

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division
BETWEEN

2021/FAM/div/00165

AT

Petitioner

AND

ALT

Respondent

AND

UNKNOWN WOMAN

Co-Respondent

Before: The Honorable Madame Justice J. Denise Lewis-Johnson
Appearances: Myra Russell for the Petitioner
Bridget Ward for the Respondent
Hearing Date: 5 July 2022

RULING

LEWIS-JOHNSON, J:

Introduction

1. The parties to the action were married on 12 August 1995. There are three minor children of the marriage ages 14, 10 and 10 respectively. On 23 June 2021, a Decree Nisi was granted to the Petitioner on the ground of cruelty.

2. A *Notice of Intention to Proceed with an Application for Ancillary Relief* was filed by the Petitioner on 1 September 2021. A Summons was filed on behalf of the Respondent on 5 January 2022.
3. The Petitioner seeks an Order regarding the custody and maintenance of the minor children, financial maintenance to the Petitioner and property adjustment. Apparent from the pleadings, custody of the minor children is not in issue. The parties are in consensus that joint custody should be awarded to both parties with day-to-day care and control to the Petitioner and liberal access to the Respondent. What remains to be decided is the maintenance for the children, should the Respondent provide financially for the Petitioner, if so the amount and property adjustment.

The Petitioner's Evidence

4. The Petitioner's evidence is contained in her Affidavit of Means dated 11 March 2022. The Petitioner is currently unemployed and has no source of income. The Petitioner is also an author of a book however, she will not receive gratuities from the sales of the book until sometime in the future. Pursuant to an Interim Order dated 17 August 2021 she receives \$500.00 monthly in respect of maintenance pending suit from the Respondent.
5. By the Petitioner's Affidavit of means her monthly expenses total \$14,041.00. In addition, the Petitioner claims that she is responsible for the minor children's weekly maintenance which totals an additional \$140.00.

The Respondent's Evidence

6. The Respondent's evidence is contained in his Affidavit of Means filed 9 July 2021. The Respondent is employed by Bahamas Information Services as a Manager at a salary of \$3,945.83 monthly. His monthly expenses total \$6,901.00. He claims that many of his expenses listed are not current and once deducted there is a short fall of some \$2,955.17.

Issues

7. The issues for determination are:
 - a) Provision of maintenance for the minor children;
 - b) Whether the Petitioner is entitled to a financial provision; and
 - c) Adjustment of matrimonial property.

Law

8. The authority to make orders for financial provision and property adjustment are conferred by **Sections 27 and 28 of the Matrimonial Causes Act, Chapter 125 of The Statute Laws of The Bahamas ("MCA")**.
9. **Section 27 of the Matrimonial Causes Act ("MCA") provides:**

"27. (1) – On granting a decree of divorce, a decree of nullify of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or nullify 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 either party to the marriage shall make to the other such periodical payments, for such term as may be specified in the order;**
 - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;**
 - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;**
 - (d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;**
 - (e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child,**

to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

(f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) to the restrictions imposed by section 33(1) and (3) on the making of financial provision order in favour of children who have attained the age of eighteen.

10. Section 28 of the MCA Act provides:

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

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or postnuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

subject, however, in the case of an order under paragraph (a) to the restrictions imposed by section 33(1) and (3) on the making of orders for

a transfer of property in favour of children who have attained the age of eighteen.

11. Section 29 of the MCA provides the matters the court must have regard to in considering the application for financial provision and property adjustment orders.

Section 29 provides:

“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.

(2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that it to say —

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.”

Maintenance for the Petitioner

12. The court derives its jurisdiction to award maintenance payments to a spouse from **Sections 27 1 (a) and (c) of the MCA.**
13. It is the Petitioner’s submission that the Respondent should make periodical payments to the Petitioner by way of maintenance until the Petitioner is successful in securing a job. It is asserted that given the Respondent’s current financial position it is obvious that he is not a man of little means and is able to make the payments as requested.
14. She argues that the Respondent has numerous sources of income not disclosed within his Affidavit of Means. She indicates that the Respondent is trading as Adrian Llewelyn Thompson doing business as “*Jump Up Service Fence*” that services contracts (i.e. fencing installations). Accordingly, providing maintenance payments should not be an issue for the Respondent.

15. The Petitioner states that she is a dedicated stay at home mother whose job is to look after the home and care for the family. The Petitioner recalls a time she was employed by Impression Oral Health Centre and was responsible for some of the expenses in the household. However, she claims that she terminated her employment because the minor children were not being cared for adequately. She submits that her responsibilities have since changed to a situation where she has made contributions to the home and to the welfare of the family by looking after the home and caring for the family as a dedicated housewife as opposed to being the breadwinner.
16. She highlights that her responsibilities have not diminished and as such she should be compensated for continuing to do so as she, in the interim, had day to day custody care and control of the said minor children and the responsibility for running the home.
17. It is the Respondent's claim that he is unable to pay maintenance to the Petitioner and be solely responsible for the maintenance of the minor children of the marriage. He asserted that he never agreed for the Petitioner to be a stay-at-home mother. The Respondent states that the Petitioner refused to perform domestic duties such as washing, cooking and ironing and he was forced to hire a maid to assist. To his knowledge the Petitioner receives financial contributions from her family and refuses to buy items as simple as a five-gallon water for the family.
18. He claims that the Petitioner simply refused to work. He recalled several instances where the Petitioner was terminated from various banking institutions for displaying a terrible attitude.
19. Presently, the Respondent pays \$500.00 per month to the Petitioner in maintenance fees. The Petitioner in her Affidavit speaks to monthly expenses in the sum of \$14,041.00 of which \$650.00 represents groceries, clothing and grooming. The remaining sums represent expenses for herself and braces for the children. There is no mention of the expenses being paid by the Respondent. However, in the

Respondent's Affidavit he confirms that he is responsible for the expenses of the children as the Petitioner is unemployed.

20. The Respondent's Affidavit of Means states his salary at \$3,945.83. His expenses total \$6,901.00 which is almost twice his salary. It is clear that the financial burden fell upon the Respondent during the marriage. However, I do not believe that it is fair for the Respondent to be continuously burdened financially with maintaining the Petitioner after the dissolution of the marriage as the parties are at an age where employment can be gained.
21. By the Affidavits it is clear that both parties have inflated their expenses and are living well above their means. The paramount consideration before this court is the welfare of the children of the marriage. Balancing pending maintenance payments for the minor children along with the reasonable expenses of the Respondent, it would be harsh to order maintenance to the Petitioner in the sum of \$650.00. The unfortunate reality is that the parties were once a union whereby the responsibilities were shared in a manner, they sought fit - the Respondent being the breadwinner and the Petitioner the homemaker. However, that reality is no more, and the Petitioner must now make certain adjustments.
22. While the Petitioner alleges the Respondent has undisclosed sources of income, no evidence is before the court to substantiate that. Without such evidence as to the amount of this income the court cannot place any weight on the assertion and make an order having regard to that assertion.
23. As such, the Respondent is ordered to continue to provide a financial support to the Petitioner in the sum of \$500.00 for an additional four (4) months from the date of this ruling. After such time has expired, maintenance payments will no longer be due to the Petitioner. I am constrained to comment on the Petitioner's lack of employment from the time of the breakdown of the marriage to now. Divorce results in significant changes, there are now two homes to be maintained, standards of living must be tempered and both parties should contribute to the maintenance of the children.

Property Adjustment – Matrimonial Property

24. Before the dissolution of the marriage the parties were in an agreement to purchase a vacant lot of land identified as Lot #382 located in Twynam Heights from Winton Estate Limited for the price of \$120,000.00. A deposit of \$12,000.00 was paid and the balance was to be paid by monthly installments. The Petitioner has indicated that there is a mortgage over the Twynam Heights property and that the mortgage is presently in a state of forbearance. Both parties indicated that they are unaware of the status of the property and assume that it might have been the object of foreclosure. The Court finds it unacceptable that neither party provided evidence of the outstanding mortgage balance, the value of an appraisal or whether the property has been foreclosed on.
25. In determining the disposition of the matrimonial property, the court has to take into consideration the provisions of **Section 29 of the MCA.**
26. Along with Section 29 considerations on the division of assets is the equal sharing in long marriages unless there are compelling reasons to depart. In the case of **A v. B [2010] 2 BHS J No. 18** Chief Justice Michael Barnett stated that this should be the approach used. He stated:
- “The modern-day approach applicable for the division of matrimonial property, is an equal sharing of the property, unless there is a compelling reason to depart from equality.”**
27. In **Jupp v Jupp SCCrApp No.37 of 2011** the Court of Appeal of The Bahamas held that Section 29 of the MCA is very clear as to what matters a judge must take into consideration when exercising the powers granted to him/her. The statute requires that a distributing judge consider all the circumstances of the case and make a decision which puts the parties in the financial position, so far as practicable, that they would have been in if the marriage had not broken down. In effect the division of the assets must be fair in its entirety.

28. A clear statement of law applicable to property adjustment in the Bahamas was explained by President of The Court of Appeal of The Bahamas Justice Anita Allen in *Jupp v Jupp SCCrApp No.37 of 2011* where she stated:

"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 enunciated by case law must be construed in this light. 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."

29. The evidence of the parties confirms that throughout the marriage the Respondent had the greater income and earning capacity as compared to that of the Petitioner. The Petitioner and the Respondent are the joint owners of a property in Twynam Heights. No evidence has been produced by any of the parties indicating there was an intent to hold this property other than as equal, joint owners.

30. The Parties resided in an apartment owned by the Respondent's father until the breakdown of the marriage. Presently, the Petitioner and the minor children still reside in the apartment. Their children attend a local private school and were taken on family vacations outside of the country. From the evidence the family maintained a modest standard of living.

31. I must also take into consideration the health and age of the parties as well as the length of the marriage. The Petitioner is 50 years of age, and the Respondent is 51 years of age. The parties were married for 25 years before the Decree Nisi was granted on 23 June 2021. There is no evidence that the Respondent suffers from any

physical or mental disability. The Petitioner states that she suffers from hypertension. However, this does not affect her earning capacity.

32. The Respondent has indicated that he would wish to purchase the Petitioner's interest in the property. The issue which presents itself is that there is no documentary evidence before this court as it relates to the value and status of the said property. I am unaware of the true value of the property or whether it has been sold. The parties have indicated that the property was subject to a mortgage that was in default and it is possible that the right of foreclosure and sale may have been exercised. I will not therefore, without more, make an order for the Respondent to purchase the Petitioner's interest for \$3,000.00 when the value may far exceed that.

33. In the event that the property has not been sold the Petitioner submits that the court should grant an order for the adjustment of property to the effect that Lot #382 Twynam Heights be sold, and the proceeds of the sale be split between the parties. The Respondent submits that the Petitioner has only contributed to the price of the property once. As such, he would like to purchase the Petitioner's interest in the matrimonial property for the sum of \$3,000.00.

34. What is agreed, is that the parties were joint owners of the property. The authorities discourage favoring the breadwinner when the other party may have had greater domestic responsibilities.

35. In all the circumstances of this case, the evidence presented, the considerations listed in Section 29 of the MCA and the case law, if the property has not been sold, the Petitioner is entitled to 40% of the equity in the property and the Respondent 60% equity.

Maintenance for the minor children

36. When deciding an order for maintenance for the children of the marriage on the dissolution of a marriage, the Court is guided by the considerations set out at **Section 29 (2) of the MCA.**

37. Custody of minor children in divorce proceedings is governed by Section 73 and 74 of the Matrimonial Causes Act, which requires the court to consider the welfare of the children and Section 3 of The Child Protection Act also provides guidelines for the court to consider when determining custody of minor children, these considerations include, the wishes and feelings of the child, the child's physical, emotional and educational needs, the likely effects of any changes in his circumstances, his age, sex, background and any harm that he has suffered or is at risk of suffering; and the capacity of the child's parents, guardians or other persons involved in caring for and meeting their needs.
38. The Petitioner submits that the Respondent has a duty to maintain the children of the family. She asserts that given his financial position the Court should grant an order that the Respondent pays maintenance of the minor children in the sum of \$500 per child, per month.
39. The Respondents submits that based on his income and expenses he is able to pay to the Petitioner the sum of \$500.00 monthly towards the maintenance of the children until each child attains the age of 18 or completes tertiary education. He further requests that the parties should share equally the medical, dental and optical expenses of the children.
40. I am tasked with determining an appropriate figure for maintenance of the minor children to be paid by the Respondent. I am guided by **Section 29 (2) of the MCA** which lists the consideration to be taken into account when determining whether the payment of periodical payment of sums to a child is appropriate. Taking into consideration the income, earning capacity, and financial obligations of the parties, it is clear that both parties are not living within their means.
41. \$500.00 per month is not sufficient to maintain three minor children. However, the entire burden should not be placed on the Respondent to maintain the children. The parties must operate as a partnership to ensure their children are well taken care of. To appropriately and fairly care for the children financially, maintenance should be

paid by the Respondent in the amount of \$300.00 per child, per month until each child attains the age of 18 or completes tertiary education, whichever is later.

42. The parties should share equally the medical, dental and educational expenses of the children until the age of 18 or completion of tertiary education, whichever is later. However, as the Petitioner is unemployed and dependent on the Respondent, the Court cannot make an order that is an impossibility to comply with.

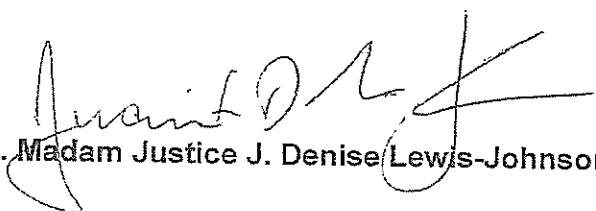
Conclusion

43. The order of the court is as follows:

- a. The parties shall have joint custody of the minor children of the marriage, with day-to-day care custody and control to the Petitioner and liberal access to the Respondent;
- b. All educational, medical, dental and optical expenses of the said children is to be provided for by the Respondent until such time as the Petitioner is employed. Upon the Petitioner becoming employed this portion of the Order is to be varied;
- c. The Respondent shall pay to the Petitioner by way of financial provision for the Petitioner the sum of \$500 monthly commencing on the 28th December 2022 and following on the 28 day of each month for a period of four (4) months from the date of this order;
- d. The Respondent shall pay to the Petitioner by way of maintenance the sum of \$300.00 per month per child towards the maintenance of the minor children until each child attain the age of 18 or completes tertiary education, whichever is the later;
- e. If the parties are the owners of the matrimonial property, it is to be appraised the cost of which shall be equally divided between the Petitioner and the Respondent;
- f. The equity interest in the matrimonial property is to be divided as 40% to the Petitioner and 60% to the Respondent;

- g. The Respondent is to purchase the Petitioner's interest within one year from the date of this ruling failing which the property shall be sold and the net proceeds be divided according to their respective interests;
- h. A Declaration is granted pursuant to Section 73 (1) (b) of the Matrimonial Causes Act that arrangements have been made for the minor children and are the best that can be devised in the circumstances;
- i. There is liberty to apply; and
- j. Each party is to bear their own costs.

Dated this 2nd day of December 2022


The Hon. Madam Justice J. Denise Lewis-Johnson