

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION
2004/FAM/DIV/FP98

BETWEEN

CM
Petitioner

AND

SM
Respondent

BEFORE: The Honourable Mrs Justice Estelle Gray Evans (Acting)

APPEARANCES: Miss Constance McDonald for the petitioner
Miss Cassietta McIntosh for the respondent

HEARING DATE: 7 February 2008

JUDGMENT

Gray Evans, J. (Ag.)

1. The parties were married on 9 February 1985 when the husband (respondent) was 26 and the wife (Petitioner) was 22.

2. By a petition filed 6 August 2004 the petitioner sought a dissolution of her marriage to the respondent on the ground of his cruelty to her. A decree nisi for was granted to the petitioner in June 2005. The decree has not yet been made absolute.

3. Although the couple has two (2) children, only one of them, Donavon, is still a minor.

4. In addition to her prayer for dissolution of the marriage, the petitioner also prayed:

- (1) That she be granted custody of the minor child of the marriage with reasonable access to the respondent, provided that the child no longer feels threatened by him.
- (2) That provisions be made for the maintenance of the minor child of the marriage.
- (3) That there be a settlement of the matrimonial property.
- (4) That the respondent be condemned in costs and
- (5) That the court makes a declaration pursuant to section 73 of the Matrimonial Causes Act.

5. By Notice of Application for Ancillary relief filed on 14 November 2007 the petitioner gave notice of her intention to apply for custody, maintenance and property adjustment orders.

6. The petitioner's evidence is contained in her Affidavit of Means and a Supplemental Affidavit filed 24 October 2007 and 17 February 2008 respectively.

7. In her said affidavit of means, the petitioner particularized her prayers for relief as follows:

- (1) That care and control of the minor child, Donavon Sherwin Mullings, be granted to her with reasonable access to the respondent.
- (2) That the respondent be ordered to pay Donavon Sherwin Mullings school fees.
- (3) That the respondent be ordered to pay medical insurance for the children of the marriage.

- (4) That the respondent be ordered to divide the mutual funds in Fidelity and the shares in Colina, Focol, Cable Bahamas in First Caribbean and CIBC equally with the petitioner.
- (5) That the respondent be ordered to share the properties equally between the parties or that all the properties including the matrimonial home be sold and the net proceeds shared equally between the parties after expenses of sale.
- (6) That the respondent be ordered to pay half of the reasonable vacation expenses of the minor child of the marriage.
- (7) That the respondent be ordered to pay the difference for the minor child's school books.
- (8) That a Declaration be made pursuant to the provisions of section 73 of the Matrimonial Causes Act.
- (9) That the respondent be ordered to pay the petitioner's costs in these proceedings.

8. I note here that the hearing of the Ancillary matters occurred more than three (3) years after the petition was filed and more than two (2) years after the decree nisi was granted.

9. I note further that in May 2005, notwithstanding that the petition had been filed in August 2004, an action was begun by the respondent in the Magistrate's Court and then Deputy Chief Magistrate ordered, on the recommendation of a Senior Welfare Officer, that Donavon spend Mondays to Fridays with his father and Saturdays and Sundays with his mother.

10. That arrangement is still in place. However, according to the petitioner, it was not working very well. One reason she said was because the respondent was rigid when it came to "his time" with the child in that he would not allow the child to interact with the petitioner during the time he was scheduled to stay with the respondent – citing his studies as the reason -- but that the respondent encroached on her time with the said child by planning activities for him during the times when he was scheduled to be with the petitioner.

11. The respondent was of the view that the arrangements were working well.

CUSTODY, MAINTENANCE AND SUPPORT

12. The respondent obviously has high hopes for the said child following his older brother into the field of tennis and he is hopeful that his younger son will also be able to secure a tennis scholarship to enable him to pursue college studies. As a result it appears that he "pushes" him to excel academically as well as at the game of tennis. The petitioner is of the view that the respondent

pushes the child too hard, particularly as, she says, the child does not like the game of tennis as much as his father hopes.

13. There is however, no dispute that the said child's grades improved after he began spending nights with the respondent.

14. The said child was born on 21 December 1990 and will therefore be 18 years old in December of this year. He is in his final year of high school and is expected to graduate in June of this year.

15. The respondent has asked that the present custody arrangements be permitted to continue at least until the child graduates from high school. He says that he takes care of most of his son's expenses; he pays his school fees, provides meals while the child is with him and that he is prepared to continue doing so. The respondent was of the view that because the child spent most of the time with him and he pays most of his expenses, the petitioner ought to be able to make provisions for the child when he stays with her, for example, purchasing groceries and paying for his school uniforms and books.

16. In his affidavit of means the respondent deposed that he has always maintained and will continue to maintain medical insurance for the minor child and that he will be taking him on vacation this year as he did last year.

17. In the end, the respondent sought the following orders:

- (1) Custody of the minor child with reasonable access to the petitioner.
- (2) That the matrimonial home be placed on the market for sale with the respondent having the right of first refusal in the sale.
- (3) That the petitioner has no interest in the other properties owned by the respondent.
- (4) That the petitioner be required to "sign off" on the life insurance policy belonging to the respondent.
- (5) That each party pays their own costs.

18. The petitioner deposed that her salary is \$1,630.00 per month and she has monthly expenses, including rent for a one-bedroom apartment in the sum of \$550.00, totaling \$1,895.00. Her annual expenses amount to \$5,995.90.

19. The respondent deposed that his annual salary is \$60,000.00 (\$5,000.00 per month) and that he has expenses of \$4,219.00 per month plus \$8,295.00 annually.

20. Included in both parties' list of expenses are charges relative to both children.

21. As indicated the minor child will become 18 in December of this year and approximately 6 or 7 months before that he will graduate from high school. His father is optimistic that he will be able to secure a tennis scholarship and he indicated at the hearing that a tennis scholarship, along with funds from a scholarship fund with Heritage Scholarship Foundation and other investments which may be liquidated, he should be able to fund Donavon's college expenses.

22. I agree with the respondent that at this point in his life the child needs a father's influence and it is evident that the respondent is the parent that is more likely to get Donavon at this stage in his life to focus on his studies.

23. There are times when children need guidance to help them focus and although they may resist, they are eventually grateful to parents for having "pushed" them to achieve. There are, unfortunately, times when parents can go overboard in their efforts-- even to the point of abuse. I did not get the impression that that was the case here.

24. I note here that the petitioner pays for the books and school uniforms. However, as Donavon is graduating in a few months, those expenses will no doubt fall away.

25. I also note that as the respondent is prepared to take the child on vacation himself as he has apparently done in the past so there is no need for me to make an order regarding vacation expenses.

26. I would therefore make the following custody and maintenance orders and in doing so I bear in mind that the petitioner currently lives in a one-bedroom apartment and Donavon will be graduating from high school and will be 18 years old in a few months:

- (1) The petitioner and the respondent shall have joint custody of the said child with the said child spending Mondays through Thursdays with the respondent and Friday nights to Monday mornings with the petitioner until he graduates from high school and thereafter the petitioner shall have care and control of the said child with reasonable access to the respondent.
- (2) That the respondent is to continue paying medical expenses for the said child.
- (3) That the respondent is to continue paying the said child's school fees and the petitioner is to continue paying for school uniforms and books for the said child.

PROPERTY ADJUSTMENT

27. The matrimonial home is owned by the petitioner and the respondent as joint tenants.

28. The petitioner also lists the following as matrimonial assets:

- (1) Lot 9, Block 21, Bahama Reef Subdivision Section 2, Freeport;
- (2) Lot No. 4, Block 5, Bahama Reef Subdivision Section 1, Freeport, purchased in December 1993 for \$15,000.00;
- (3) Lot 23, Block 106, Unit 1, Lucaya Estates Subdivision, Freeport;
- (4) 3 - 5 lots in Royal Bahamian Estates Subdivision, Freeport;
- (5) Mutual funds in Fidelity
- (6) Shares in Colina Financial
- (7) Shares in Cable Bahamas
- (8) Shares in First Caribbean Bank
- (9) Shares in Freeport Oil Company (FOCOL)

29. In addition to the property and shares mentioned by the petitioner, the respondent admits that he is also the owner of the following properties. However, he denies that the assets listed in paragraph 26 hereof or those hereunder are matrimonial assets:

- 1) Lots 21 and 22 Block 106 Unit 11 Lucaya Estates purchased in August 1999 – no values or purchase prices indicated;
- 2) Lot 5 Block 25 Royal Bahamian Estates – purchased in April 1999 – deposit of \$1,100.00 paid;
- 3) Lot 1, 2, 3, 4 and 5 Block 10 Royal Bahamian Estates – purchased in 1998 – deposit of \$3,500.00 paid;
- 4) Lot 8 Block 32 Royal Bahamian Estates – purchased in November 1999 for \$8,000.00;
- 5) Lot 9 Block 25 Royal Bahamian Estates – purchased in December 1999 for \$14,000.00;
- 6) Lot 11 Block 31 Royal Bahamian Estates – purchased in December 1995 for \$5,000.00;
- 7) Lot 12 Block 31 Royal Bahamian Estates – purchased in December 1995 for \$5,000.00;

30. The respondent also averred that the petitioner is the owner of shares in Abaco Markets as well as Commonwealth Bank Limited which he purchased for her and which the petitioner neglected to disclose in her affidavit of means.

31. The petitioner has asked that all of the aforementioned assets, including the matrimonial home, be shared equally between the parties or that they be sold and the net proceeds of sale divided between them equally.

32. The respondent's position with regard to the matrimonial assets is that except for the matrimonial home, which is in the joint names of the parties, he is the sole legal owner of all of the other properties and assets and that the titles thereto are in his name alone.

33. The petitioner alleges that although the properties were in the respondent's name alone, he had in fact purchased them with monies out of the couple's joint account and told her that they were for the family; that he was able to make the purchases because she assisted in other areas such as purchasing groceries, paying the utility bills and paying the maid.

34. According to the respondent, the funds with which he purchased the said assets were derived from moneys he received from former employers by way of pension funds and savings plans, such funds totaling approximately \$304,000.00. However, I note that his evidence is that he is still paying for one of the properties (Lot 9, Block 21, or Lot 21 Block 9 Bahama Reef). I also note from the copies of documents provided, that the said properties were purchased over the period 1993 to 1999.

35. The respondent deposed that two (2) of the said properties, Lots 8 and 11 in Royal Bahamian Estates, were purchased for the couple's sons to give them a "start in life."

36. The respondent proposed therefore that the matrimonial home be sold and the net proceeds shared equally between he and the petitioner and he has offered to transfer two (2) pieces of property to the petitioner namely: Lot 12 Royal Bahamian Estates valued, according to the respondent, at \$35,000.00 and one of the lots in Lucaya Estates. No value was given for the Lot in Lucaya Estates.

37. As to the shares, the respondent averred that they were purchased in his sole name from personal funds and he produced copy certificates evidencing his ownership of 1,000 shares in each of Cable Bahamas, Canadian Imperial Bank of Commerce, Freeport Oil Company and Commonwealth Bank Limited

38. The respondent deposed, which was not denied, that the petitioner is also the owner of shares in Commonwealth Bank and Abaco Markets, which the respondent said he had purchased for her and he produced a copy of a certificate for 1000 shares in Commonwealth Bank Limited in the petitioner's name. There was no other evidence of shares in Abaco Markets.

39. The respondent denied that he and the petitioner pooled money or that she even contributed to any moneys in an account with him, joint or otherwise. He averred that the petitioner's name was placed on his account for emergency purposes.

40. The respondent also deposed, which was not denied by her, that in or about 2006, the petitioner removed \$6,000.00 from the bank account in the joint names of the parties which funds the respondent says were derived from his income; that the funds were removed without his knowledge and that the petitioner has yet to account to him for them.

41. The respondent averred further that it was never his intention for the petitioner to have an interest in the properties or the shares held in his sole name as, in his view, the petitioner never had any interest in acquiring any properties jointly with him or otherwise.

42. There is no dispute that except for the matrimonial home and apparently the shares in Commonwealth Bank and Abaco Markets, all of the other assets which may be described as family assets are held by the respondent in his sole name.

43. Whether or not a property, real or personal is a "family" asset is determined by the intention of the party acquiring the property.

44. In the case *Wachtel v. Wachtel* (1975) 1 All ER 829, it was held that the phrase "family assets" refers to things acquired by one or both of the parties with the intention that they should be continuing provisions for them during their joint lives and should be used for the benefit of the family as a whole. Such property would not only include the matrimonial home but also other property, real and personal, acquired by either or both parties during the marriage.

45. It is not disputed that the matrimonial home is a matrimonial asset nor is it disputed that the petitioner made no direct contributions to the acquisition of the other assets. The only evidence given is by averment in her affidavit of means, which is denied by the respondent, that during the marriage the couple operated a joint account into which her salary for a time as well as other funds she received on the death of her mother were deposited.

46. Counsel for the respondent submitted that had it been the intention of the parties that the petitioner acquire a beneficial interest in the properties her name would have been added to the title deeds as had happened with the matrimonial home.

47. She submitted further that the properties were not utilized to benefit the family as a whole; that the petitioner never contributed to their acquisition, nor can the petitioner show that any of the properties are being held on trust for her as in the case of *Gissing v. Gissing* [1971] AC 866. Consequently, she submitted, the assets were not "family assets" and the petitioner could lay no claim to one-half thereof or otherwise.

48. The respondent's evidence, which is not denied, is that he always earned more than the petitioner. Therefore the petitioner's financial contribution to the family was significantly less than his.

49. However, there is no dispute that the petitioner did in fact make some contributions, financial and otherwise, to the welfare of the family and as was noted by Campbell, JA, in the case of *Dean v. Dean* [1991] BHS J. No. 175 Civil Appeal 20 of 1990,

"...if a spouse acquire properties other than the matrimonial home from the income of which the family is maintained then it may well be that all these properties constitute family assets of a capital nature."

50. In support of her submission that the petitioner should be awarded one-half of the matrimonial assets, counsel for the petitioner referred the court to the recent case of *Miller v. Miller and McFarlene v. McFarlene* (2006) UK HL 24 and the judgment of Lord Nicholls of Birkenhead in which he states, inter alia, on the issue of how to achieve fairness in the division of property following a divorce:

“Fairness is an elusive concept...This element of fairness reflects the fact that to a lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provisions for the parties housing and financial needs, taking into account a wide range of matters such as the parties ages, their future earning capacity, the family’s standard of living and any disability of either party.”

51. Lord Birkenhead continued at paragraph 16:

“A third strand is sharing. This ‘equal sharing’ principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals....This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less....”

52. This court’s power to grant property adjustment orders may be found in section 28 of the Matrimonial Causes Act, Chapter 111, which provides, inter alia:

“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... such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion...”

53. And Section 29 of that Act imposes a duty on the court to take certain factors into account when making property adjustment orders for the parties

which, as far as practicable, will put them in the position they would have been had the marriage not broken down.

“29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section ... 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.”

54. So, whether or not the properties acquired by the respondent during the marriage and held in his name alone are “matrimonial assets,” as defined in *Wachtel v. Wachtel* the petitioner may still be entitled to an interest therein when taking into consideration the factors set out in section 29 aforesaid.

(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;

55. The petitioner is a Bookkeeper/Computer Operator and she earns a salary of \$19,560.00 per annum. The respondent is a Mechanical Engineer and he earns between \$60,000.00 and \$70,000.00 per annum. As deposed in his affidavit, the respondent has always and will likely continue to earn substantially more than the petitioner. Both parties are steadily employed and relatively young with several more working years. They own the matrimonial home as joint tenants; the petitioner owns shares in two (2) companies; the respondent owns a number of pieces of real properties as well as shares in several companies.

(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;

56. Their immediate financial needs are to have sufficient funds to meet their expenses. The petitioner's current monthly expenses total \$1,895.00 and she has annual expenses totaling \$5,995.00. The respondent's current monthly expenses amount to \$4,219.00 and his annual expenses have been pegged at \$8,295.00. In a few months the youngest child will be finished with high school and is likely to go to college. Although the respondent is hopeful that he will get a scholarship, both parents will no doubt still be expected to make some financial contributions to his college as well as vacation expenses should be return home during college breaks.

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

57. The family apparently enjoyed a relatively high standard of living before the breakdown of the marriage. They owned a 4-bedroom house that is mortgage free and were able to acquire other assets and make other investments.

(d) the age of each party to the marriage and the duration of the marriage;

58. The marriage lasted 20 years and produced two (2) children one of whom is now 22 years in college and the other 17 years in his final semester in high school and will turn 18 in December. The petitioner is 42 years old and the respondent is 46.

(e) any physical or mental disability of either of the parties to the marriage;

The parties appear to be healthy and no physical or mental disability of either of them has been alleged or disclosed.

(g) 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;

59. The contributions to the welfare of the family include financial and non-financial resources to the acquisition of the family assets as well as the parties' efforts in looking after the home and caring for the family.

60. Because the respondent's income was substantially more than the petitioner, his financial contributions were more substantial than that of the petitioner. It appears that he made all of the direct payments for the acquisition of the real properties as well as the shares in the various companies. However, the petitioner was responsible for managing the household and ensuring that bills were paid.

(h) 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;

61. None has been alleged or disclosed.

FINDINGS AND ORDERS

62. I accept the petitioner's evidence that although she made no direct contribution to the acquisition of the properties and/or the shares, title to which is held in the respondent's name alone, by contributing to the welfare of the family and paying household bills during the course of the marriage, she has contributed indirectly to such acquisition. It is therefore the finding of this court that the petitioner is entitled to an interest in the said properties.

63. In making the orders set out hereunder, I bear in mind that the respondent by his cruelty to the petitioner drove her from the matrimonial home which is jointly owned; that he has had the benefit of living there rent free since the petitioner's departure, while she had to find other accommodations and pay rent without any financial assistance from the respondent. That the one-bedroom apartment is inadequate to provide suitable accommodation for the petitioner and a teenager, both of whom need their "space" and it is anticipated that as a result of the said orders the petitioner will be able to improve her current standard of living to that she would have enjoyed prior to the dissolution of the marriage, while not diminishing the respondent's.

64. I also bear in mind the respondent's evidence that he has not yet completed paying for Lot 21 Block 9 Bahama Reef Subdivision and that Lot 8 Block 32 and Lot 11 Block 31 in Royal Bahamian Estates Subdivision were purchased for the benefit of the children of the marriage.

65. So, it would appear from the evidence that the remaining properties, other than the matrimonial home, include the following:

- (1) Lot No. 4, Block 5, Bahama Reef Subdivision Section 1, Freeport, purchased in December 1993 for \$15,000.00

- (2) Lots 21, 22 and 23 Block 106 Unit 11 Lucaya Estates purchased in August 1999 – no values or purchase prices indicated;
- (3) Lot 5 Block 25 Royal Bahamian Estates – purchased in April 1999 – deposit of \$1,100.00 paid;
- (4) Lot 1, 2, 3, 4 and 5 Block 10 Royal Bahamian Estates – purchased in 1998 – deposit of \$3,500.00 paid;
- (5) Lot 9 Block 25 Royal Bahamian Estates – purchased in December 1999 for \$14,000.00;
- (6) Lot 12 Block 31 Royal Bahamian Estates – purchased in December 1995 for \$5,000.00;

66. Except for the deposit paid in some instances, the purchase prices in others and the respondent's averment that Lot 12 Block 31 Royal Bahamian Estates is valued at \$35,000.00, there is no other indication as to the current value of the said properties.

67. So, on the state of the evidence and having regard to all the circumstances including the section 29 factors, the submissions of counsel and the authorities provided, and doing the best that I can to place the parties, so far as it is practicable, 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, I make the following property adjustment orders:

- (1) The matrimonial home is to be sold and the net proceeds shared as to 55% to the petitioner and 45% to the respondent.
- (2) That the petitioner is entitled to a 1/3 interest in the properties listed in paragraph 65 hereof;
- (3) That the respondent shall pay to the petitioner a sum equal to 1/3 of the combined value of the said properties such value to be determined by agreement between the parties, failing which, the properties shall be appraised at the parties' joint expense.
- (4) Alternatively, the respondent shall transfer, at the parties' joint expense, to the petitioner his interest in so much of the properties as would equal 1/3 of the combined value thereof;
- (5) Should neither of the options at (3) and (4) above be exercised within 90 days of the date hereof, the said

properties are to be sold and the net proceeds shared between the parties as to 2/3 to the respondent and 1/3 to the petitioner.

- (6) That neither party is to have any interest in the Ordinary Shares held in the other's sole name.
- (7) The petitioner is to assign her interest in the respondent's life insurance policy of which she is the beneficiary, as the respondent shall direct or require.
- (8) The respondent is to pay the petitioner's cost of these proceedings, such costs to be taxed if not agreed.
- (9) That the parties have liberty to apply.

68. As regards custody and maintenance, the orders are summarized hereunder:

- (1) The petitioner and the respondent shall have joint custody of the said child with the said child spending Mondays through Thursdays with the respondent and Friday nights to Monday mornings with the petitioner until he graduates from high school and thereafter the petitioner shall have care and control of the said child with reasonable access to the respondent.
- (2) Each party shall be responsible for maintaining the said child while he is in their care and control;
- (3) That the respondent is to continue paying medical expenses and/or maintaining medical insurance for the said child;
- (4) That the respondent is to continue paying the said child's school fees and the petitioner is to continue paying for school uniforms and books.

69. AND IT IS DECLARED pursuant to section 73 (1)(b)(1) of the Matrimonial Causes Act that there is one child of the marriage to whom the section applies namely, Donavon Sherwin Mullings, and arrangements for his welfare have been made and are satisfactory.

DATED the 18th day of February A.D. 2008

Estelle Gray Evans
Justice (Acting)