

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Law Division

2016/FAM/div/FP/00046

B E T W E E N

BMS

Petitioner

AND

RJS

Respondent

Before: The Honourable Justice Constance Delancy (Acting)

Appearances: Cassietta McIntosh-Pelecanos for the Petitioner

Ntshonda Tynes for the Respondent

Hearing date(s): 15 February, 2024

DECISION

DELANCY, J (ACTING)

1. This is the Petitioner's application for an order for property adjustment of the matrimonial assets. The parties filed Affidavits and were both cross-examined on the contents thereof.

Background

2. The parties were married on 26 September, 2001 in New Providence. At the time of the marriage, the Petitioner was a widow age 36 years and mother of two children (JG 10 years and KG 6 years). The Respondent was, at the time of the marriage, a bachelor age 32 years and father of two children (RS1 age 3 years and RS2 age 1 year). During the marriage, the parties had two children together (RS3 born 2002 and RS4 born 2003). All of the children are now *sui juris*.

3. The Petitioner is currently age 59 years, a banker and businesswoman, now a full-time student, and resides in Canada. The Respondent is currently age 54 years, a Chartered Public

Accountant, and resides in New Providence. The parties were married for 14 years prior to the pronouncement of the Decree Nisi 29 June, 2016 (and made Absolute 23 June, 2023).

4. The current assets held by the parties, which are subject to mortgages with FirstCaribbean International Bank (FCIB), consist of the following:-

- i. matrimonial home situate at Point Look Out Drive, South Bahamia, Grand Bahama held in the name of Sugar Apple Company Limited (shares held jointly by the parties); and
- ii. a house located in Garden Hills Estates Subdivision, New Providence held in the Petitioner's name.

Issue

5. The Court must determine whether the Garden Hills and South Bahamia properties are matrimonial assets; and whether the Court ought to depart from the equal sharing principle as it relates to the matrimonial assets.

Evidence

6. Both parties filed Affidavits in which they identified properties and assets which they regard as the matrimonial assets and were both cross-examined by Counsel for the respective parties.

7. The Petitioner's evidence is found in her Affidavit of Means sworn 31 January, 2017; Second Affidavit sworn 20 December, 2017; and Supplemental Affidavit sworn 20 July, 2023.

8. The Respondent's evidence is found in his Affidavit of Means sworn 6 November, 2017 and Supplemental Affidavit of Means sworn 13 January, 2024.

9. The following facts summarized from the parties' respective Affidavits:

- i. The Petitioner came to the marriage with significant assets namely, the Garden Hills property and a fixed term deposit;
- ii. The parties owned one (1) acre property located in Love Estate in the Western District of New Providence;
- iii. The Love Estates property, Gardens Hills property and the fixed deposit were used as collateral for the acquisition of the matrimonial home, overdraft facilities, loans by both parties and family living expenses;

- iv. That throughout the marriage the Respondent's salary serviced the loans and family's expenses including the school expenses for the then minor children and insurance on the Garden Hills property and the matrimonial home;
- v. At time of the filing of the divorce proceedings, the Petitioner was employed as sales agent at a business in Grand Bahama;
- vi. The fixed term deposit and the Love Estates property have since been realized by the Bank to service the loans;
- vii. The Respondent lost his job in Grand Bahama in 2019 and since 2023 is employed as Chief Financial Officer with a newspaper publication company in New Providence and currently earns a salary of \$105,000 per annum;
- viii. The Petitioner relocated to Canada in 2016 and enrolled as a full-time student and currently earns a salary of \$34,0000 CAD per annum;
- ix. That the Petitioner operated two businesses, one prior to the marriage and one during the marriage both floral and home décor in nature, the debts of which were absorbed into the family's overall expenses;
- x. The Petitioner rented the Garden Hills property for an unspecified period and the income derived therefrom is unknown;
- xi. The Respondent purchased materials and paid for the replacement of the roof to the Garden Hills property;
- xii. The appraised value of the properties as of 2023 were as follows:-
 - (a) Matrimonial home in South Bahamia at \$336,000; and
 - (b) Garden Hills house at \$180,000.
- xiii. The outstanding sums due and owing under the FCIB mortgages as at July 2023 was \$514,623.55.

Submissions

10. Counsel for the Petitioner contends that the Court ought to consider the initial financial position of the Petitioner when she entered the marriage having had considerable assets. That she trusted the Respondent as head of the household to manage the family's assets and the Respondent's poor decisions resulted in the foreclosure of matrimonial assets. The Petitioner's position with reference to the adjustment of the matrimonial assets are set out in Supplemental Affidavit filed 6 September, 2023:

1. Immediate possession of the Bahamia home so that she may seek a tenant and the rental proceeds therefrom paid to the bank.
2. Assistance from the Respondent financially to repair/replace upgrade all that is needed to make it rentable as he and his guests have had occupation of the same for several years.
3. Eight months from the date of the Court Order to make an application to the Bank to secure a Mortgage in her sole name or herself and another to remove the Respondent's name from the Mortgage and Conveyances.
4. The Respondent to pay an agreed sum to the Petitioner as a contribution to the Mortgage.

11. Counsel for the Respondent contends that the Respondent's interest in the matrimonial assets is based on the considerations found at section 29 of the Matrimonial Causes Act. That although the Petitioner brought assets into the marriage, the Court must balance that consideration against the Respondent's contribution to the family unit during the marriage. Counsel further submits that the Court ought to have regard to the particular circumstances as to what is not only fair and equitable but what is practical having regard to the financial obligations of the parties. The Respondent's position is to have the matrimonial property (South Bahamia) sold and the proceeds of the sale applied to the mortgage; and that he would release whatever interest he has in the Garden Hills property.

Law

12. Section 25 (2) of the Matrimonial Causes Act (MCA) provides that the Court has the power to make property adjustment orders:-

(2) The property adjustment orders for the purposes of this Act are the orders dealing with property rights available (subject to the provisions of this Act) under section 28 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say —

- (a) any order under subsection (1)(a) of that section for a transfer of property;
- (b) any order under subsection (1)(b) of that section for a settlement of property; and
- (c) any order under subsection (1)(c) or (d) of that section for a variation of settlement.

(3) Where the court makes under section 27 or 28 a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale in which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.

(4) Any order made under subsection (3) may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include —

(a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and

(b) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order. [Emphasis added]

13. Section 28 of the MCA provides:

(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, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so 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;

14. Section 29 of the MCA provides the guidelines that the Court must follow when make property adjustment orders:

(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 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 towards the other....” [Emphasis added]

Analysis

15. The Court must determine what the matrimonial assets are. Matrimonial assets or family assets were described in the case of **Wachtel v. Wachtel** [1973] 1 All ER 829 per *Lord Denning MR* at page 836:

...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.

16. In the Court of Appeal case of **Collie v. Collie** SCCivApp. No. 19 of 2015 as per *Crane-Scott, JA* at paras. 58, 59 and 65-67 thereof:

58. It now appears from the decision of the English Court of Appeal in **Charman v. Charman** [2007] 1 FLR 1246 that where a court elects to adopt the “*yardstick of equality of division*” first identified in **White v. White** [2001] 1 AC 596 or the “*equitable sharing principle*” coined by *Lord Nicholls of Birkenhead* in **Miller v. Miller; McFarlane v. McFarlane** [2006] UKHL 24, the equal sharing principle is not restricted only to matrimonial assets, but applies to all the parties’ property unless there is good reason to depart from those proportions.

59. Delivering the Court’s decision in **Charman**, *Sir Mark Potter P* explained the approach to the statutory exercise required by section 25(2)(a) of the English Act [corresponding to our section 29(1)(a)] in the following terms:

[65]...It is clear that the court’s consideration of the sharing principle is no longer to be postponed until the end of the statutory exercise. We should add that, since we take ‘the sharing principle’ to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not from the principle but takes place within the principle.

[66] To what property does the sharing principle apply?...We consider...the answer to be that, subject to the exceptions identified in **Miller** to which we turn in para [83]-[86], below, the principle applies to all the parties’ property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in **White**, at 605 F-G and 989

respectively, and in **Miller**, at paras [24] and [26], *Lord Nicholls of Birkenhead* approached the matter in that way; and there was no express suggestion in **Miller**, even on the part of *Baroness Hale of Richmond*, that in **White** the House had set too widely the general application of what was then a yardstick.

[67] Even if, however, a court elects to adopt the sharing principle as its ‘starting point’, it is important to put that phrase in context. For it cannot strictly, be its starting point at all... The inquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in s. 25(2)(a)... a court should first consider, with whatever degree of detail is apt to the case, the matters set out in s. 25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future....” [Emphasis added]

17. The Court adopts the equitable sharing principle approach in **Miller v. Miller; McFarlane v. McFarlane** to the division of matrimonial property. The Petitioner has not demonstrated any compelling reason for the Court to depart from applying this principle to all the parties’ properties.

18. The Court when exercising its powers under Section 28 must consider the factors in Section 29 of the MCA. In the instant case the Court considered:

- i. That the Petitioner 59 years of age and Respondent 54 years of age and were married for over 14 years prior to the granting of the Decree Nisi and is therefore not a short marriage;
- ii. That is no evidence to suggest that either party suffers from any physical or mental disability;
- iii. That the Petitioner brought assets to the marriage; and that the Respondent was the primary breadwinner and paid the family’s expenses inclusive of the mortgages, insurances on both properties and private school fees for the children;
- iv. That evidence, which has not been disputed, the Respondent earns a higher salary than the Petitioner but he is heavily indebted;
- v. That there is no dispute that the South Bahamia property is a matrimonial asset despite the fact that title to the same is held by a company;
- vi. That the Garden Hills property held in the sole name of the Petitioner was used as collateral for the acquisition of the matrimonial home and for the benefit of the family. The Garden Hills property ought to be considered a matrimonial asset;

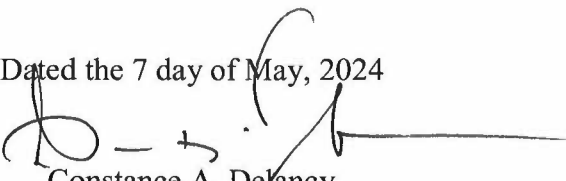

- vii. That the Respondent contributed to the upkeep of the Garden Hills property in particular conducted and paid for major roof repairs;
- viii. That the Petitioner derived income from the Garden Hills property for which she has not given a full disclosure of;
- ix. The Petitioner distanced herself from the family's current financial woes and placed the duty of managing the family's assets solely on the Respondent;
- x. The properties are heavily indebted and in danger of being foreclosed;
- xi. That the family enjoyed a high standard of living kept afloat by loans and overdraft facilities;
- xii. That the parties both agree that they have been discussing the issues related to the properties over years since the granting of the Decree Nisi and have been unable to resolve the same.

Conclusion

19. The Court hereby orders:-

- i. That the South Bahamia and Garden Hills properties be sold and that the Mortgages are satisfied from the proceeds of the sale and all other related charges are settled and thereafter the remaining funds are to be shared 60/40 by the Petitioner and the Respondent;
- ii. That each party is to bear their own cost of these proceedings;
- iii. That in the event that either the Petitioner or Respondent is unwilling or unable to execute the necessary conveyances for the sale of the properties, a Deputy Registrar of the Supreme Court Northern Division is authorized upon application being made to execute the relevant conveyances.

Dated the 7 day of May, 2024



Constance A. Delancy
Justice (Acting)