

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION
BETWEEN

2018
FAM/div/00549

K. A. H

Petitioner

AND

Y.H

Respondent

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Alton McKenzie for the Petitioner

Maria Daxon for the Respondent

Ruling Date: 8th March, 2023

RULING

BACKGROUND FACTS

1. The Petitioner, K.A.H was married to the Respondent Y.H on 9th December 2000. There are three children of the marriage, namely K.A.H born 14th August 1998, K.A.H.J born 12th February 2002 and K.A.H born 26th January 2008. K.A.H is the only minor for the court's consideration.
2. The Petitioner filed his Petition on 16th August 2018 seeking a divorce on the ground that since the celebration of the marriage the Respondent had lived separate and apart from him for a period in excess of five years.
3. The Decree Nisi was granted on 18th September 2019 and the ancillary matters were adjourned to Chambers.
4. The Petitioner sought the following by his Amended Notice of Intention to Proceed with an Application for Ancillary Relief filed 6th August 2019:-

- i. That the parties be granted joint custody of the minor child of the marriage with day to day care and control to the Petitioner with reasonable access to the Respondent
 - ii. That the Petitioner continue to cover all day to day of the minor child. Additionally that the Petitioner continue to cover half of the medical, dental and optical expenses of the minor child
 - iii. That the matrimonial home's title be transferred solely to the name of the Petitioner
5. The Respondent sought the following relief as set out in her Affidavit of Means:-
- i. That the Petitioner pay \$300.00 per month in child maintenance
 - ii. The Petitioner is to have access to the child of the marriage every weekend from 3:00pm Friday to Monday 8:00pm
 - iii. The child will spend Father's Day with the Petitioner and Mother's Day with the Respondent. Additionally, the child will spend one half of her birthday with the Petitioner and the other half with the Respondent or as they will agree otherwise
 - iv. The Petitioner is to have access to the child for the month of August during summer school holidays or as otherwise agreed by the parties
 - v. The child will spend one half of the Christmas holiday and one half of the Easter holiday with the Petitioner, and the Petitioner and the Respondent will alternate access to the child on Christmas Day and New Year's Day
 - vi. If the Petitioner is to travel with the child during his periods of access, he shall notify the respondent and the Respondent shall hand over the child's passport to the Petitioner one week prior to the travel. The Petitioner shall return the child's passport to the Respondent when the child is returned
 - vii. The Petitioner is to pay clothing allowance of \$200.00 every June and December for the minor child
 - viii. That the Petitioner and Respondent shall share equally all medical, dental and optical expenses of the minor child
 - ix. That the Petitioner and Respondent have joint custody of the minor child with care and control to the Respondent and reasonable staying access to the Petitioner
6. By an Interim Order made 13th July 2021, it was ordered that:-
- i. The Petitioner and the Respondent share joint custody of the minor child with primary care to the Respondent and liberal access to the Petitioner
 - ii. A seat be reserved at both Stapeldon School and PACE Christian Academy in respect of the minor child.
 - iii. Until the Court has made a determination as to which institution is best suited to meet the educational needs of the child she shall be fully enrolled in the Stapeldon School and shall attend the same

7. By an Interim Order made 25th July 2022, it was ordered that:-
- i. The Petitioner shall to the Respondent \$350.00 per month for maintenance for the minor child of the marriage
 - ii. The Petitioner pay \$625.00 which is a portion of the outstanding amount owed for arrears in maintenance in addition to the regular monthly payment by 15th August 2022
 - iii. The said child be evaluated by Dr. Novia Carter

PETITIONER'S EVIDENCE

8. The Petitioner filed his Affidavit of Means on 6th August 2019. He was self-employed as an Auto Body Repairman earning approximately between \$1,500.00 - \$2,500.00 per month.
9. He maintained that he purchased the land where the matrimonial home is located in 2000 and solely began to slowly develop the land out of his pocket. The construction of the home started in 2005. The Respondent and their two children moved into the matrimonial home in 2007. He always paid the mortgage on the matrimonial home alone, without the assistance of the Respondent.
10. He currently resides in the matrimonial home. He has paid off the mortgage with considerable difficulty.
11. The Petitioner maintains that he was responsible for the overall maintenance and all bills associated with the household, the Respondent did not assist him.
12. He also has a whole life insurance policy with BAF Financial Bahamas with a value of \$150,000.00.
13. In a Supplemental Affidavit of Means filed 20th March 2020, the Petitioner further stated that the mortgage was secured for \$36,000.00 to assist with the construction of the home.
14. The Petitioner maintained that the Respondent moved out of the matrimonial home in 2013 with one of the children of the marriage, while the other two children remained living with him in the home. From 2013, he has been solely responsible for the needs of the minor child and has been solely responsible for ensuring that the child is taken to and from school.

15. The Petitioner also operated his auto body mechanic repair business from the matrimonial home.

16. As of 22nd February 2020, the matrimonial home was appraised at a value of \$177,000.00.

17. The Petitioner's monthly expenses as of 11th May 2021 were:-

| | | |
|-------|------------------------------------|--------------------------|
| i. | Electricity | \$200.00 |
| ii. | Internet & Phone | \$100.00 |
| iii. | Boat Maintenance & Fuel | \$400.00 |
| iv. | Water | \$60.00 |
| v. | Telephone | \$60.00 |
| vi. | Grocery & Toiletries | \$300.00 |
| vii. | Gas (vehicle) | \$200.00 |
| viii. | NIB | \$121.53 |
| ix. | Cell Phone Card | \$80.00 |
| x. | Child Support | \$350.00 |
| xi. | Gas (cooking) | \$20.00 |
| xii. | Yard Maintenance | \$60.00 |
| | <u>TOTAL</u> | <u>\$1,951.53</u> |

18. His yearly expenses were:-

| | | |
|------|--------------------------------------|--------------------------|
| i. | Insurance (car) | \$332.00 |
| ii. | Vacation | \$3,000.00 |
| iii. | School Supplies | \$250.00 |
| iv. | School Books | \$400.00 |
| v. | School Uniform | \$300.00 |
| vi. | Clothing (myself & child) | \$1,000.00 |
| | <u>TOTAL</u> | <u>\$5,282.00</u> |

RESPONDENT'S EVIDENCE

19. The Respondent filed her Affidavit of Means on 28th January 2020. At the date of filing the Respondent was employed with the British Colonial Hilton Hotel as a maid, earning a salary of \$840.00 per month.

20. Her monthly expenses were:-

| | | |
|------|-------------------------------|-----------------|
| i. | Credit Union Loan | \$332.00 |
| ii. | Rent | \$600.00 |
| iii. | Water & Sewage | \$120.00 |
| iv. | Grocery | \$300.00 |
| v. | Grooming & Notions | \$200.00 |

| | | |
|-------|-------------------------|--------------------------|
| vi. | Clothing | \$50.00 |
| vii. | Union Dues | \$40.00 |
| viii. | Family Life Ins. | \$40.00 |
| | <u>TOTAL</u> | <u>\$1,682.00</u> |

21. In 2004 the parties obtained a mortgage for the purchase of a vacant lot located at #28 Victoria Gardens for \$36,000.00. The mortgage was paid by both parties equally until 2013, when the Respondent was thrown out of the matrimonial home by the Petitioner in 2014 after he had hit her and screamed at her. The Petitioner became solely responsible for the mortgage payments after such time.
22. The Petitioner remortgaged the property in 2012 to purchase a fishing boat and not to construct the matrimonial home. The home was built by cash payments. The Respondent maintained that every week she purchased blocks, cement, steel and other building supplies for the construction of the matrimonial home.
23. The Petitioner refused to provide any financial assistance to the Respondent of the children of the marriage after she was thrown out of the home. The child of the marriage was not left in the home with the Petitioner when she was thrown out.
24. In 2015, the male child of the marriage went to live with the Petitioner while the female children of the marriage remained living with the Respondent until the Petitioner refused to return the minor child to her mother's house where they presently live.
25. Both parties have had numerous arguments regarding pick up and drop off times of the minor child, which has caused the child's school performance to decrease drastically.
26. It was agreed that the Petitioner would operate his auto mechanic business from the matrimonial home. Prior to the construction of the house, they lived with the Respondent's mother and he operated his business from there.

DECISION

PROPERTY ADJUSTMENT

27. **Section 28 of the Matrimonial Causes Act** enables the Court to make property adjustment orders in divorce proceedings. The Court's starting approach in these type of proceedings is the equal sharing principle unless there exists a compelling reason to depart from it. The Court must consider the established

principles in **Section 29 of the Matrimonial Causes Act** when making these orders. The equal sharing principle is not immoveable or inflexible.

28. The Petitioner submits that the Court should depart from the equal sharing principle on the basis that the Respondent moved out of the matrimonial home and that he solely was responsible for paying the entirety of the mortgage and the upkeep of the property. The Petitioner is seeking an order that he be granted 100% interest in the matrimonial home.

29. The Respondent submits that the Court should not depart from the equal sharing principle as she paid half of the down payment on the matrimonial home and that she was equally responsible for expenses and utility bills during the course of the marriage. The Respondent submits that she was also responsible for paying her share of the mortgage until she was thrown out of the home. The Respondent is seeking that the parties be granted an equal share in the matrimonial home. She also looked after the children and the home while living there.

30. In **A v B [2010] 2 BHS J No.18, Barnett CJ**, reaffirmed the stance in **White v. White [2001] 1 All ER** that the modern day approach to the division of assets in The Bahamas is equal sharing of property unless there is compelling reason to depart from it.

31. In **White v White [2001] 1 All ER** Lord Nicholls stated:-

“Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome of these matters, whether by agreement or by court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone’s life is different. Features which are important when assessing fairness differ in each case. And sometimes different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eyes of the beholder.”

32. Further **Miller v Miller; McFarlane v McFarlane (2006) 3 All ER 1** the House of Lord stated:-

“This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rises 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 provision for the parties housing and financial needs, taking into account 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. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.”

33. In Jupp v Jupp SCCrApp No.37 of 2011, a Judge must take into consideration section 29 when exercising his discretion.

“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 vet), 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 required 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 reason for the same.”

34. The objective of the Court in these proceedings is to achieve a fair result between the parties having considered Section 29.

35. In considering the statutory considerations, the evidence and the submissions of both parties, I accept the following:-

- i. The parties were married for eighteen years. This was a relatively long marriage
- ii. There is no evidence that either party suffers from any physical or mental disability, therefore their earning capacity is not hindered in any way by disability
- iii. The parties have presented evidence which is contradictory to each other. The Petitioner claims that he solely purchased the property, secured the mortgage and built the home from his personal cash. He also further claimed that he made all mortgage payments and paid all utility bills without any assistance from the Respondent.
- iv. The Respondent on the other hand maintains that she contributed to half of the down payment and made financial contributions towards the mortgage and contributed equally to the utility bills and maintaining the home.
- v. The Petitioner made all of the mortgage payments after the Respondent ceased living in the home
- vi. The Property has been appraised at \$177,000.00

36. Based on the evidence provided by the parties, I am satisfied that both parties made financial contributions to the matrimonial home, either by contributing to the purchase of the land, the mortgage payments or by paying the household bills and also by the caring for the home and the children.
37. While it is evident that the Petitioner paid the majority of the mortgage during the marriage and solely after the Respondent ceased living in the home, it would be unfair to disregard her contributions during the course of the marriage. As held in **Miller v Miller and McFarlane**, the non-financial contributions of the Respondent cannot be overlooked or considered as less important. I am satisfied that after the Respondent left the home the entire burden of the matrimonial home was on the Petitioner, but until then the efforts may have differed in kind but equal in value.
38. Accordingly, it is fair to depart from the equal sharing principle and it is ordered that the Petitioner be awarded 65% of the value of the matrimonial home and the Respondent 35%. The Petitioner shall retain the right to purchase and pay to the Respondent 35% of the appraised value of the property within 90 days of the date of this ruling, namely \$61,950.00.
39. Failing to exercise such right, the property shall be listed for sale by both parties and sold at the highest offer. The party whose offer is accepted will control the sale. The net proceeds are to be shared between the parties as ordered above.

CUSTODY AND MAINTENANCE

40. The court is empowered to determine any issue relating to children by **Section 74 of the Matrimonial Causes Act** which provides:-

“The Court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen in any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute).”

41. Further **Section 3 (1) of the Child Protection Act (CPA)** set out what is the paramount consideration when making any decision affecting a child. It provides:-

“Whenever a determination has to be made with respect to –

- a) The upbringing of a child
- b) The administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the paramount consideration.”

42. **Section 3 (3) of the CPA** sets out the considerations which in addition to the starting considerations of **Section 29 of the MCA** which relate to children, the court must have regard to. These considerations are:-

“In determining any question relating to circumstances set out in Paragraphs (a) and (b) of subsection (1), the court or any other person shall have regard in particular to -

- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;**
- (b) the child’s physical, emotional and educational needs;**
- (c) the likely effects of any changes in the child’s circumstances;**
- (d) the child’s age, sex, background and any other circumstances relevant in the matter;**
- (e) any harm that the child has suffered or is at the risk of suffering;**
- (f) where relevant, the capacity of the child’s parents, guardians or other persons involved in the care of the child in meeting his or her needs.”**

43. The court interviewed the child of the marriage and also interviewed the Principals of two of the schools involved. The court recognized the special educational needs of the child and made orders to address those issues.

44. The court in determining what is in the paramount interest of the welfare of the child, must consider the wishes of each parent, the rights of the child, the means of each parent, and the needs of each child. I accept that because the child is a girl it may be presumed that she should be with her mother. This presumption was addressed by Dame Butler-Sloss in **Re S (A Minor) (Custody) [1991] F.L.R. 390:-**

“There are dicta...to the effect that it is likely that a young child, particularly perhaps a little girl, would be expected to be with her mother, but that is subject to the overriding factor that the welfare of the child is the paramount consideration. When there is a dispute between parents as to which parent should take the responsibility of the care of the child on a day-to-day basis, it is for the justices or for the judge to decide which of those parents would be the better parent for the child, who cannot have the best situation since they are (not?) together caring for her. I would just add that it is natural for young children to be with mothers but where it is in dispute, it is a consideration but not a presumption.”

45. Also in **Edwards v Edwards [1990] 27 J.L.R. 374** Rowe P. stated:-

“It would seem to be self-evident that a young female child should be reared by her mother if that can be accomplished without harm to the child.”

46. The child is a young girl, a factor which this court must consider. The authorities are replete with the desirability unless there are obvious reasons not to, that young children should maintain a very close connection with their mother who is the initial nurturer of the family unless there is evidence to the contrary. I have not been provided with any evidence to refute this statement. I do not, by this statement, in any way intend to cast any aspersions on the ability of the Petitioner to nurture his child. In fact, I am satisfied that he does love and care for his child, and has been doing so, but I am satisfied that this mother, by her evidence loves her daughter and is willing and able to take care of her. I am also cognizant of the fact that the Petitioner works as an auto mechanic from his home and this occupation results in strangers being present at all times at the matrimonial home. I also am cognizant of the special challenges of this child which may create an unusual risk for her in the presence of strangers.
47. I am therefore satisfied that the parties shall share joint custody of the minor child of the marriage with primary care to the Respondent and liberal access to the Petitioner.
48. The following terms of the Interim Order made on 1st September 2022 are confirmed:-
- i. The Petitioner shall pay to the Respondent \$350.00 per month to be paid on or before the 28th day of each month for maintenance of the minor child of the marriage until she reaches the age of 18.
 - ii. The Petitioner shall pay the outstanding amount owed for arrears in maintenance in addition to the regular monthly payment
49. The minor child of the marriage shall remain enrolled in S.C. McPherson Junior High School in the special program for students with educational challenges.
50. The Petitioner and the Respondent shall equally pay all educational fees for the said child and shall equally share all medical, dental and optical expenses of the said child of the marriage
51. Each party is to bear its own costs of these proceedings.

Dated this 8th day of March 2023



The Hon. Madam Justice G. Diane Stewart