

**COMMONWEALTH OF THE BAHAMAS**

**2007**

**IN THE SUPREME COURT**

**335**

**Family Division**

**BETWEEN: -**

**RW**

**Petitioner**

**AND**

**DW**

**Respondent**

**AND**

**INH**

**Woman-Named**

**Appearance:** Marylee Braynen Symonette for Petitioner  
Al-Leecia Delancy for Respondent

**Hearing Dates:** 2021– 18<sup>th</sup> January; 9<sup>th</sup> January  
2022 – 10<sup>th</sup> February; 22<sup>nd</sup> February; 20<sup>th</sup> July; 13<sup>th</sup> September;  
14<sup>th</sup> September  
2023 - 30<sup>th</sup> March; 28<sup>th</sup> June, 12 December  
2024 - 30<sup>th</sup> April; 14<sup>th</sup> May; 15<sup>th</sup> May

**Decision:** 27<sup>th</sup> February 2025

**Headnotes:**

*Divorce - Property Adjustment - Equal Sharing Principle - Division of Assets – Occupational Rent- Spouse’s Pension Entitlement - Matrimonial Causes Act- Section 29 considerations.*

## **RULING**

### **NEWTON J:**

The instant Application for ancillary relief is filed on behalf of the Petitioner (Wife) in July 2012. The Wife is asking for the following relief:

- a) \$84,000 as occupation rent from February 2011 to November 2019,
- b) That the Order of the Court of Appeal that the Husband pays the Wife \$800 monthly, remains until she receives her one half interest.
- c) \$200,107.97 as occupation rent from the Golden Gates property from February 2011 to October 2024.
- d) \$1,250 per month as occupation rent from 1st November 2024 until the Wife is paid her interest.
- e) \$13,456 as a payment for her interest in the boat.
- f) \$13,000 for her 1499 shares in Wilmed Ltd. with interest from January 2011 until payment at the statutory rate.
- g) \$991,362.50 as her interest in the matrimonial home.
- h) \$118,905.25 as her interest in the Golden Gate Clinic.
- i) 6.5% interest on the sums owing
- j) All properties be sold and the Wife retains the proceeds owing to her.

The Husband claims:

- a) The matrimonial home in South Ocean to be sold and the proceeds divided as to 75% to the Husband and 25% to the Wife.
- b) \$800 ordered by the Court of Appeal to cease and the payments made are to be set off against any payment to be made to the Wife.
- c) Blue Hill Road property to be sold and proceeds divided as to 100 percent to the Husband or alternatively 80% to Husband and 20% to the Wife.

### **Background**

This has been a fairly long marriage some 23 years. The Parties were married in 1988 and there are two children of the marriage both of whom are sui juris. The Decree Nisi was granted on the Husband's adultery in 2012 and made Absolute.

The ancillary application was previously heard by two justices, one of whom demitted office before giving a decision and the other whose decision, except for

the declaration, was set aside by the Court of Appeal. The Court of Appeal at that hearing ordered that the Husband pays \$800 monthly to the Wife until the resolution of this matter.

There has been a plethora of affidavit evidence (22) filed in this matter between the Parties.

The family resided in an apartment owned by the Wife's mother for 11 years prior to moving into the matrimonial home in South Ocean. The Wife left the home in 2011. The Wife is a microbiologist and employed with the Bahamas Government while the Husband is a Physician in his own practice.

### **Issues**

The issues are;

- a) What are the matrimonial assets?
- b) How are these assets to be divided between the parties?
- c) Is the Wife entitled to occupational rent?
- d) Is the Husband entitled to the Wife's Pension?
- e) Should there be a costs order?

### **Matrimonial Assets**

The Wife is requesting that the matrimonial assets are divided equally. She identifies them as

- a) The matrimonial home located Lot 20 Country Club Estates, South Ocean (South Ocean home)
- b) Lot No. 12 Golden Gates Estates
- c) Wilmed Ltd. t/a The Golden Gates Clinic
- d) B & J Auto Sales
- e) Apartments in Golden Gates
- f) Vacant Land South Ocean
- g) Boat

The Husband adds to this the Wife's Public Service Pension and her Pension with British Fidelity.

### **South Ocean home**

The Wife's evidence is that while they resided in the mother's apartment, she paid the rent. The Husband however questions this as he says he was not aware that rent was paid to her mother.

There is no dispute between the Parties that this property is the matrimonial home. The question is what is a fair division between the parties.

The Wife submitted that the parties purchased this property together and together they built the matrimonial home out of their pockets. She said that she, together with the children assisted in the construction by mixing cement. She also stated that she worked inside as well as outside the home. That she spent her earnings in the home, purchasing groceries, caring for the children and the Husband, as they did not have a domestic helper. She said that she obtained a loan from the bank (which she repaid) a portion of which was used to purchase the windows for the home.

The Wife submitted an appraisal dated 2014 which gives a value of the home at \$1,982,752. The valuations are at variance with one another and since they are both more than 10years old I would order that a new appraisal be done at the joint expense of the Parties.

Counsel for the Wife submitted that her contribution in proportion to her salary is more than that of the Husband's. Thus she said that she is entitled to an equal share in the matrimonial home.

The Husband on the other hand refuted the Wife's evidence as to her contribution to the family and to the construction of the home.

He said that he managed and performed most of the work on the construction himself, building it from the ground up.

He stated that he paid the deposit on the property as well as made all the mortgage payments to the bank. He stated further that he paid all the taxes on the property.

He explained further that the roof of the house was destroyed by hurricane and he alone had to repair it without any assistance from the wife.

He submitted an appraisal report dated 2012 which valued the home at \$758,000

Additionally he said he cared for the children after the Wife left in 2011.

Counsel for the Husband submitted that he made substantial financial contributions to this property as well as the Golden Gates property and these are compelling reasons to depart from the equal sharing principle.

For these reasons he said that the interest in the matrimonial home should be divided as to 75 per cent to him and 25 percent to the Wife.

Golden Gates Estates

The Wife submitted that they both acquired this property together with the intention that it is used for the Husband's medical practice. She provided an appraisal report (2014) which valued it at \$239,651.

The Husband agrees that the purpose of obtaining this building was to operate his practice. He said that he provided the deposit for this property. He also stated that they obtained a mortgage on this property to which he continues to pay in addition to paying the taxes on it, without any assistance from the Wife. He said he has undertaken renovations which improved about 50 per cent of the building. This again she submitted is another reason to depart from the equal sharing principle. He provided a 2012 valuation of this property as 236,000 some \$3,000 less than the Wife's.

Counsel for the Husband submitted that for these reasons the court should depart from the equal sharing principle.

I accept the Husband's submission that these are reasons to depart from the equal sharing principle.

### Wilmed Limited

According to the Wife's evidence, she owns 1499 shares in this company which is jointly owned by the Parties and was established for the operation of the Husband's medical business. She said she worked many hours in the clinic during the week and on weekends. That she was not an employee but a partner. She is requesting that she is paid the value of her shares.

The Husband says the company never acquired any assets and though it was established to operate his medical clinic it never did so. He stated that the licence for the practice was always in his name because it would be a breach of the Medical Legislation to have a partnership with someone who is not a medical practitioner.

I accept that at some point the Husband did operate his clinic out of Wilmed I am not clear how much of the business operated out of the company or whether the company was used solely for the bank account.

### Occupation Rent

Counsel for the Wife argued extensively that the Wife should be paid occupational rent because she was forced to flee the matrimonial home because of the Husband's cruelty.

She submitted that the Court of Appeal Ordered the Husband to pay occupational rent when it made the Order in 2019.

Where it said

***“We direct that the appellant pays to the respondent the sum of \$800 by close of business today and that he will continue to pay \$800 to the respondent on the first day of every month continuing from the 1<sup>st</sup> of March 2020 until the matter has been resolved.”***

I agree with Counsel for the Husband that the Court did not identify this payment as occupational rent as claimed by the Wife.

I also accept Counsel for the Husband’s position that the Wife is not entitled to occupational rent. I rely on the case of Jones vs Jones where the example of circumstances in which occupational rent would be appropriate is in the case of ouster by a co-owner whether actual or constructive.

I do not find, from the evidence, that when the Wife eventually left the matrimonial home in 2011, it was because she was forced out. The evidence shows that she left not because of the Husband’s cruelty but rather it was because of his adultery.

However, I disagree with Counsel for the Husband that an Order should be made to bring the \$800 to an end. Its duration, is as the Ct of Appeal directed, until the matter is resolved.

### *The Wife’s Civil Service Pension*

Counsel for the Husband made extensive submissions under this head. However I will say simply that the Husband is not entitled to the Wife’s pension based on his expert witness’ evidence as well as the Acting Treasurer’s evidence. At the time of the breakdown of the marriage, her pension had not vested and therefore she would not have been entitled to it.

### **Property Settlement - Equal Sharing Principle**

1. The authority to make orders for financial provision and property adjustment is conferred in **Sections 27 and 28 of the Matrimonial Causes Act, Chapter 125 of The Statute Laws of The Bahamas (“MCA”)**, respectively.

2. However, before the Court exercises this jurisdiction it must consider the factors outlined in **Section 29 (1) of the MCA**, which states that:-
3. In determining what constitutes matrimonial asset we look to the decision of Lord Denning in the case of *Wachtel v Wachtel [1973] 1 All ER 829* where he described the phrase “matrimonial assets” (sometimes also called “family assets”) in the following terms:

*“...It 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.”*

4. The term Matrimonial Property was also defined in *Miller v. Miller; McFarlane v. McFarlane [2006] UKHL 24*, where Lord Nicholls of Birkenhead asserted that:

*“Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance.”*

5. When it comes to the division of Matrimonial Property Sir Michael Barnett CJ, (as he then was) explained in of *A v B 2010 2 BHS No.19* that:

*“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”*

6. In *Miller v Miller, McFarlane v McFarlane 2006 2 AC 618* Lord Nicholls in considering the fairness approach stated that:-

*“This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives 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.”*

7. When dividing matrimonial property, it is important to note that there should be no bias in favour of the greater earner if each party contributed equally to the welfare of the family. This was expressed in the case of **White v White 2003 3 WLR 1571** where Lord Nicholls asserted 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.”*

8. Further, former President of The Court of Appeal the Honorable Mrs. Justice Allen once stated in the case of **Jupp v Jupp SCCrApp No.37 of 2011** that:-

*“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.”*

9. The yardstick for equality is as stated by Sir Charles J in **H v. H [2007] EWHV 459**, that equality should be applied as an aid, not a rule and that each case should be examined on its merits.

## **Conclusion**

I accept that the marital assets include:

- a) South Ocean Property
- b) The Golden Gates Property
- c) Wilmed Limited

Considering the Wife left the matrimonial home from 2011 and the Husband continued to pay the mortgage as well all the taxes I find that fairness in this matter

requires a departure from the equal sharing principle. The matrimonial home is to be shared 60/40 in favour of the Husband.

As neither of the parties are in occupation of the home it should be sold within 90 days from this order and after taxes the net proceeds shared 60/40. It is to be sold at the value on the breakdown of the marriage which is 2011.

Golden Gates Property 60/40 Husband to pay Wife her share at the breakdown of the marriage after deductions for mortgage balance and real property taxes. Wife is to be paid the value of her shares in Wilmed Limited.

I do not find that the Medical business is a matrimonial asset. There shall be no award for occupational rent and no award for payment from the Wife's pension.

The \$800 per month payment is to continue until payment of the interest stated herein.

Each Party to bear its own costs.

**Dated this 27th day of February 2025**



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**The Honourable Justice Donna D. Newton**

