

**COMMONWEALTH OF THE BAHAMAS**

**2020**

**IN THE SUPREME COURT**

**FAM/DIV/00066**

**FAMILY DIVISION**

**BETWEEN**

**I.J.W**

**Petitioner**

**AND**

**E.D.A.W**

**Respondent**

**Before: The Hon. Madam Justice G. Diane Stewart**

**Appearances: S. Anne Wells- Darville for the Petitioner  
Troy Kellman for the Respondent**

**Ruling Date: March 8<sup>th</sup>, 2023**

## **RULING**

### **BACKGROUND FACTS**

1. The Petitioner, I.J.W was lawfully married to the Respondent, E.D.A.W. on 3<sup>rd</sup> April 2005. There is one child of the marriage, namely D.J.W (male) born 29<sup>th</sup> November 2006. The Petitioner is employed as a manager. The Respondent is employed with Bahamas Power & Light.
2. The Petitioner filed her Petition on 4<sup>th</sup> February 2020 on the ground of the Respondent's cruelty. The Decree Nisi was granted to her on 14<sup>th</sup> July 2020.
3. On 19<sup>th</sup> February 2021, the Petitioner filed a Notice of Intention to Proceed with Ancillary Relief seeking the following:-
  - a) The parties have joint custody of the child with care and control to the Petitioner and liberal access to the Respondent; The parties share all school fees and educational expenses equally until the child attains the age of 23 years old or completes tertiary education;

- b) The Respondent contribute \$450.00 per month for maintenance of the child until the child attains the age of 23 years old or completes tertiary education;
- c) The Respondent purchase the Petitioner's 50% interest in the rental property and/or the Respondent liquidate the mortgage on the matrimonial home and transfer his 50% interest to the Petitioner in a trust for the child of the marriage;
- d) The Respondent pay the Petitioner 50% of the value of each of the following:-
  - Clear Bridge Investment Group
  - Primerica Shares
  - Arawak Port Development Shares
  - British American Annuity
  - Credit Union Account
- e) The Respondent pay the Petitioner \$100,000.00 for her 50% interest in the family business, namely, Sunshine Deli; and
- f) The Respondent be removed as beneficiary of the Petitioner's life insurance policy at Colina

4. By Order made 20<sup>th</sup> May 2022, it was ordered that

- i. The Petitioner and the Respondent share joint custody of the child of the marriage with care and control to the Petitioner and liberal access to the Respondent
- ii. The Petitioner and Respondent shall equally share all medical, dental and optical expenses for the child of the marriage until the child attains the age of 18 years old
- iii. The Respondent to purchase the Petitioner's 50% equity in the matrimonial home for the sum of \$46,000.000 within 90 days of the making of this order. Thereafter the Respondent to transfer and release her interest in the said matrimonial home to the Petitioner and vacate the same upon payment. In the event that the Respondent is unable to purchase the Petitioner's 50% equity in the matrimonial home, the matrimonial home is to be sold and the net proceeds shared equally between the parties
- iv. If the home is to be sold it is to be advertised and both parties are to agree the sales price. The agreement of either party is not to be unreasonably withheld
- v. Should any party fail to execute any document necessary to complete the sale, the Registrar is appointed to execute any and all documents for and on behalf of that party
- vi. The Petitioner shall be entitled to the bedroom set situate in the room she occupies in the matrimonial home and the gas tank
- vii. The Petitioner and Respondent to share all the shares held in the following companies equally which are to be transferred and/or liquidated and the net proceeds shared equally within 90 days of the making of this Order:-

- a) Primerica
  - b) Credit Union
  - c) British American
  - d) Bank of Funds
  - e) Arawak Port Authority
  - viii. The Petitioner and Respondent are declared equal shareholders of the Sunshine Deli and shall conduct an accounting within 90 days of this Order to determine profits and losses if any and thereafter share the same equally
  - ix. The Respondent to assume the payment or liquidate the loan at Commonwealth Bank presently in the name of the Petitioner
- The court also granted a Section 73 (1) (b) declaration that it was satisfied with the arrangements made for the welfare of the child.

5. It was ordered on 7th September 2022 that:-
- i. The Respondent obtain an educational evaluation of the child of the marriage, the cost of which was to be paid solely by the Respondent. In the event that the Respondent is unable to obtain the educational evaluation he is to pay half the costs (\$1,250.00) of the same obtained by the Petitioner
  - ii. The Respondent to provide all documents of a financial nature in his possession as it related to Sunshine Deli to his Attorney.
  - iii. The Respondent to pay the Petitioner's half of the cost of the Accountant's Report in the sum of \$2,805.00
6. By order made November 25<sup>th</sup>, 2022 the court ordered that the child attend Blairwood Academy and the fees and expenses be shared equally. The court also noted that the financial report on the Sunshine Deli was received.

## **ISSUES**

- 7. The only issues to be determined are the sharing of the interest in the marital business, the Sunshine Deli; and
- 8. The BAF annuity payment.

## **EVIDENCE**

9. The Petitioner averred:-
- i. The Respondent controlled all of the family's money. However, the Respondent never paid the Petitioner a salary. She alleged that even though she worked in the business, the Respondent withheld her salary for the past 12 years.
  - ii. The Petitioner had no say in what happened with the family business. The Respondent collected all the money, paid staff, bills and made

purchases and deposits to the account for the business.

10. The Respondent averred:-

- i. Due to the pandemic, the business suffered greatly and was about to close.
- ii. He paid the employees a severance package.
- iii. In 2013, he obtained a loan from Commonwealth bank for \$50,000.00 which was used to pay off the balance of the loan against the Petitioner's vehicle in the sum of \$10,000.00 and to start up the family business which included paying first and last rent, repairs to the building, building materials, labor and purchasing supplies, cookware, and inventory.
- iv. On or about 15<sup>th</sup> May 2020, he took out a Contingency Business Loan for the sum of \$20,000.00 being offered to small business to assist with salaries during the lockdowns as a result of the pandemic. The Petitioner had full knowledge of this.
- v. When the business closed down, the equipment was sold and the proceeds were used to pay some staff and suppliers. The debt of the business at the date of closing was approximately \$100,000.00, made up as follows:-
  - a. Unpaid severance of employees \$8,000.00
  - b. NIB contributions \$10,000.00
  - c. Business License fees \$3,000.00
  - d. BPL \$4,000.00
  - e. Water & Sewage \$500.00
  - f. BTC \$2,500.00
  - g. Air condition maintenance & repairs \$1,000.00
  - h. Bahamas Waste Management \$1,000.00
  - i. Arrears in rent \$2,000.00
  - j. Business Contingency Loan \$50,000.00
- vi. He acknowledged that he and the Petitioner jointly owned the family business and both were signatories on the business bank accounts at Scotiabank. Both parties had different roles and duties in the business. However, he mainly dealt with suppliers, maintenance, bank deposits and withdrawals.

**DECISION**

**SUNSHINE DELI**

11. By an order made 20<sup>th</sup> May 2022 the court declared that the parties were equal partners in the Sunshine Deli business and it was further ordered that an accounting was to be performed to determine the profit and losses of this marital asset.

12. Both parties obtained reports from independent accountants licensed with the Bahamas Institute of Chartered Accountants.
13. The Petitioner provided the documentation in her possession to Nexia Cochinamogulos who prepared the accounting report for the Petitioner. This report was then forwarded to Forbes & Associates along with the documentation that the Respondent advised the court that he had to prepare the Respondent's report.
14. The procedures performed by the Petitioner's accountant were set out in his report as follows:
  - i. Obtain the general ledger for the period under examination to determine the recorded earnings, deposits, and disbursements of Sunshine Deli.
  - ii. Obtain POS sales reports, check books and deposit receipts for the period under examination ascertain the completeness and accuracy of the general ledger accounting records.
  - iii. Obtain bank statements for the period under examination to determine the completeness and accuracy of the general ledger information,
  - iv. Calculate the differences between deposits to the bank and POS sales.
  - v. Perform procedure, supported by evidence, to ascertain amount of sale revenue that was not deposited and the amount of disbursements unrelated to the operations of Sunshine Deli/Café as follows:
    - a. Perform alternative procedures to determine earnings that were not deposited.
    - b. Use bank statements provided to tally the total checks which cleared the bank.
    - c. Use bank statements to determine total cleared checks for which blank images were provided.
    - d. Use bank statements to determine total cleared checks for which no images were provided.
    - e. Use bank statements to tally total cleared checks for which payees name was not available.
    - f. Use bank statements to tally ATM withdraws and calculate the average monthly ATM withdrawal.
    - g. Use bank statements to determine total transfer without payee identified.
  - vii. Request Mrs. Williams to identify payees from the Sunshine Deli/ Café cleared checks for which there was no authorization by her to receive payments and which Mrs. Williams identify as payees that are not related to Sunshine Deli/Café operations.
15. The findings were:-

- i. Item 1; Mrs. Williams reported that there was no general ledger in the form requested to assist with the objective of the engagement.
- ii. Item 2; Mrs. Williams reported that documents in the forms of POS sales reports, check books, or deposit receipts were not available, that such records were kept by her husband, Mr. David Williams.
- iii. Item 3: Mrs. Williams provided bank statements for account number 1151692 in the name David and Ingrid Williams trading as Sunshine Deli/Café. We were unable to determine the completeness of the general ledger because, as indicated the above response to item 1, no general ledger was provided.
- iv. Item 4: We were unable to calculate the difference between the POS sales receipt and deposits because no POS sales receipts or deposit records were provided. Mrs. Williams indicated that Mr. David Williams made deposits and there were no records of the POS sales receipts available.
- v. Item 5:
  - a. There was insufficient information to determine sales revenue that were not deposited.
  - b. Total checks clearing Sunshine Deli Café bank accounts was \$582,191.40.
  - c. Checks in the amount of \$48,286.89 are checks which cleared the bank for which the bank presented a blank image.
  - d. Checks that cleared the bank for which no images were provided totaled \$224,788.75.
  - e. Checks for which payee name was not available was \$274,635.64.
  - f. ATM withdrawals: Over the course of 107 months, ATM withdrawals totaled \$293,355.45, resulting in an average monthly ATM withdrawal of \$2,741.64.
  - g. Total transfers of \$600,654.24 were made from the bank account of Sunshine Deli/Café, of which \$504,689.24 had no payee account number and \$574,033.24 had no named payee.

#### Significant Findings

- i. There were \$48,846.89 in bank checks negotiated for which blank images were provided by the bank.
- ii. There were \$224,788.85 in checks negotiated for which no check images were provided.
- iii. Mrs. Williams found the average monthly ATM withdrawal of \$2,741.64 reasonable for the operations of Sunshine Deli/Café.
- iv. Mrs. Williams identified the check withdrawals unrelated to Sunshine Deli/Café for which Mr. Williams was signatory in the amount of \$172,843.33.
- v. Transfers totaling \$504,698.24 had no transferee information, and \$574,034.24 had no transferee named.

16. The Respondent's accountant set out the procedures he was perform as follows:-

- i. Obtain copies of the bank account statements of Sunshine Deli, as well as the checkbooks, for the period under review, and list all of the activities and include a schedule based on the details found.
- ii. Where the checkbook details may not be available, the bank statements will be utilized, along with the copy of the checks that are attached to the bank statements.
- iii. Obtain copies of the all relevant credit card statements, to be able to ascertain certain transfer details to and from the bank account of Sunshine Deli.
- iv. Create schedules that outline the disbursements by each year under review (Summarized Details) and indicate whether the disbursements are deemed to be that of a business or personal nature.
- v. Highlight the main expenditure detail from the credit card under review, specifically the personal credit cards in the name of Dave Williams, to ascertain if expenses were business or personal.
- vi. Seek to acquire independent documentation of loans or agreements that were in place during the period under review.
- vii. Seek to provide answers to the queries/findings indicated by the accounting firm Nexia Cochiamogulos.
- viii. Seek to review any financial report available for further clarifications.

17. His findings were:-

- i. **“We obtained a fairly good amount of the bank statements of Sunshine Deli, as some were missing and we were able to create schedules of disbursements based on those details found. A number of checkbook details were either missing or unable to be recorded, and even if it was available, some of the check stubs had little to no detail and the attached carbon copy, barely legible at best. Nonetheless, we created a schedule by year, indicating the summarized details of the disbursements and indicated the amounts relating to each payee. Those disbursement amounts for which we could not get any payee details, they were assigned as a “personal” amount to Mr. Williams. (SEE “Analysis of checkbook details per year”) These schedules done by year, were further summarized by TOTAL dollar amounts for review, and the allocated amounts of personal and business expenditure and the relevant percentages. (SEE “Summary of loan disbursements by checks.”**
- ii. **The most common expenditures we determined was processed on a regular basis, by year. (Some of the items include payee information that is a part of the queries by the accounting firm Nexia Cochiamogulos, but as the details of their queries per payee was not provided to us, we were unable to further provide any more details other than that which was listed in the summarized schedule).**
- iii. **The total expenditure that was arrived at based on the checkbooks and bank statements provided was \$591,305.17, of which \$455,900.18 was captured as business expenses and \$135,404.99 as personal**

expenses. Of note is that a checkbook in the numerical series was not found in 2014, and some check details were missing in 2019 and 2020.

- iv. A) The queries by Nexia Cochinamogulos relating to \$48,286.89 worth of checks cleared by the bank with the bank giving blank check images and \$224,788.75 of cleared checks for which no images were supplied by the bank, were not able to be cleared by ourselves. No other details were provided to us other than the amounts indicated.
- B) The query of checks totaling \$274,635.64 having no payee information, was not able to be cleared by ourselves as we had no details on this total for further clarification.
- C) The query of \$600,654.24 worth of transfers being made from the account of Sunshine Deli, with either no payee name (\$574,033.24) or indicated account number (\$504,689.24) was also not able to be further clarified, as we had no details on the total amount provided. There were a number of transfers that we were able to identify as having been transferred to various credit cards of Mr. Dave Williams, that were utilised for both personal and business use, however many of the statements were not available for review; of those available, a schedule was created for review, "Summary of transfers from Sunshine Deli".

We also made note of at least 3 major expenses (Bahamas Food Services, BPL, & BAF Financial) charged to at least 4 of the credit cards in the name of D. Williams, totaling some \$371,306.58 from the available statements for the periods under review. (See schedules "Major payments through Credit Cards of D. Williams").

D) The query of the amount of \$172,843.33 not being legitimate withdrawals of the Deli, Mr. Williams indicated that over \$113,000 of those funds (65%) were repayments of informal loans received over the years to assist with business operations, of which his wife should be aware. The remaining represents payments to charitable organizations and an investment payment.

Mr. Williams contends that personal funds from his retirement from BPL of some \$170,603.32 (of which 7% went directly to the Deli's account, the remainder to his credit card ending in \*\*\*4538) indicates his personal commitment to the success of the Deli's overall operations. (See schedule titled "Transfers from personal account of D. Williams to Sunshine Deli).

- v. We were not able to acquire sufficient documentation for the loan repayments. It was indicated that most of the loans were informal and acquired from friends and acquaintances. Rent payments for the period was confirmed for the period under review (Schedule provided).



- vi. **There were no financial statements or related financial reports to review for this engagement.**
18. The Respondent confirmed that he was the Chief Financial Officer and controlled the monies derived from the business. He also advised the court that he had a substantial number of documents for the business which he would provide to his accountant. It is clear from the report of Mr. Forbes that the documentation was not provided.
19. The Petitioner submits that based on the findings she is entitled to one half of the funds spent by the Respondent for his personal expenses. The Respondent submits that the Petitioner is to be liable for one half of the debt.
20. Based on a review of both reports, the significant findings were:
- i. \$135,404.99 was spent by the Respondent for personal expenses. (Respondent's report)
  - ii. \$48,286.59 in checks were cleared with blank images.
  - iii. \$224,788.75 in checks cleared the bank for which there were no images provided.
  - iv. \$274,635.64 in checks for which the payee name was unavailable.
  - v. ATM withdrawals totaled \$293,335.43.
  - vi. Transfers in the amount of \$600,654.24 were made from the business and of that sum \$504,598.24 had no payee account and \$574,033.24 had no named payee.
  - vii. \$172,843.33 in checks signed by the Respondent to third parties were not authorized by the Petitioner. (Petitioner's report)
21. The court may make property adjustment orders by virtue of **Section 28 of the Matrimonial Causes Act (MCA)**. The marital assets are the business known as Sunshine Deli/Café and the annuity with BAF. The parties each have a 50% interest in the Deli but as the business has now closed and has considerable liability, the court must decide how much of the liability must be shared between the parties; based on the allegation of the Petitioner that the Respondent misused funds for personal expenses.
22. In reviewing the Section 29 statutory guidelines, the evidence and submissions presented by the parties, I accept the following:-
- i. The parties were married for 15 years before the marriage was dissolved. This was a relatively long marriage.
  - ii. The family business, Sunshine Deli, is a joint family asset and when it closed down in February 2021 there was considerable debt remaining.
  - iii. A loan was taken out for the business from Bank of The Bahamas valued at \$50,000.00 and Contingency Business Loan from The Bahamas Government valued at \$20,000.00
  - iv. A loan was taken out at Fidelity bank in the sum of \$80,000.00 by the Respondent

- v. The Respondent was the CFO of the business and controlled the funds of the business and the marriage. He paid the bills for the business and obtained all the funding for the same.
- vi. The business finances were not properly managed. Documentation was not properly kept. The Petitioner did not authorize many of the business transactions. The daily sales records were not kept.
- vii. The total expenditure based on the checkbooks and bank statements available was \$591,305.17 over an eight year period. Business expenses totaled \$455,900.18 and \$135,404.99 to \$172,843.33 were personal expenses of the Respondent and paid directly from the business.
- viii. The checks which were issued from the account without either payee information or without check images cannot be verified whether they were legitimate expenses or not.
- ix. The BAF annuity is an asset jointly owned. There is evidence that the Petitioner received less than one half of the sum paid out.

23. Matrimonial assets was described by Lord Denning in Wachtel v. Wachtel 1973 1 All ER 829 as:-

**“1. ... 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.”**

24. In Rossi v. Rossi [2006] EWEC 1482 (Fam), Judge Nicholas Mostyn QC provides useful guidance on the distinction between non-matrimonial and matrimonial property:-

**“1. the matrimonial property is likely to be divided equally, although there may be departure if (i) the marriage is short, and (ii) part of the matrimonial property is "non-business partnership, non- family assets' or if the matrimonial property is represented by autonomous funds accumulated by dual earners; and**  
**2. the non-matrimonial property is not in fact quarantined or excluded from the court's powers. It simply represents an unmatched contribution by the party who brings it to the marriage. The court must decide whether it should be shared and, if so, the proportions in which it is to be shared. In reality, the longer the marriage, the more likely the non-matrimonial property will become merged with matrimonial property. By contrast, in a short marriage, non-matrimonial assets are not likely to be shared unless needs dictate.”**

25. The consideration for the distribution of the matrimonial property begins at the breakdown of the marriage and when mutual support ended. This was enunciated

in Rosemary Edit Burrows v Sylvester John Burrows SCCivApp No. 58 of 2021 where Crane Scott JA held:-

**“The legal principle is that the date when the marriage broke down and mutual support ended is the point in time at which the property and financial resources of the parties which are or will be available for equitable distribution is to be assessed. That overarching principle is, in our view, well established and not seriously in dispute.”**

26. Having declared that the parties are equal owners of the Sunshine Deli business and having acknowledged that the Petitioner worked in the family business and benefitted from the same, it is only reasonable that the liability would be shared between both parties, however, there is evidence that the Respondent used the business funds for personal expenses to the tune of \$135,404.99 as determined by the Respondent's accountant or \$172,843.33 as determined by the Petitioner's accountant. Either sum is more than the outstanding debt owed for the business. The Respondent confirmed that the business had a debt of \$100,000.00 for unpaid expenses. In the absence of any documentary evidence to confirm the amount and based on the fact that the Respondent ran the business without the Petitioner being aware of the details, I accept this sum as the debt owed.
27. The Petitioner would normally be liable for \$50,000.00 of this debt but I order that the Respondent be fully liable for the same because of his using business funds for his personal expenses which could have paid the debt. I also accept that the Petitioner was not paid a salary, and further that there is no evidence of her using any of the business funds for her personal expenses.
28. I also order that the Respondent reimburse the Petitioner \$77,062.08 representing one half of the funds spent by him for personal expenses within 90 days of the date of this order. I computed this sum as being the median between the figures stated by both of the accountants and then divided in half.
29. I am not able to make any order with regard to the checks with blank check images or other missing information as I am unable to categorically determine if they were genuine business expenses or not. They simply reflect the mismanagement by the Respondent.
30. I also note for the record that the Respondent failed to provide any submissions in support of his case as ordered by the court. I also note that the Respondent's report forwarded to the court was without any of the schedules or attachments referred to in the body of the report and as such the report was incomplete.
31. I also order that the Petitioner is entitled to 50% of the BAF annuity account based on the documents submitted in her affidavit filed 8<sup>th</sup> September 2022.

32. The sum of \$574,033.24 in direct transfers however also reflected the mismanagement by the Respondent. He was directly responsible for transferring these sums and would have had to provide some banking information in order for the transfers to occur. These were deliberate actions on his behalf. He failed to produce any documentation and in the circumstances I order that the Petitioner is to be awarded one third of the sum namely \$191,344.41 taking into consideration that some of these were legitimate business transfers and also taking into consideration the \$100,000.00 debt. The report of Forbes & Associates confirmed that there were a number of transfers that he was able to identify as having been transferred to various cards of the Respondent and which were used for both personal and business use. The schedule however was not provided to the court to confirm the precise amount.

33. Each party shall bear their own costs.

**Dated this 8th day of March 2023**



**The Hon. Madam Justice G. Diane Stewart**