has failed to consistently contribute towards the monthly maintenance for the children. Currently, he is in arrears which leaves the financial burden on the

Petitioner to take care of the children in addition to her paying/absorbing the debt of the Respondent.

30. In terms of contribution to the property, Counsel submits that the Respondent has showed no proof of his contributions which would justify half of the equity in the condo. In this regard, it is Counsel's submission that this case is one where the Court should depart from the equal sharing principle.

Respondent's Submissions

31. Counsel submits that the court is required to consider s. 29 of the MCA. In the case of **Jupp v Jupp SCCrApp No. 37 of 2011**, it was 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 case law must be construed in this light. The statute requires you to look at all the circumstances and you make the order which puts the parties in the financial position so far as it is 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 trial judge to list the assets of the family and to divide them one by one. The trial judge must look at the circumstances on the whole, examine the entire context of the case and make an award accordingly, stating sufficient reasons for the same."

32. Considering each of the provisions of s. 29, Counsel submits:

- (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:
- a. The Killarney Shores property was potentially in foreclosure due to nonpayment of arrears. The Respondent has transferred his interest in the Killarney property to the Petitioner and signed a Deed of Release in her favour without any compensation. The Petitioner has been negotiating with the bank to remortgage the property and pay the debt. The Respondent was allowed by court order to stay in the home until the bank approved the refinancing of the mortgage, however the Petitioner had the locks changed thereby prohibiting the Respondent access to the property.
 - b. The Petitioner receives the rental income from the condo. The Respondent is of the view that the mortgage over the condo has been paid in full. See **2006/FAM/DIV/00148 ABC and ECM** the Petitioner collected the rental income in full.

- c. The Respondent by Consent Order of the court contributes \$700 monthly towards the maintenance of the children of the marriage.
- (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:
 - a. The Petitioner will have the benefit of both the condo and the matrimonial home.
 - b. The Respondent is renting and has no assets
- (c) The standard of living enjoyed by the family before the breakdown of the marriage:
 - a. The Petitioner and the Respondent are educated and enjoyed a modest lifestyle.
 - b. The Respondent is struggling to keep the standard he was accustomed to during the marriage.
- (d) The age of each party to the marriage and the duration of the marriage:
 - a. Both parties are professionals and middle aged.
- (e) Any physical or mental disability of either of the parties of the marriage:
 - a. None
- (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:
 - a. The parties shared the expenses during the marriage and shared the role of money earner, home maker and child carer.
- (g) In 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:
 - a. None

33. Counsel referred the court to the Court of Appeal decision of **Rosemary Edith Burrows (nee Knowles) v Sylvester John Burrows SCCivApp. No 58 of 2021**, the Court referred to the case of **White v White [2001] 1 AC 596**, Lord Nicholls stated:

“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.”

34. In a further decision of **Miller v. Miller; McFarlane v. McFarlane, [2006] UKHL 24**, guidance was given by the House of Lords as to how the wide discretionary powers are to be exercised in order to achieve ‘a fair outcome’. Lord Nicholls of Birkenhead at paragraphs [8] and [9] opined:

“[8] For many years one principle applied by the courts was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant’s award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling thus put in place was shattered by the decision of your Lordships’ House in the White case. This has accentuated the need for some further judicial enunciation of general principle.

*[9] The starting point is surely not controversial. **In the search for a fair outcome, it is pertinent to have in mind that fairness generates obligations as well as rights.** The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. **It is not a case of ‘taking away’ from one party and ‘giving’ to the other property which ‘belongs’ to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property.** The search is always for what are the requirements of fairness in the particular case.” [Emphasis added]*

35. In ancillary proceedings, the overall goal of the Bahamian courts is “to achieve a fair result” in accordance with the MCA. See. **A v. B [2010] 2 BHS J. No. 19; Sawyer v. Sawyer SCCivApp. No. 134 of 2014; Collie v. Collie SCCivApp. No. 19 of 2015; Munroe v. Munroe SCCivApp. No. 120 of 2018; and Chisholm v. Chisholm SCCivApp. No. 127 of 2020.**

36. Miller v McFarlane, supra, Lord Nicholls said at paragraph 21

“[21] ... By s. 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future. [22] This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One

of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes call the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavor, the latter is not. 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 the marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been."

The Issues

37. Whether the condo is a family asset?
38. Is the Respondent entitled to an equal share of the condo? If not, is he entitled to an interest and if so what is that percentage.

The Law

39. Section 25 (2) and 28 of the Matrimonial Causes Act, Ch. 125 permits the Court to consider property adjustment. These sections provide:

“25 (2) The property adjustment orders for the purposes of this Act are the orders dealing with property rights available (subject to the provisions of this Act) under section 28 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say —

(a) any order under subsection (1)(a) of that section for a transfer of property;
(b) any order under subsection (1)(b) of that section for a settlement of property;
and (c) any order under subsection (1)(c) or (d) of that section for a variation of settlement.

(3) Where the court makes under section 27 or 28 a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale in which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.

28. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made

absolute), the court may make any one or more of the following orders, that is to say —

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

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them...”

40. Section 29 of the MCA are the matters that the court ought to consider in determining the exercise of its powers under ss. 25 and 28.

“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.”

41. Section 40 of the MCA permits for the sale of the home or the court may direct a payment to be made.

“40. (1) The court, on granting a decree of divorce, if it is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever), may, if it thinks fit on the application of either party made before the decree of divorce is made, make in lieu of any order under section 25(3) affecting the matrimonial home an order —

(a) subject to subsection (2) directing the sale of the home (including the land on which it is situated and such other land appurtenant thereto as the court directs) and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the court thinks fit; or

(b) directing that either party pay to the other such sum, either in one sum or in instalments and either forthwith or at a future date and either with or without security, as the court thinks fair and reasonable in return for the contributions made by that other party.”

Decision

Issue 1: Whether the condo is a family asset?

42. In any ancillary proceedings concerning property adjustment, the court is obligated to consider the provisions of ss. 25 (2), 28, 29 (1) of the MCA. The issue in dispute is whether the condo owned solely by the Petitioner should be treated as a family asset. When considering what is a family asset, the court is guided by authorities such as **Wachtel v Wachtel [1973] 1 All ER 829** where Lord Denning stated that family assets:

“... refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.”

43. Similarly, in the Court of Appeal decision in **Dean v Dean (1991) BHS J No. 164**, Henry P defined family assets —

“... it is clear that it is not every capital asset acquired by the party to the marriage either before or during the subsistence of the marriage that will automatically become a family asset. The intention of the party acquiring the asset is vital if one of the spouses acquire a house and meets the purchase and furnishing expenses exclusively but nonetheless use the house as the matrimonial home, the house acquire the attribute of family assets because of the intention of the spouse in whom the legal ownership resides and because the house is being used for the benefit of the family as a whole.”

44. The Petitioner admitted that she purchased the condo prior to the marriage. This was not denied by the Respondent. The Petitioner paid most of the condo's mortgage. She stated that the Respondent contributed to the mortgage only for two years when she was unemployed. The Respondent provided receipts which showed payments being made to Finance Corporation towards the mortgage for the condo for the period 2007 to 2015.
45. Even though the Petitioner's evidence is that the condo was not to be considered matrimonial property, she admitted that she, the Respondent and the children resided in the condo for approximately eight years. This length of time is disputed by the Respondent, he stated that they resided in the condo for 11 years before moving to the Deal's Heights property. Two of the children were born during the time they lived in the condo. The Respondent averred that the home was intended to be their temporary home until the matrimonial home was built, I accept this evidence.
46. In the case of **Roberts v. Roberts BS 2007 SC 80** Lyons J stated that:-
- "20. ... the law in The Bahamas, as applied to the matrimonial Causes Act, is that, where the property at issue is held only in the name of one of the parties, the other party must present to the court sufficient evidence of the expression of a common intention that the subject property was (or is) intended to be held jointly in such proportion as one agreed or determined by the court."*
47. The Petitioner and the Respondent shared equally the household bills and expenses. It is clear from the Respondent's evidence that the condo was being used for the benefit of the family. It was used as collateral to establish their business, Lullaby Limited. Eventually, the condo was rented and the rental income was used to pay the mortgage.
48. Taking into consideration the above, the court declares that the condo is a family asset as they resided in the condo for a significant period of time and it was used for the benefit of the family.

ISSUE 2: Is the Respondent entitled to an equal share of the condo? If not, is the Respondent entitled to an interest and if so what is that percentage?

49. I accept that the equal sharing principle is a guiding principle in property adjustment, if the parties have been married for at least ten (10) years which is considered a long marriage the starting point is fifty percent to each party. This equal sharing principle generally holds unless there are compelling reasons to depart from it. Chief Justice Michael Barnett (as he then was) in **A v. B [2010] 2 BHS J No. 18** stated:

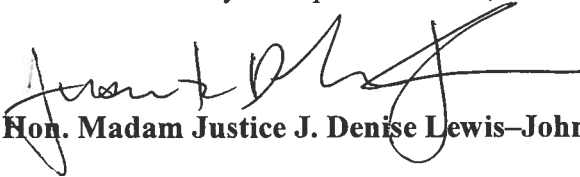
"The modern-day approach applicable for the division of matrimonial property, is an equal sharing of the property, unless there are compelling reasons to depart from equality. The law is perhaps best summarized in the judgment of the English Court of Appeal in Charman v Charman [2007] 1 FLR 1246. "The 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 led to an equal division to be unequal. It also tallied with the overarching objective: a fair result.”

50. I accept that the Respondent’s submission that the court is required to consider the factors of **Section 29 of the MCA**, prior to applying any principle established in case law. This was determined by Dame Anita Allen in **Jupp v Jupp** as quoted above.
51. I will not restate the Section 29 considerations, the Respondent has laid them out in his submissions, I have considered each of them and there is nothing significant that would cause the court to find that the Respondent does not have an interest in the condominium. The parties are healthy and employable; neither are nearing retirement age. The parties were married for 14 years and for a minimum of 8 years (if I accept the Petitioners position) lived in the condominium and it served as the matrimonial home. The both contributed to its upkeep and mortgage. I would be unfair to find that the Respondent has no interest. The Petitioner acknowledged that she was unemployed for at least two years and he paid the mortgage. The only issue for this court is what percentage interest should be given to the Respondent.
52. Neither party provided the court with an appraisal of the condo to determine its current value and it is alleged that the condo is subject to a mortgage. A copy of the mortgage was not provided to the court and I am uncertain if it has been satisfied or there continues to be a lien on the condo.
53. In order to achieve the overall objective of fairness, the court considered all of the circumstances of this case, the considerations of Section 29 and the authorities. It is usual for parties to minimize the contributions of each other at the break down of the marriage, however, all evidence indicate that the parties worked and supported each other through their challenges, whether unemployment or otherwise. There is no clear evidence that this was not to be a matrimonial asset. Its mere acquisition prior to marriage does not automatically make it the sole asset of the party whose name it is in.
54. The Respondent having contributed toward the mortgage, paying half of the utility bills and other expenses of the family, has gained an interest in the condo of at least Thirty (30%) percent of its equity.
55. Having considered the evidence of the parties, the submissions of counsel and the law, the court finds as follows:
 1. That the condo is a matrimonial asset.

2. That the Respondent is entitled to Thirty percent interest (30%) in the equity of the condominium and the Petitioner to Seventy (70%) percent interest in the equity.
3. That the Petitioner has Sixty (60) days from the date of this ruling to secure financing, if necessary, for the purchase of the Respondent's equity. Should the Petitioner be unable to secure financing, the condo will be sold and the net proceeds shall be distributed 70% to the Petitioner and 30% to the Respondent.
4. That the Petitioner is to pay 30% of the Respondents cost, to be taxed if not agreed.

Dated this 2nd day of September A.D., 2025


The Hon. Madam Justice J. Denise Lewis-Johnson