

**COMMONWEALTH OF THE BAHAMAS**

**2016**

**IN THE SUPREME COURT**

**FAM/div/00208/**

**Family Division**

**BETWEEN**

**MICHELLE MARIE ROBERTS**

Petitioner

**V**

**MICHAEL FRANCIS ROBERTS**

Respondent

**BEFORE: The Honourable Madam Justice Donna Newton**

**APPEARANCES: Mr. Roger L. Minnis - for the Petitioner**

**Mr. Alexander Maillis- for the Respondent**

**HEARING DATES: 4<sup>th</sup> April 2017, 30<sup>th</sup> September 2019, 2<sup>nd</sup> March 2017**

**DECISION: 14<sup>th</sup> February 2025**

**RULING**

***Headnote:** FAMILY LAW. ANCILLARY RELIEF. The case concerns a dispute regarding the validity of a postnuptial agreement- signed by both parties- in relation to ancillary relief.*

*Held: That the Separation Agreement is set aside on the ground of undue influence and that there was no independent legal advice. Equality principle applied in the division of the property.*

**NEWTON J.**

1. The instant application is on the part of the Petitioner (Wife) for a property adjustment order and a declaration that a Separation Agreement (the “Separation Agreement”) signed by the Parties on 15<sup>th</sup> September 2014 is null and void. Also, for an Order that she is granted half of the value of the real property and half of the funds in a joint bank account.
2. The Respondent (Husband) maintains that the Agreement is valid and ought to be recognized by the court.

**Background**

3. The Parties were married on the 22<sup>nd</sup> May 1993. There are no children of the marriage.
4. A Decree Nisi was granted on the 9<sup>th</sup> January, 2018 and on the 22<sup>nd</sup> May, 2018, the Decree Nisi was made absolute.
5. Following the breakdown of the marriage and prior to the filing of the Petition the Parties executed the Separation Agreement. In referencing the matrimonial assets, the following clauses stated:
  - a. *“The Wife would leave the matrimonial home and would take up residence elsewhere in the Island of New Providence within one (1) week of the signing of the Agreement”.*
  - b. *“Upon the departure of the Wife from the matrimonial home, the legal title to which is in the Husband’s name alone, the Husband shall continue in possession of the same and shall be at liberty to sell the same or otherwise dispose of the same without reference to the Wife for any reason whatsoever”.*
  - c. *Upon the signing of this Agreement the Wife shall release to the Husband all rights of dower to which she may be entitled at law in all real estate owned by the Husband, including any and all rights in the matrimonial home”.*
  - d. *“As part of this separation the Wife hereby declares that she desires no part of the Husband’s real property, including the matrimonial home, rights of dower or of ownership of the same (in the event of the Husband dying intestate), and in this regard undertakes to sign such release or releases as shall be necessary”.*

On the issue of maintenance, the agreement says this:

- a. *“...the Wife will assume full responsibility for the cost to herself of rent, food, health insurance, doctors and hospital visits.....and all other matters pertaining to the welfare of the Wife and will not hold the Husband responsible for the same”.*
  - b. *“...that as a term of this Separation Agreement the Wife will not seek, nor will the Husband be responsible for paying to the Wife on any basis whatsoever, any sum for maintenance of a periodic or other kind”.*
  - c. *“The Husband shall continue to enjoy the benefit of the health insurance cover provided by the Wife’s employer.....and the Wife undertakes that such insurance cover shall continue so long as she is employed.....with her present employer”.*
  - d. *“the Husband shall be responsible to keep the fourteen (14) dogs which the Parties own and maintain at the matrimonial home, and upon the separation of the parties herein provided for, the Husband shall continue to look after and maintain the animals so that their physical health shall not be impaired through neglect, while the Wife will provide the food for the animals....”*
6. Additionally, it was agreed that in lieu of maintenance and property rights or any other legal right which the Wife may be entitled to claim, the Husband undertakes to pay to her, upon the execution of the Agreement, the sum of **\$300,000**.

### **The Wife’s case**

7. Counsel for The Wife submits that the Separation Agreement should be declared null and void for the following reasons:
- a. *The Petitioner was under duress at the time in which it was signed;*
  - b. *The Petitioner did not have the benefit of independent legal advice; and*

- c. *That the vast majority, if not all of the monies that were on the joint account, were contributed by the Petitioner.*
8. Counsel for the Wife argued that, on the point of duress, that the Wife contends that prior to the signing of the Separation Agreement she suffered a violent attack from the Respondent. He noted that the Wife's evidence is that the Husband's attitude was "take it or leave it". In support of her assertion that she was unduly influenced to sign the agreement, she relies on the dicta of Lord Justice Ormrod in the case of *Edgar v Edgar [1980] EWCA Civ 2*, where he said:
9. *"To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. (Emphasis mine) ...; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Under pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties.....".*

### The Husband's Case

Counsel (former) for the Husband submitted that the facts do not bear out the duress that the Wife alleged. She stated that the Wife accepted an offer which she thought was good at the time, she submitted that the document should stand on its face. She summed it up as "*buyer's remorse*". She further submitted that there was no duress. That the time issue is very important. That this point ought to have come to the court's attention before now. She asked the court to uphold the Separation Agreement.

### 10. Issues

11. *Whether the Separation Agreement signed by both parties on the 15<sup>th</sup> of September, 2014, should be enforced by this Court.*
12. *Whether there should be an equal sharing of the matrimonial assets.*

### The Law

#### Duress

The court's approach to Separation Agreements is expressed in the case of **Radmacher v Granatino [2010] UKSC 42; [2010] 3 WLR 1367** at paragraph [75]: -

***“The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement”.***

The question to be determined is whether, in this case, it is fair to hold the Parties to the Separation Agreement. The court is required to look at *all the circumstances* of the case in making its determination.

The Wife claimed that she was under duress when she signed the agreement. For this she explained that prior to the execution, she was violently attacked by the Husband. On this point, the case of **Royal Bank of Scotland Plc v Etridge (No 2) [2001] 2 FLR 1364** at paragraph 13 said this:

***“Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case”.***

Taking this into consideration, I am not satisfied that the Wife had provided sufficient evidence to support her allegation of an attack. However, this alone does not mean that there was not undue influence during the execution of the agreement.

Undue influence was discussed in the case of **Na v Ma [2006] EWHC 2900 (Fam)**. The post-nuptial agreement had been signed a few months after the husband had discovered that the wife had committed adultery with one of his friends. The agreement had been drafted by the husband and his advisors; although a matrimonial lawyer had eventually been instructed, no matrimonial expertise had been employed in assessing the figures. The husband had sent the wife to a different set of matrimonial lawyers for independent legal advice and had provided a broad breakdown of his assets, but when the wife's lawyers had requested further information, the husband had informed the wife she was simply to sign.

The attendance notes kept by the wife's solicitor suggested that the wife had been placed under great strain by the husband, who was giving her an ultimatum, sign or end the marriage.

(1) To overturn the agreed post-nuptial settlement the court had to be satisfied that the wife's will was overborne by her husband exercising undue pressure or influence over her. The court said that in a case involving a husband and wife, when it was clear that interdependence and

mutual influence were the basis of the relationship, the court had to take special care when assessing the manner in which each party's conduct affected the other. For example, if a wife was accustomed to placing reliance upon her husband's decisions she might be much more easily influenced than an individual in a commercial transaction. Even if the agreement was not overturned, the court still had to consider whether it was fair (see paras [18], [20], [21]).

(2) The wife had been placed under undue influence by the husband, who had used his dominant position, both emotional and financial, to ensure that the wife felt she had no alternative but to sign the agreement. Further, it was held that the agreement had not been premised on fairness, having been calculated on the basis of what the husband was prepared to provide rather than upon a fair assessment of what might be appropriate or needed, and had been non-negotiable. It would be wholly unfair to implement the terms of the agreement, and unfair to use them as a starting point with which to judge the fairness of any award.

Eastman, J, in **Edgar v Edgar (1980) EWCA Civ 2** in dealing with disparity of bargaining power said this:

*“If the court on the evidence takes the view that having regard to the disparity of bargaining power, it would be unjust not to exercise its powers under Section [25 MCA] having regard to the considerations under [Section 29], it should exercise such powers even if no fraud, misrepresentation or duress is established which, at cannon law, would entitle a wife to avoid the deed”.*

Lord Ormrod explained that when he coined the phrase “*disparity of bargaining power*” in **Brockwell v Brockwell** he was referring to a situation where one spouse takes advantage of the other in the throes of marital breakdown, a time when emotional pressures are high, and judgment apt to be clouded.

He explained further that the question, is not whether the husband had a superior bargaining power, but whether he exploited it in a way which was unfair to the wife so as to induce her to act to her disadvantage.

A clause in the Separation Agreement in the instant case requested the Wife to leave the matrimonial home within a week of executing it. In fact, the evidence shows that she left the day after the execution. Taking the Agreement as a whole, the only thing that the Wife was left with was \$300,000 out of a joint account with a balance of approximately \$900,000 which the evidence show was largely contributed to by the Wife.

In the case of **Na Vs Ma**, the court set aside an agreement notwithstanding the Wife had independent legal advice. The court found that the husband used his dominant position, both emotional and financial, to ensure that the wife felt she had no alternative but to sign the agreement. This, the court found, was an example of undue influence.

## 1. Independent Legal Advice

The attorney for the Husband in the divorce proceeding, Mr. Michael Horton, prepared the Separation Agreement and attended to its execution. He swore an affidavit in support of the Husband's case where he denied the presence of duress in the execution of the agreement. He said:

*“... At all times when the parties consulted with me in Chambers, the Petitioner appeared very relaxed in manner, and did not evince any fear of her husband; she (the Petitioner) did not appear to be under any compulsion, threat or duress to sign the Agreement, nor did she complain of such”.*

The court must look at all the circumstances of the case to see if some unfair or unconscionable advantage was taken or some relationship between the parties which enables the Court to say that the agreement was not entered into as a free agent.

“Bad” legal advice is a relevant factor that should be taken into consideration when determining the circumstances under which an Agreement is made as noted by **Ld. Ormrod in Edgar v Edgar**. Applying this provision to the instant case, the Wife was taken to the Husband's attorney. The document was placed before her, and like Counsel for the Wife indicated, there is no evidence that the document was explained to her or that she was questioned as to whether she understood the document. The document was executed by the Parties and both signatures witnessed by the same person, a member of the attorney's firm.

### **Restriction of Courts Power in Ancillary Matters**

**Sections 27 and 28** of the MCA empowers the Court to make financial provisions and property adjustment orders in matrimonial proceedings. **Section 29** of the Act provides the factors the court should consider when making these orders. They include the income of the parties, their financial needs, their obligations and responsibilities, the age of the parties, and their physical and mental abilities.

The court is required to examine all the circumstances of the case and then make an 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.

A term of the Agreement is that *“...as a term of this Separation Agreement the Wife will not seek, nor will the Husband be responsible for paying to the Wife on any basis whatsoever, any sum for maintenance of a periodic or other kind”.*

Referring to agreements to oust the court's power to make provisions on the dissolution of the marriage, **Lord Atkin** in **Hyman v Hyman (1929) AC 601** explained that:

*“.... no agreement made inter parties can ever deprive the court of its right to review the question of maintenance for a wife. That the wife cannot covenant to preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.*

### Analysis

I find that Attorney Michael Horton’s statement that the Wife appeared to be relaxed is self-serving. The circumstances in themselves are intimidating. At the time of execution, the marriage had broken down, the document was signed in his chambers and witnessed by a member of his staff. Taking these circumstances into consideration can it reasonably be concluded that the Wife had the benefit of independent legal advice or that she entered into as a free agent. I think not.

*Edgar v Edgar* obligates the court to consider the conduct of the Parties before and subsequent to the execution. In the instant case the Wife’s evidence was that she was afraid of the Husband. It is worth noting that the Wife was granted the divorce against the husband on the ground of cruelty. I also consider the Wife’s evidence that the Husband’s attitude was “take it or leave it” coupled with the fact that the Wife left the home the day after the execution of the agreement.

Considering the Parties’ conduct, coupled with the circumstances of the execution of the agreement, I find that the Wife did not freely enter the agreement, that she was under undue influence when it was executed.

I also agree with Counsel for the Wife that she had not received independent legal advice prior to signing the agreement.

I do not accept Counsel for the Husband’s submission that the phrase “*buyer’s remorse*” is applicable in these circumstances.

The Wife is prevented from contracting out of the provision in the MCA. Thus this clause in the Separation Agreement that “*the Wife will not seek, nor will the Husband be responsible for paying to the Wife..... any sum for maintenance*” is of no effect.

Considering all these factors I find that the Separation Agreement ought to be set aside.

Referring to the MCA, the Court is required to examine the entire context of the case and make an award accordingly, stating sufficient reasons for the same. (As per Dame Anita Allen in **Jupp v Jupp SCCrApp No.37 of 2011**).

In **A v B [2010] 2 BHS J.No.18 Barnett CJ** (as he then was) explained the court’s approach to the property adjustment issue. He 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.”*

Lord Nicholls of Birkenhead, in **White v White [2001] 1 All ER 1**, in further explaining equality in family assets, established the ‘yardstick of equality’ or ‘equal sharing’ principle between the parties to a marriage. He stated that:

*“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 prejudice or advantage either party when considering s25(2)(f) of the 1973 Act.*

*“.....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.” (Emphasis mine)*

Fairness in this case demands that the matrimonial assets should be divided equally.

The facts show that the Husband who is a boat captain has not had a steady income from 2008 while the wife, an accountant was continuously employed. However, I accept, as he said he contributed to the joint account. The fact that the account is held jointly mandates that the disposition the funds ought to be done equally.

Regarding the matrimonial home and the property in Gladstone Road, they are also to be shared equally.

### **Conclusion**

The Separation Agreement is set aside, the funds standing in the joint account are to be divided equally. As the Husband resides in the matrimonial home in Coral Harbour, within 90 days he is to pay to the Wife her one half share, less real property taxes due up to the date of sale. Should he fail to do so then the home is to be sold and after expenses of the sale the proceeds are to be divided equally between the Parties.

Regarding the Gladstone Road property, either party to purchase the other’s half interest failing which it is to be sold and after the expenses of sale, the proceeds to be shared equally between the Parties.

Should either party fail to execute any of the transfers then the Registrar of the Supreme is authorized to do so.

Each party is to bear its own costs.

Dated this 14<sup>th</sup> day of February 2025



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Justice Donna D. Newton

The Petitioner also contends that during the signing of the Separation Agreement, there was an absence of independent legal advice on her behalf. The Petitioner submits that the Respondent has not produced anything proving that the Petitioner was independently advised, in any way, prior to signing the agreement.

2. It is generally understood that independent legal advice is important to the creation of any legal agreement. However, the mere absence of independent counsel is not in itself a fatal element of a contract. This Court is guided by the obiter dicta expressed within the

case of *Radmacher (formerly Granatino) v Granatino [2010] UKSC 42* at paragraph 114 where it was stated that:

*“The Court of Appeal differed from the finding of the trial judge that the ante-nuptial agreement was tainted by the circumstances in which it was made... The judge had found that the husband had lacked independent legal advice. Wilson LJ held that he had had well understood the effect of the agreement, had the opportunity to take independent advice, but had failed to do so. In these circumstances he could not pray in aid the fact that he had not taken independent legal advice”.*

3. Following the completion of the document both the Petitioner and Respondent were asked to return to the office of Mr. Horton to review that the Separation Agreement contained their wishes. Taking these facts into consideration, it is clear to this Court that notwithstanding the absence of independent legal advice, the Petitioner still fully understood the terms of the Separation agreement and what signed it would entail. Moreover, this Court finds that during the time in which Mr. Horton took to draft the Separation Agreement, the Petitioner could have sought and received independent legal advice but failed to do so. The Petitioner understood the risks which came with proceeding without independent counsel and choose to sign the agreement anyway.

### **Beneficial ownership of funds by the Petitioner**

4. Lastly, the Petitioner submits that the Separation Agreement should also be deemed null and void due to the fact that she is the beneficial owner of the vast majority of the funds held in the martial account. Having reviewed these facts, this Court finds that notwithstanding the Petitioner’s assertion of having beneficial ownership of the joint account funds, she willfully signed over her rights. As previously stated, the Petitioner would have reviewed the contents of the Separation Agreement and continued on to sign it. In addition to this, the Petitioner would not have been subjected to any pressure or undue influence to perfect the document. Through her perfection of the document the Petitioner willfully and knowingly signed over any beneficial rights she would have possessed over the account. As a result of this the general rules of contract laws applies. This means that the Court will not seek to interfere with the agreement of two willful individuals.

## **Conclusion**

5. After thoroughly reviewing the facts of this matter, this Court finds that the Separation Agreement dated the 15<sup>th</sup> of September, 2014, is enforceable, valid, and binding on the Petitioner.

**Dated this 14<sup>th</sup> day of February 2025**

A handwritten signature in black ink, appearing to read "D. Newton", written over a horizontal line.

**The Honourable Justice Donna D. Newton**