

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2021/FAM/div/00802

B E T W E E N

C. M. (nee M)

Petitioner

AND

D. M.

Respondent

Before: The Honourable Justice C.V. Hope Strachan

Appearances: Judith Smith for the Petitioner
Nadia Hope Adderley for the Respondent

Hearing date: 28th September 2023; 31st January 2024

Family law — Divorce — Ancillary Relief — Petitioner claiming lump sum payment - spousal maintenance - Property adjustment of matrimonial home- Whether parties have equal share in matrimonial property- Conduct of parties material to decision.

JUDGMENT

Background

[1.] This is an application for ancillary relief. The Petitioner, C.M (nee M) (“the wife”) and the Respondent, D.M (“the husband”) were married on 20th June 2009. The wife is a hairdresser and the husband a teacher. There are no children of the marriage. The wife filed for divorce on 29th December 2021. A Decree Nisi was granted on 12th April 2022, on the ground that since the

celebration of the marriage the husband had treated the wife with cruelty. A Decree Absolute was granted on 1st November 2022. The marriage lasted just Two (2) months shy of Thirteen (13) years.

[2.] The wife filed a Notice of Intention to Proceed with Application for Ancillary Relief (“the Notice of Intention”) on 18th January 2023 seeking the following periodical payments and property adjustment as follows:

- i. That the wife receives periodical payments including a lump sum.
- ii. That the property located on Carmichael Road is marital property.
- iii. The wife is entitled to a 50 % share in property of the marriage.
- iv. Costs:
- v. Such further or other relief as to the Honourable Court deems just.

[3.] Thereafter the wife filed a Summons on 20th September 2023 seeking Interim relief in a truncated form to that which was requested in the Notice of Intention. She sought;

- vi. A lump sum payment of \$4,000.00
- vii. A unit at the matrimonial home to operate a beauty salon;
- viii. \$800.00 per month; and
- ix. Such further or other relief as the Honourable Court deems just.

[4.] By positive providence the parties, at their appearance to the referenced summons, indicated that they had reached an agreement on the issues to be resolved at that hearing and hence the court ordered by consent of the parties on 28th September 2023, that in the Interim, and until further order:

- i. The wife shall have the right to operate her salon from one (1) unit and will have Unit No.1 to live and reside in.
- ii. The husband will have a unit to live and reside in and will continue to collect the rents and pay all of the financial obligations such as the mortgage and utilities from the rent.
- iii. The husband will give the tenant thirty (30) days to vacate the unit which the wife is given the right to occupy.

[5.] Presently the substantive issues remain to be decided to resolve and finalize the disposition of the assets belonging to the parties and/or either of them.

[6.] The wife relies on her Affidavit of Means filed on 21st April, 2023, a Supplemental Affidavit of Means filed on 15th September 2023 (“the Supplemental”), a 2nd Supplemental Affidavit of Means filed on 16th November 2023 (“the 2nd Supplemental”), Interrogatories filed on 2nd October 2023 and a Notice to cross Examine the Petitioner (husband) but which was withdrawn and Counsel’s Submissions dated 24th January 2024.

[7.] The husband relies upon his Affidavit of Means filed on 21st September 2023 and an Affidavit filed on 17th November 2023 containing responses to the wife's interrogatories Counsel's submissions on behalf of the Respondent are dated 31st January, 2024.

The Issue(s)

[8.] The issues before this Court are: -

- a. Whether the wife is entitled to periodical payments and if so in what amount?
- b. Whether the wife is entitled to a lump sum payment and if so in what amount?
- c. Whether the property located Carmichael Road is matrimonial property?
- d. Is the wife entitled to a Fifty Per centum (50%) share of the matrimonial property?
- e. How shall the court divide any property it deemed to be matrimonial property?

The Statutory Provisions

Periodical or Lump Sum Payments

[9.] **S. 25 – 29 of the Matrimonial Causes Act, Chapter 125, Statute Laws of the Commonwealth of The Bahamas (“the Act”)** empowers the court to grant any of the several reliefs sought by the wife for a property adjustment order. These provisions give clear and specific guidelines to follow when considering and determining financial provision and property adjustment orders. I have partialarised them below:-

[10.] According to Section 25 (1) of the Act:

“The financial provision orders for the purposes of this Act are the orders for periodical or lump sum provision available (subject to the provisions of this Act) under S. 27 for the purpose of adjusting the financial position of the parties to a marriage or judicial separation and under section 31(6) on proof of neglect by one party to a marriage to provide, or to make a proper contribution towards, reasonable maintenance for the other or a child of the family, that is to say –

- (a) Any order for periodical payments in favour of a party to a marriage under Section 27 (1) (a) or 31 (6) (a) or in favour of a child of the family under Section 27 (1) (d), 2 or (4) or 31 (6) (d).*
- (b) Any order for secured periodical payments in favour of a party to a marriage under Section 27 (1) (b) or 31 (6) (b) or in favour of a child of the family under Section 27 (1) (e), (2) or (4) or 31 (6) (e); and*
- (c) any order for lump sum provision in favour of a party to a marriage under section 27 (1) (c) or 31 (1) (c) or in favour of a child of the family under section 27 (1) (f), (2) or (4) or 31 (6) (f).*

[11.] According to S. 25 (3) of the Act:

“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 either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.”

[12.] According to s. 27. (1) of the Matrimonial Causes Act (“the Act”):

“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 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)*
- (e)*
- (f)*

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.”

Property Adjustment

[13.] *“28. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —*

- (a) an order that a party to the marriage shall transfer to the other party, 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;*

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.

(2) the court may make an order under subsection (1) (c) notwithstanding that there are no children of the family.”

[14.] The court shall consider the following under s. 29 of the Act:

“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.”

[15.] The sale of the matrimonial home or payment may be directed by the Court;

S. 40 (1) “The court on granting a Decree of divorce, if it is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever), may, if it thinks fit, on the application of either party made before the Decree of divorce is made, make in lieu of any order under section 25(3) affecting the matrimonial home and order-

- (a) Subject to subsection (2) directing the sale of the home (including the land on which it is situated and such other land appurtenant thereto as the court directs) and the division of the proceeds, after payment of the expenses of the sale, between the parties in such proportions as the court thinks fit; or*
- (b) Directing that either party pay to the other such sum, either in one sum or in instalments and either forthwith or at a future date and either with or without security, as the court thinks fair and reasonable in return for the contributions made by that other party.*

S.40 (2) Where the home comprises part of a building that is not used exclusively or principally as the home of the parties, or where the land appurtenant to the home is not used exclusively or principally for the purposes of a home, the court shall not make an order under this paragraph, unless in the special circumstances of the case the court considers it is fair and equitable.

(3)-

(4) Where the court makes an order under subsection (1), it may make such other orders and may give such directions as may be necessary or desirable to give effect to the order."

EVIDENTIARY MATRIX

[16.] A summary of the Wife's and the Husband's evidence is recounted here to provide context for the Court's deliberations in applying the Law and facts;

The Wife's Affidavit Evidence summarized:

[17.] The wife is Forty-Two (42) years old. She is a self-employed Hair Care Technician, a profession she engaged in since she was Seventeen (17) years old. She presently earns Two Thousand (\$2,000.00) dollars per month from her hair business but her income is supplemented by Six Hundred (\$600.00) dollars which she receives from the husband as a portion of rental income from their apartment units. She spends an average of Two Thousand Eight Hundred sixty-six (\$2,866.00) dollars monthly for personal and household expenses, creating an obvious deficit of Two Hundred sixty-six (\$266.00) dollars each month. Although she started out working with her mother in her mother's salon the husband through his friend encouraged her to move away from her mother's salon and to establish her own salon, at the matrimonial home.

[18.] The wife admits to fluctuations in the level of her income from time, pointing out that at one point she was able to earn up to Three Thousand Three Hundred (\$3,300.00) dollars per week but based on expenses it worked out to Eight Thousand (\$8,000.00) dollars per month. She states further that now, because of the marital situation her earnings have declined considerably. Due to her living accommodation and her attendance at University of The Bahamas as a student she is unable to devote as much time to the salon and her clients, hence her earnings have decreased to an average of One Thousand and Ten (\$1,010.00) dollars per week. After expenses of One Thousand (\$1,000.00) dollars she is left with approximately Three Thousand and Forty

(\$3,040.00) dollars. This is a significant drop of some Four Thousand Nine Hundred Sixty (\$4,960.00) dollars.

[19.] The wife recounts suffering a form of a debilitating medical condition which forced her into therapy sometime in 2019/2020 around the time of the Covid 19 Pandemic but by every indication the condition was treated and is no longer an issue for her.

[20.] The wife attests to what might in broad terms be considered a nomadic lifestyle during the marriage. She was continually being forced to move away from the matrimonial home by the husbands conduct, and to find living accommodation elsewhere. On one occasion she was with her mother, on another occasion in an apartment owned by her church, on another occasion, in accommodation owned by her cousins. Each time dissatisfied with the living conditions at those places only to return home to be soon dissatisfied by the husbands conduct and treatment of her.

[21.] Even now the wife is unhappy with her present living arrangements. The situation is apparently compounded by the fact that the husband tells her that she has no entitlement to the matrimonial property since they are divorced. He says he's only allowing her the use of the property for her salon. While the wife acknowledges that the property was gifted to the husband from his mother, she points out that together they obtained a mortgage to build the matrimonial home and moved into it about Six (6) months after the day they were married. She is not of the view that she has no entitlement to the property.

[22.] The wife avers that the couple had an agreed arrangement surrounding their financial obligations whereby the husband paid the monthly instalments of the mortgage of One Thousand Three Hundred (\$1,300.00) dollars, while she paid utilities and miscellaneous expenses, to the extent of providing the husband with lunch money. She asserts that the husband continuously complained about money. In fact it was the husband's constant complaints about money which caused the wife to leave university to devote more time to her clients and the possibility of earning more money.

[23.] In accounting for how the couple came to own a Six (6) unit apartment complex the wife describes a Seven (7) stage construction odyssey. The building started out as Two (2) bed, Two (2) bath home which over a short period of time was increased and transformed into those units. The wife recounts that she participated in the construction through several activities; she managed and paid tradesmen from her own money earned from the hairdressing salon; she paid credit card bills for costs related to the construction; provided furnishings and worked in the yard. While the wife's evidence points to the fact that the husband was the instigator of turning the matrimonial home into apartment units she does admit that she was constantly attempting to achieve a hair salon out of all of the construction.

[24.] The wife's determination to create a hair salon in the property was spurred on by many of the same complaints mentioned before. In fact the husband's complaints about her running the hair salon in the house caused them to borrow money from the bank. The intention was to use that money to add an efficiency and to build a hair salon. The wife states that the husband took his portion of the loan money and purchased a truck while she invested hers into building the salon. This was Twenty Three Thousand (\$23,000.00) dollars to start with. However due to the husband's

dissatisfaction with the building during its construction she had to tear down walls and reset windows. Resulting in over-expenditure of Twenty Thousand (\$20,000.00) dollars on the project. She ended up losing.

[25.] The wife speaks to this hard won salon being turned into an efficiency at the husband's instigation. In consternation she offers that even after the breakdown of the marriage and her leaving the matrimonial home, the husband continued construction on the home, putting in a bedroom for himself and a panel box and recess lighting.

[26.] The wife alleges that all told she made the following contributions to the Six (6) unit apartments.

- i. \$23,000.00 from the bank loan.
- ii. \$20,000.00 from tearing down walls and resetting windows while constructing the hair salon.
- iii. \$15,000.00 paid out of pocket to tradesmen and the like.
- iv. \$2,150.00 Furnishings
- v. \$4,077.36 Furnishings (Furniture Plus)
- vi. \$2,270.00 Furnishings (Furniture Plus)
- vii. \$1,528.00 (Washing Machines for apartment Units.

These amounts to \$68,146.96. (Emphasis mine)

THE HUSBAND'S AFFIDAVIT EVIDENCE summarized;

[27.] The husband came into the marriage as a teacher with the Ministry of Education, a position which he still currently holds. Over the years he was contracted as an adjunct professor at the University of The Bahamas. His income from the Two (2) positions are Three Thousand Four Forty-One (\$3,441.00) dollars per month from teaching at CC Sweeting Senior High School and \$275.00 per month from his position at UB. These total Three Thousand Seven Hundred Sixteen and sixty-seven cents (\$3,716.67). The husband accounts for collecting Three Thousand Two Hundred (\$3,200.00) dollars rents from the apartments bringing his total monthly income to Four Thousand Two Hundred Forty-seven and fifty four cents (\$4,247.54). However the husband lists his monthly expenses at Six Thousand Three Hundred Forty-eight and seventy-nine cents (\$6,348.79) and after his monthly expenses including the mortgage on the matrimonial home he operates in a deficit.

[28.] The husband describes the matrimonial home as One Unit and Five (additional units) that are rental income apartment units that was conveyed to him by his mother and sisters. The copy of the conveyance is about to be stamped and recorded as at the date of his affidavit. He does not deny that he and the wife mortgaged the property to Scotiabank. He recounts that he and the wife also entered into Three (3) Further Charges with Scotiabank. The SPL/Mortgage – Account Information which he exhibits shows the amount loaned as Three Hundred and Twenty-four Thousand Eight Hundred (\$324,800.00) dollars with a current balance of Two Hundred and Eighty-seven Thousand Five Hundred Seventy-nine dollars and eighteen cents (\$287,579.18.) The mortgage is paid by salary deduction from his salary.

[29.] While the husband admits that the wife assisted with the expenses in the matrimonial home he puts the average amount at \$800.00. He is not aware of the wife ever depositing \$3,000.00 from her business in the course of one week.

[30.] The husband states that to the best of his knowledge the wife contributed a total of Twenty Thousand (\$20,000.00) dollars, Seven Thousand (\$7,000.00) dollars to the construction when they turned the Two (2) bedrooms in to an apartment (one bed, one bath, Kitchen, front room and washer and dryer) and then another injection of Thirteen Thousand (\$13,000.00) dollars to complete the salon.

[31.] The husband believes that the wife is entitled to Thirty Five per cent (35%) of the value of the matrimonial home which sum can be provided to her by selling the matrimonial home. He says that the wife left the matrimonial home although he offered her the option of staying there. That he paid her between Four Hundred and Fifty (\$450.00) dollars and Seven Hundred and Fifty (\$750.00) dollars each month from March, 2021 to May, 2023 totaling Seventeen Thousand Eight Hundred Seventy (\$17,870.00).

[32.] The husband states that he is not in a position to pay the wife Eight Hundred dollars (\$800.00) dollars per month or to provide the wife with a lump sum of Four Thousand (\$4,000.00) dollars to rent an apartment elsewhere.

[33.] Prior to the agreed Interim Order the husband offered the wife an interim payment of Six Hundred (\$600.00) dollars per month provided she resided and works in another location or that the wife can have/or make use of the end south unit to either run her salon only or live only provided she pays for the utilities for the unit as it is on its own meter. That the said unit will be made available to her by giving the existing tenants notice.

[34.] In answer to Interrogatories made to him by the wife the husband disclosed that he is the sole owner of Lot # 1 Winding Bay Road Tarpum Bay Eleuthera, Bahamas and joint owner of a company owned by he and his sisters A, A and A M of Lots 3 and 7 Winding Bay Road, Tarpum Bay Eleuthera. He also alludes to ownership of property on a public pathway North of Mason's

Street, Mason's Addition Nassau Bahamas – Vacant – Appraised value Seventeen Thousand (\$17,000.00) dollars.

[35.] The husband also produced a number of receipts in connection with the construction of the matrimonial home and the Six (6) unit apartments. The receipts evidence monies paid for construction materials and labour and rents. Some receipts issued in the name of the wife and some in the husband's.

[36.] That he has medical Group Insurance with the Government of The Bahamas and the wife is not covered under the medical insurance.

ANALYSIS OF THE EVIDENCE HAVING REGARD TO THE LAW

[37.] There is no dispute between the parties that the Six (6) Unit apartment building is matrimonial property and in which they both have an interest. It is described as a multi-family residential property comprised of a six-unit apartment building being; "ALL That piece parcel or tract of land containing approximately 12,653 square feet situate on the southern side of Adelaide Road in the Western District of the Island of New Providence one of the Islands in the Commonwealth of The Bahamas."

The property is appraised at Five Hundred and Eighteen Thousand (\$518,000.00) dollars according to an appraisal Report commissioned by the wife dated November, 2022, and exhibited to her affidavit.

[38.] The question is whether the properties in Winding Bay and Mason's Addition are considered matrimonial property. The wife has made no claim to them. It seems quite obvious that the Winding Bay property is derived from the husband's family acreage. It is vacant land and there is no evidence of any contribution by the wife made to its acquisition or retention at all.

[39.] Property in the name of one of the parties is not always considered matrimonial property and subject to distribution: per Lord Cooke of Thorndon in **White v White** etc.

"Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention." Haldane v Haldane [1977] AC 673, [1976] 3 WLR 760 at 697 of the former report."

[40.] *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618.....

“that there was a real difference between matrimonial property and non-matrimonial property; that as regards non-matrimonial property the duration of the marriage would be highly relevant; that in the case of a short marriage fairness might well require that the claimant should not be entitled to a share of the other's non-matrimonial property; that (per Lord Nicholls) matrimonial property was property acquired during the marriage otherwise than by inheritance or gift and the entitlement of each party to a share of such matrimonial property was the same however long or short the marriage might have been; that (per Lord Hoffmann, Baroness Hale of Richmond and Lord Mance) matrimonial property should be regarded as the family assets, i. e. assets which were acquired for the use and benefit of the whole family or from family businesses in which both parties worked, and if the assets were not family assets, or not generated by the joint efforts of the parties, then the duration of the marriage might justify a departure from the yardstick of equality of division; “.....

[41.] Based on the expounded principles I am satisfied, that the Winding Bay and Masons Addition properties are not matrimonial properties, and are not subject to distribution between the husband and wife. Conversely, I am satisfied that the Adelaide property is matrimonial property that is subject to distribution.

[42.] The Court is not bound by the opinions of the wife that she deserves a 50% share in the matrimonial property or the husband's view that the wife is entitled only to 35% while he should get the lions share at 65%. This courts principle objective is to achieve fairness between the parties.

DISCUSSION AND ANALYSIS

[43.] Achieving Fairness Between The Parties

Fairness is an equal sharing of property:

In A v B 2010 2 BHS No. 18 – Barnette CJ (as he then was) – “In my judgment the modern day approach to a division of property in a marriage is that fairness is an equal sharing of property unless there is a compelling reason to depart from that equality. The Law is perhaps best summarized in the judgment of the English Court of Appeal in *Charman v Charman* [2007] 1 FLR 1246.”

[44.] Barnett was also reaffirming the seminal ruling in *White v White* [2001] 1 All ER where Lord Nicholls of Birkenhead stated:

“Divorce creates many problems. One Question always arises. It concerns how property of the husband and wife should be divided and whether one of them should continue to support the other. States 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."

[45.] Fairness achieves a just result between the parties per Ward J. in the Court of Appeal's decision of ***Robson v Robson* [2010] EWCA Civ. 1171**, said:

"Like every exercise of judicial discretion, the objective must be to reach a just result and justice is attained when the result is fair as between the parties....Need, compensation and sharing will always inform and will usually guide the search for fairness."

[46.] Fairness is the overriding objective and Lord Nicholls of Birkenhead's formula for achieving fairness are applied universally, in the Caribbean, and indeed, in The Commonwealth of the Bahamas. The formula allows courts here and throughout the world to foster consistency, the objective being to renounce discrimination between married couples when decisions about distribution of assets are being made:

Per ***Lord Cooke of Thorndon in Sharpe v Sharpe***

"most important point, in my opinion, in the speech of my noble and learned friend Lord Nicholls is his proposition that, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions."

[47.] The UK'S. 25 Matrimonial Causes Act aligns with our corresponding provisions under S.29 of The MCA. The seminal case of ***White v White* [2001] 1 AC 596** followed by the likes of ***Miller V Miller/ Macfarlane v Macfarlane* [2006] 1 UKHL 24** and ***Sharpe v Sharpe* [2018] Fam. 317** are among many others. Several will be dealt with in this discourse. Consistent in all of the authorities is that each case will turn on its own facts and circumstances, with the achievement of fairness, justice and the avoidance of discrimination trumping equality of division as the benchmark or standard;

Per Lord Nicholls of Birkenhead in ***White***:

"Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need

to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”

[48.] One is not left to their own devices in deciding where fairness, justice and the avoidance of discrimination lies. Section 29. Of The Matrimonial Causes Act, provides an almost exhaustive inventory of the circumstances, which color the life of married couples, all of which are influential to the court’s decision making process. Since the husband in particular is of the opinion that the wife’s interest is not equal to his the court is mandated to examine all the circumstances of the case against the backdrop of the S.29 considerations, to resolve the issue. Only if the court finds a **“compelling reason to depart from the equal sharing principle,”** is there an obligation to resile therefrom and order an unequal distribution of their respective interests in the property they call Carmichael Road but is legally described as, being Adelaide.

[49.] In **Jupp v Jupp SCCrAPP No. 37 of 2011** it was expressed that 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 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 required that you look at all 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 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.”

THE SECTION 29 CONSIDERATIONS

[50.] **Income and earning capacity, S. 29 (1) (a);**

The starting point is distinctly expressed in **Charman supra**, a case aligned to our S. 29 MCA provisions that references the UK corresponding provisions;

“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. As Coleridge J himself stated in the passage cited in para 59 above, the starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry 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) other than in the order there set out, 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. Irrespective of whether the assets are substantial, likely future income must always be appraised for, even in a clean break case, such appraisal may well be relevant to the division of property which best achieves the fair overall outcome. We appreciate that remarks of Baroness Hale in Miller, at 154, are also said to permit argument that a party's earning capacity is itself an asset to which the other has contributed and which might to some extent be subject to the sharing principle; this seems to us an area of complexity and potential confusion which in this case it is unnecessary for us to visit."

[51.] Both the husband and the wife are of modest income notwithstanding their ventures into commercial ownership through the Six (6) rental Units. Both the husband and the wife, according to their stated financial conditions operate at deficits on a monthly basis. The wife carries a shortfall of Two Hundred and Sixty-six (\$266.00) dollars per month and the husband is in the red Two Thousand One Hundred and One Dollars and Twenty-five cents ((\$2,101.25). Neither party has offered any explanation as to how the shortfall is covered on a monthly basis or at all.

[52.] In this regard there was also a failure to give full and frank disclosure as to the rationale behind the specific amount given by the husband to the wife on a monthly basis. To simply inform the court that he has paid the wife between Four Hundred and Fifty dollars and Seven Hundred and Fifty (\$450.00) dollars to Seven Hundred Fifty (\$750.00) dollars monthly, amounting to Seventeen Thousand Eight Hundred and Seventy (\$17, 870.00) dollars from March, 2021 to May 2023 does not permit the court to decide whether this was a fair distribution of the rents received, and it also leaves out vital information of what the wife might expect to receive futuristically. In the circumstances the bare statement by the husband that he is not in a position to pay the wife Eight Hundred (\$800.00) dollars per month or to provide a lump sum, is simply self-serving. In his Nov 17th affidavit the husband included a variety of receipts. Rents received were mixed with receipts for construction with no proper explanation. Some of the receipts were made out to the husband and some to the wife. Some receipts were made out to the parties jointly, while some were made out to other individuals. While no effort was made to explain the details of the receipts or to attribute them to the parties individually, what was illustrated from the bundle of receipts is a clear picture that the wife was as involved in the construction of the apartment units and the collection of the rents from them after construction.

[53.] The wife's information as to her income is also nebulous. There is a discrepancy of Two Hundred (\$200.00) dollars between what she says she received up to June 2023 and what the husband quoted as her receiving on a monthly basis seemingly up to the time of the filing of his affidavit on 21st September, 2023. Again, not necessarily accepting the wife's averments about the rents received from the Husband at this stage, even at its highest her stated monthly income of Two Thousand Four Hundred (\$2,400.00) dollars does not cover her stated expenses of Two Thousand Eight Hundred and Sixty-six (\$2,866.00) dollars per month. She like her husband is

operating at a deficit. Hers being Four Hundred and Sixty-six (\$466.00) dollars per month. The wife's present earnings based on her past income clearly shows that her earning potential has been negatively impacted by her circumstances. She said;

“Before the Respondent and I separated the salon was operating fully from the matrimonial home. Between Mondays to Thursday, I would see about 4 persons each day. On Friday and Saturday, I would see about 7 persons each day. On Sunday I would see about 4 persons because I would do hair after church. I worked 7 days a week. I estimate that each person would spend on average \$100.00. So I made about \$3,300.00 per week.”

Later in the same affidavit the wife states:

“Now, I go to school and do hair on Friday, Saturday and Sunday from 8 a.m. – 10 p.m. I would average \$1,010.00 a week. My expenses are about \$1,000.00 a month. Monday – Thursday, I may squeeze a client in between 1 p.m. and 5 p.m.”

[54.] The discrepancy in the income stated by the wife is obvious and to some extent bewildering since in both instances they are both emanating from business conducted at the matrimonial home. It is difficult to account for the discrepancy. What becomes clear from the evidence they have both provided in their respective affidavits is that the husband's earnings and earning capacity is safer and more reliable than that of the wife. However, while the wife currently presently earns less than the husband she has an advantage over the husband as far as future earning capacity goes. As a beautician, the possibility of an increase in income is more likely, and more achievable than that of a government teacher and/or adjunct professor. Her evidence suggests that the negative fluctuation in her income occurred due to operational circumstances (where she operated her business from), and/or upon her attendance at university. This apparently caused her not to be able to devote as much time to her hair salon. This is evidenced in her account of her earnings at different periods of her life when she was not attending college. Earnings up to Three Thousand (\$3,000.00) dollars per week at times, depending on her circumstances, demonstrates obvious potential. I believe that once the educational pursuit is achieved the wife will have the ability to assume her previous work calendar or pursue her chosen field of endeavor augmented by her degree from College, possibly earning considerably more than the husband.

[55.] The situation outlined regarding the parties respective incomes causes me to consider whether the present income carries more weight in the decision making process than the future earning capacity or vice versa. Neither party has alluded to any financial resources other than the income from their jobs/professions and the apartment units. The only bank account information provided was that of the husband whose statement from Fidelity Bank shows a negative balance of One Thousand Two Hundred and One (-\$1,201.19) dollars. Exhibit Dam 1 of the Husband's November affidavit speaks to a credit card debt of Five Thousand Nine Hundred Eighty-one Dollars and Eighty-five cents (\$5,981.85) owed to Commonwealth Bank. The one share in Public

Workers Co-Operative Credit Union valuing One Hundred and Fifty-four (\$154.00) dollars does not help his financial situation in any appreciable way. I'm forced to make the assumption that the wife has no bank account at all since no evidence of the same was provided by her nor was such alluded to by either of the parties.

[56.] I find that the financial information provided by both parties is vague and imprecise. I accept however that the husband was the larger income earner in the marriage. I find the wife to have a larger earning capacity, futuristically. But neither is sufficiently compelling, at this stage, and it would be premature to decide to depart from the equal sharing principle before consideration of the other S. 29 considerations. After which all of these factors will be applied to a balancing exercise.

The Financial Needs, Obligations and Responsibilities of the Parties, s. 29(1) (b).

[57.] I turn now to the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.

“It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to, among other matters, the financial needs, obligations and responsibilities which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future.”

See Halsbury's Laws of England - Matrimonial and Civil Partnership Law (Volume 72 (2019), paras 1–460; Volume 73 (2019), paras 461–940)

[58.] Based on a plain ordinary interpretation of this provision one would look immediately to determining what each individual needs, what each individual is obligated to do and their respective responsibilities, for fairness to be achieved. This is said to involve an exercise of comparisons between the parties.

[59.] **S.v S. [1977] Fam.127** it was held;

“that in applying section 25 of the Matrimonial Causes Act 1973 to a case where there had been a short marriage between parties, who were not young, the adoption of a fraction for the wife of the parties' joint income could lead to an unsatisfactory situation; that, in applying section 25 to the present case, the primary consideration was to look at the need of the wife, then check that need against the husband's resources and consider how the parties would stand in relation one to another and relate that to all the circumstances of the case including the shortness of the marriage and the effect of that marriage on the parties; that, in the result, the order would be that the husband should settle £11,000 on the wife for her life or until her remarriage.”

[60.] Courts have journeyed into defining financial needs beyond the ordinary meaning and a simple examination of the factors which would demonstrate a clear need of the parties. However Lord Nicholls of *Birkenhead in White* inform *felt there was no need to provide an alternative definition such as reasonable requirements to the terms “financial needs “when the objective is to achieve fairness. He clearly indicated that deciding fairness must involve all of the considerations which have been put into our local statute under S. 29 MCA;*

.....’there is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression ‘reasonable requirements’ in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person’s age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognized, there is some overlap between the factors listed in s 25(2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties’ contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme. In accepting that, this S.29 (1) (b) financial needs, obligations and responsibilities is truly only one of the several considerations.

[61.] The wife’s need for a stable place to live and from which to operate her hair salon (other than from where she is living) is the principal consideration for her futuristically. She describes it as being “*desperate to get something permanent and I need money to do that.*” Despite her foray into architecture at The University of the Bahamas (UB) and her continuing education even now at UB, (no particular field of study was indicated) it is clear that the wife’s established profession from which she makes her living is as a hair dresser and there is no indication that this is likely to change now or in the foreseeable future. There is also no evidence to suggest that her profession, obligations and/or responsibilities, are likely to change in the future. Likewise the husband. There is no indication that he is likely to change his profession, source of income or obligations and responsibilities. They both have need of accommodation but neither have expressed an attachment to or a desire to retain the matrimonial home as their own. This will be pivotal to the courts final determination after consideration of all of the circumstances.

[62.] **Martin v Martin [1977] 3 All ER 762 – Held –**

- (i) *Where the only available asset was the matrimonial home, the most important circumstance to be taken into account in applying s 25 of the 1973 Act, even where there were no children of the marriage, was that both parties should have a home (see p 765 h, p 768 h and p 769 h, post).*

[63.] Neither of these parties are in an obvious more advantageous position from the other. Their individual circumstances here does not compel a departure from equal sharing, although I must reiterate that at the end of this exercise the contrary may be found after the balance of the S. 29 considerations are applied.

THE STANDARD OF LIVING ENJOYED BY THE PARTIES, S. 29 (1) (c)

[64.] **Halsbury's Laws of England Matrimonial and Civil Partnership Law (Volume 72 (2019), paras 1–460; Volume 73 (2019), paras 461–940), (v) Standard of Living of the Parties, 641. Court's duty to have regard to family's standard of living.**

“It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to, among other matters, the standard of living enjoyed by the family before the breakdown of the marriage or civil partnership or other relevant event. It will usually be unavoidable that the standard of living of both parties will diminish following their separation. However, the qualitative assessment of the parties' standard of living during the marriage or civil partnership may influence the court's determination of the appropriate provision that should be made after separation. Even where the assets are not divided equally between the parties, it may be appropriate to ensure that the parties' standards of living are not wholly unequal, particularly where there are children. Where the parties have adopted a frugal standard of living during the marriage or civil partnership in the expectation of future wealth, this should not act as a limiting factor within the proceedings for relief. Equally, extravagance will not bolster a claim. The standard of living during the marriage or civil partnership may give a true indication of the financial resources and power of the parties. The standard of living during a marriage or civil partnership of short duration may, however, be a factor of little significance.

[65.] The court is not constrained to duplicate the same standard of living the couple enjoyed but to do what is appropriate in the changed circumstances of the parties;

Nicholas v Nicholas [1984] FLR 285 at 289, CA 'In deciding what standard of accommodation was appropriate for [the wife], it is reasonable to look at the kind of accommodation that over the years the parties themselves lived in as they steadily improved their position and standard of living as a result of the success in [his] the husband's business ventures' (emphasis mine).

[66.] Again in the **Encyclopedia of Forms and Precedents FAMILY Vol. 16(2) Commentary, (2) RELATIONSHIP BREAKDOWN, FINANCE ON MARRIAGE BREAKDOWN, 34.9 Standard of living**

“The court must have regard to the standard of living enjoyed by the family before the breakdown of the marriage. In many cases, where funds are limited, there will be an inevitable drop in the standard of living of both parties and the children upon divorce. In cases where the assets are substantial, the marital standard of living may be determinative of the standard of living that the parties should be able to expect afterwards. The standard of living of the parties was treated as a significant factor in the case of Miller v Miller; McFarlane v McFarlane. However, in most cases it will be impossible to replicate the same standard of living for both parties post-dissolution.”

[67.] It is patently clear that both the husband and the wife fancied themselves to be entrepreneurs. The wife trying desperately to establish a successful hair salon, while the husband was hell bent, seemingly obsessed, on being a Landlord to as many tenants as possible. The wife was ambivalent throughout the process. She suggests that she was actually part of the construction of most of the Six (6) apartment units; paying and supervising workers, buying building supplies and materials and actually building a salon for herself. She clearly bought into the husband's ambitions but at the same time was frustrated by the constant construction, the husband's obvious arrogance in the decision making about the construction of the units and the constant change in her living accommodations and her hair salon. It is unfortunate that the matrimonial home (even the marital bedroom) was chosen by the husband in particular for his ambition. The living arrangements coupled with frequent, “arguments” made for a most unhappy living environment, a strained matrimonial home, indeed. The husband seemed not to want to settle into a reasonably comfortable, stable marital home opting to turn every part of their living space to commercial purpose. While the wife seemed oblivious to the upheaval she caused to the couple finding marital harmony that her constant moves away from the matrimonial home created. The atmosphere in the home was charged with discontent and it is not hard to appreciate why the wife was so unsettled in the marriage. While this court must strive to achieve equality between the parties as to their standard of living in the buildings they will occupy and do business in, the physical separation of these parties to their individual spaces must surely auger well for some much needed tranquility. Any stability made to the constant upheaval of this couple should actually improve the standard of living they individually had.

[68.] These parties spent the majority of their married lives in a construction zone. That construction zone ended with each having the ability to boost the incomes they derived from their respective professions with rental income. The mortgage on the matrimonial property is also a factor which is a pertinent factor when lifestyle is being considered. To that extent they are both on the same footing. Therefore I am of the view that achieving an appropriate living standard for each, out of the one available asset is achievable, although the usual solutions may have to be

varied. This couples lifestyle and standard of living alone does not in and of itself compel the court to depart from the equal sharing principle but again regard will be had to the totality of the circumstances of the marriage under the Section 29 provisions.

THE AGE OF THE PARTIES, S.29(1)(d)

[69.] The wife indicated that she is Forty-two (42) years old. The husband did not state his age in his affidavit evidence however scrutiny of the marriage certificate shows that he is now Fifty-two (52) years old. In the premises the age difference being Ten (10) years is not insignificant in that it is a factor to be considered in terms of the years each party has to work before they can retire and in consideration of what resources may be available to them at retirement. In the scheme of things the husband is likely to get there quicker. He also has the advantage of being employed as a teacher at a government institution and is more likely than not entitled to a pension at retirement. The wife's position is somewhat precarious and dependent upon several factors including the vagaries of her industry and her health. Age is also momentous to the issues surrounding the disposition of the matrimonial property where arrangements may have to be made with a financial institution by one or either of the parties. Except to say that he is unable to afford to pay the wife the money she is seeking in the divorce and the wife's insistence that she needs money to relocate herself and her business, neither party has provided any information to the court relative to their ages being of any significance to this process. The marriage lasted Twelve (12) years, which may be described as "*not as desperately short as some but still not lengthy*" (judge at first instance as described by Macfarlane J.) in **White v White** *supra*. However, neither party gained any personal financial advantage during the currency of the marriage sufficient to set them at a significantly advantageous position over the other party.

[70.] See **Sharp v Sharp** [2017] EWCA Civ. 408, where

The Court of Appeal, Civil Division, in an appeal against a decision to divide matrimonial assets on an equal basis held that the appellant wife was correct to contend that the combination of potentially relevant factors, namely, short marriage, no children, dual income and separate finances, was sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness between the parties.

[71.] The age of the parties is not of sufficient significance to compel a departure from the equal sharing principle. All other considerations need to be applied and balancing all the factors is helpful to this purpose.

PHYSICAL OR MENTAL DISABILITY –S.29 (1) (e)

[72.] No physical or mental disability of either of the parties to the marriage was indicated as being an issue futuristically. The wife told of a medical problem which she experienced several

years back where she had undergone physical therapy. However her evidence suggests that the problem was resolved and is not a factor currently. Therefore this contributes nothing to advance the husband's argument of a compelling reason to depart from the equal sharing principle.

LOSS OF ANY BENEFIT CAUSED BY DISSOLUTION OF THE MARRIAGE S.29(1)(g)

[73.] I am adding this to the discussion at this juncture out of sequence, for organizational purposes. S. 29 (1) (f) will be reverted to in succession to this. While the possibility exists, particularly for the wife, neither the wife nor the husband has given any evidence of losing the chance of benefitting from any pension by reason of the dissolution the marriage.

CONTRIBUTIONS BY EACH OF THE PARTIES, S.29 (1) (f)

[74.] Most often issues surrounding the party's respective contributions to the welfare of the family, dominate contentious proceedings for property adjustment. The contribution made by looking after the home or caring for the family is critical to deciding the issue. This couple did not have any children so consideration of contributions will reflect what each of the parties did in looking after their home and just the two of them as a *family* unit. In this regard the dollar difference between the wife's and the husband's contributions, examined above, is significant, One Thousand Five Hundred and Sixty (\$1,560.00) dollars per month by the husband as compared to the wife's Nine Hundred and Ninety (\$990.00) dollars.

[75.] The wife's payment of the monthly consumer related bills facilitated the husband's ability to pay the greater of their bills, being the mortgage assists in the equalization of their respective contributions. However the wife's frequent moves away from the matrimonial home to reside elsewhere, is evidence that she was not always there to pay the utilities as was agreed. It stands to reason that the husband would've been forced to pick up those bills. It appears from both affidavits of the parties that the parties arranged their financial obligations themselves from the knowledge they had about their respective incomes. This is not unusual in marital arrangements and is a practical approach to all intents and purposes. One theory I propose is as follows; one can only contribute what one has. If one party gives 100% of all they have and it totals only 10% of what the other gives, then the significance of that contribution should lie in the overall impact it had on the couple's finances and their ability to enjoy the standard of living they aspired to. The contribution should not be devalued simply because the dollar amount is less. Another theory is that one should contribute what one agrees to contribute if both parties have contributed what they *agreed* between them, should be contributed, no argument should be made that such is unfair or unequal. In this particular case I have concluded that while the wife's contributions to the family were substantial they were not equal to the husband's as she was not contributing what she agreed to, due to her frequent absences residing outside the matrimonial home. I do not accept that she paid those bill while living elsewhere. To that extent she probably affected the couples finances negatively, placing that burden on the husband. The huge disparity in the respective contributions

as calculated, in those circumstances, cannot be ignored. It swings the pendulum in the direction of a departure from the principle of equal sharing, in favour of the husband. By the same token she could not have been contributing *as best she could*. In totality these circumstances favour a departure from the equal sharing principle even further. But the circumstances of the discord in the marriage will be shown to play a pivotal part in the wife's behaviour that will affect the overall decision made in this case. The extent of that departure will be informed by the role the husband played in the wife's nomadic behavior and its effect on the couples finances.

[76.] *Sharp v Sharp* [2017] EWCA Civ. 408, [2018] Fam. 317, [2017] 4 All ER 1046, [2018] 2 WLR 1617, [2017] 2 FLR 1095, [2017] Fam Law 821, 167 NLJ 7751, 167 NLJ 7752, [2017] All ER (D) 74 (Jun) Per Lord Justice Macfarlane in quoting the seminal decision of the House of Lords per Lord Nicholls of Birkenhead in a central passage of his speech in *White v White* supra, under the heading 'Equality', Lord Nicholls said as to the UK MCA 1973 s. 25 (Our S. 29 MCA);

'Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. ... But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): "the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family" (Emphasis added). If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.'

[77.] In all the circumstances as considered above I make Three (3) material findings which will influence the direction the court takes ultimately;

- (i) I accept that the contributions by the wife towards utilities, and the like, groceries and other household expenses including the husband's lunch facilitated the husband's ability to pay the mortgage installments, and were of significant value to the family when she was there to make them. However the recognizable discrepancy in the dollar contributions is glaring

and I am unable to ignore it, if discrimination is to be avoided and fairness is to be achieved. The pendulum swings both ways;

- (ii) The Husband was gifted the vacant land upon which the matrimonial property was built and for which the mortgage was obtained by his mother and sisters. I note that according to the appraisal report exhibited the vacant land is valued at One Hundred and Fifty-three Thousand One Hundred and Seven Dollars and Seventy-six Cents (\$153,107.76); a significant part of the overall value of the property. The superiority of the dollar amounts contributed by the Husband is obvious to the one major matrimonial asset, and this also cannot be ignored when the mandate not to discriminate and to achieve fairness between the parties is applied.
- (iii) The Husband paid the mortgage throughout, maintained the apartment units by ensuring all the related expenses for the building were paid and absorbed the management functions, like collecting the rents and paying the associated bills when the wife was absent and or decided to cease those activities'

[78.] Based on the disparity in dollar contributions and in all the circumstances outlined in S. 29 (1) (f) in consideration of the parties respective contributions I am willing to depart from the equal sharing principle in favour of the husband. However, I do not readily accept the husbands view that the distribution should be on a 65% to the husband 35% to wife bearing in mind the overarching context within which the section 29 provisions reside as discussed infra.

PLACING THE PARTIES IN THE FINANCIAL POSITION THEY WOULDVE BEEN IN HAD THE MARRIAGE NOT BROKEN DOWN

[79.] Ancillary to, or found within the mandate to achieve fairness between the parties is the objective included in the concluding paragraph of S. 29 MCA; ...” *so 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.*” To achieve this purpose it is my view that focus must be brought to bear on the issue of the conduct of the parties within and during the marriage. One of the most significant observations upon reading the wife’s affidavit in support of this application is the frequency of her leaving the matrimonial home to live elsewhere. One gets a sense of her having created a tumultuous living situation which was in every sense counterproductive to marital harmony.

[80.] The court, in an attempt to rationalize her behaviour revisited the Decree Nisi and the Petition she filed. The Decree Nisi was obtained by the wife on the grounds of the husband’s

cruelty towards her. When the husband's uncontroverted conduct is viewed in light of S. 29 and the yardstick of equality it is difficult to ignore the gravity of that conduct and its effects on the wife, the marriage and the circumstances outlined in S. 29 (1) (a) to S. 29 (1) (g), particularly the wife's earning capacity. The husband's conduct was not only counterproductive to his marriage to the wife but was anathema to the entire institution of marriage.

[81.] Harkening back to the Facts alleged and proven in the Petition as a backdrop to the issue of conduct the incidents of cruelty when viewed as a whole can easily be described as gross, egregious and contrary in every respect to marital harmony. Some of the allegations I have summarized and included here to demonstrate the point;

- (1) Treating the matrimonial home as a commercial enterprise to be used to realize his ambitions of becoming a landlord.
- (2) Creating an environment which caused the wife to be so uncomfortable in her home environment that she was forced to relocate her home and her business on several occasions.
- (3) Causing the wife to waste her personal resources by breaking down the structure she built to house her beauty Salon.
- (4) His displayed dissatisfaction with the wife's choice of study at college which wreaked of arrogance.
- (5) Doling out to the wife only what he wished from the money collected for rent from the apartment units with no accountability as to the entire sum collected and what portion he was taking for himself nor in fact to the wife's invaluable contribution to acquiring the apartments.
- (6) Most egregious of all was his failure and/or refusal to consummate the marriage and withholding of sexual relations from the date of the marriage in 2009 to the date of filing the Petition, 12 years later. This behaviour was the essence of Cruelty and it is not difficult to appreciate the wife's need to get away from the husband on so frequent occasions.

[82.] One can appreciate that the husband's treatment of the wife negatively affected her overall ability to cope as a wife, to be a solid dependable business woman and to maximize her earnings. If she were supported or even allowed to thrive in stable business premises it might possibly have allowed an increase in her financial contributions to the marital finances of the parties. Having to always be moving, relocating and/or in construction mode could not bode well for her business. It's clear that she made some serious sacrifices to please the husband but it seems that no matter

what she did her husband pressed for more and more from her while giving very little of himself other than applying financial resources to grow and retain his commercial enterprise.

[83.] I find that, had the husband properly discharged his duty to his wife, by ensuring his business ambitions did not conflict with his marital duty, to help to provide a stable and loving home environment, the wife would have been positioned to contribute even more financially to the relationship. Further, that had he not encouraged his wife to bring her business pursuits into the matrimonial home, the marriage would likely have had a better chance of survival. There would've been Two (2) incomes, ensuring that the financial deficit that the husband finds himself in with the mortgage could be better managed and overcome.

[84.] Factoring in that the husband brought the land which was gifted to him into the marriage, that he apparently never wavered in his obligation to pay the mortgage, that he would have paid the wife's portion of the bills on the occasions when she moved out from the matrimonial home and accepting that his contribution to constructing the Six (6) apartment units far exceeded the wife's, I was initially convinced that the husband's proposed calculation of the sharing on a 65% to him and 35% to the wife basis, seemed appropriate and I initially tipped the scale in his favour to that degree. However, having considered his conduct, as the statute mandates and my conviction that his conduct affected the wife's capacity and ability to earn, I have altered my calculations.

[85.] I am satisfied that the division of the matrimonial property being the Six (6) apartment units located Carmichael Road, Adelaide should be shared on a Sixty Per centum (60%) to the husband and Forty per centum (40%) to the wife basis.

[86.] The wife also expressed a desire for a lump sum payment. This appears to be motivated by the necessity to find living accommodation as well as accommodation for her beauty Salon. Lump sums may be awarded in circumstances where the court determines that a clean break between the parties is necessary. Notwithstanding that the *White case, supra*, involved people of considerable wealth the principles established are general and applicable in all cases. The circumstances of the case will dictate whether a lump sum payment is possible based on the available resources or alternatively whether a periodical payment over a period of time might suffice.

[87.] As in the case of *Wachtel and Wachtel [1973] Fam div 72*, I regard the ability for the husband and the wife each to leave the marriage with a home or at the very least sufficient financial resources to obtain a home to be the greatest objective. This might be through the good fortune of buying one, building one or renting one.

[88.] While there are significant factual differences in *Wachtel* there are many substantial similarities. Counsel for the Wife has commended this authority to me in support of the wife's contention that she is entitled to an equal share of the marital asset. For the purposes of highlighting the similarities I have set out a significant passage to demonstrate purposively;

[89.] *There are two important issues in this case. The first is the future of the matrimonial home and the second is the amount of the periodical payments for the wife and the daughter. This is a typical middle-class professional family with virtually no capital assets other than the home which is being bought on mortgage but with an above average earning capacity. Due largely to inflation the house has greatly increased in value and the balance outstanding on mortgage (about £2,000) is small in relation to its current value, which is said to be about £20,000-£22,000, but it is, in fact, only a modest suburban house. The husband is a dentist carrying on practice in the Streatham/Tooting area and earning a reasonably good income. The family have hitherto enjoyed a reasonably comfortable standard of living and there is nothing to suggest that there has been any real shortage of money. I shall have to examine the income position in more detail later.*

So far as the house is concerned, it was bought in the husband's name in 1956, with the assistance of a 100 per cent. mortgage, but about £1,000 was spent on repairs and redecoration. There was an issue in the Married Women's Property Act 1882 proceedings about the contribution alleged to have been made to its purchase by the wife. On any view this was relatively small but it might have been an important issue in those proceedings as the law now stands. So far as the discretionary powers under section 4 of the Matrimonial Proceedings and Property Act 1970 are concerned it is of little importance compared with the fact that like so many couples since the last war the husband and the wife set about building up a home together by their joint efforts. This house represents an investment for each of them of 18 years of their adult lives. Applying paragraph (f) of section 5 (1) of the Matrimonial Proceedings and Property Act 1970 and taking into account the contribution which Mrs. Wachtel has made to the welfare of this family in looking after the home and caring for the family, I am quite satisfied that hers has been a very substantial contribution over these 18 years. To put these two people into a position which even approximates to their position before the dissolution of the marriage it is essential that each of them should have a home. Since each has to care for one of the two children, their needs in this respect are clearly similar. In these days the difficulty of finding accommodation to rent and the cost of such accommodation if it can be found is so great that it is almost essential to make provision, if it can be done, for some capital to be available to the party, in this case the wife, who has left the matrimonial home. Taking all the circumstances into account the only fair way of dealing with these two people, in my judgment, is to divide the only capital asset more or less equally between them. I think that a sum of £10,000 or half the net value of the house whichever is the less should be transferred to the wife. Whether this is to be done by transferring to her a half interest in the house or by way of a lump sum payment is a matter of arrangement to be decided by the parties and their legal advisers. I think that it is a practicable arrangement although inconvenient for the husband and that in the light of the whole history of their conduct as spouses and as parents and as members of a family it is the

just result. If I had to assess conduct in terms of responsibility for breakdown I would, with some doubts, regard each spouse as roughly equally responsible.

[90.] In any event the husband contends that he is not in a financial position to pay the wife for her interest in the property or to pay her a lump sum. The Financial resources of this couple are clearly limited. I see no possibility of a lump sum payment to the wife from a husband who boasts of a little more than One Hundred Dollars (\$100.00) in savings. Periodical payments are only possible depending on and to the extent of the method employed for the disposition of the marital property.

[91.] The extant mortgage on the apartment units and all expenses attendant upon the matrimonial property whether transferred or sold, dictate that the sum netted on its disposition will be at best a modest sum. However, no alternative to a sale of the property has been sought or recommended by either the husband or the wife. Notwithstanding their failure to propose that alternative I shall not dismiss it out of hand. It is fortuitous that **S. 40 of the MCA (supra)** provides the discretion that enables the court to be creative in its approach in seeking to achieve fairness between the parties.

CONCLUSION

[92.] In order to achieve fairness between the husband and the wife, through ensuring that at the end of the day some resources are available for both parties to start a new life I order the following;

- 1) The wife's application for a lump sum payment is refused.
- 2) The only property which comprises the matrimonial home is the Six (6) Unit house and apartment complex situate Adelaide Road, Western District, Island of New Providence, The Bahamas.
- 3) That the husband shall buy the wife's interest in the said matrimonial property situate Carmichael Road, Adelaide within Ninety (90) days from the date hereof whereupon the wife shall execute a deed transferring her right, title and interest in the property to the husband. The husband shall then assume the mortgage and indemnify the wife. The wife shall be paid by the husband for her 40% interest as has been determined by this court upon her transfer of title to him.

ALTERNATIVELY: -

- 4) That the wife shall buy the husband's interest in the said matrimonial home situate Carmichael Road, Adelaide within Sixty (60) days after the expiration of the husband's Ninety (90) day period, whereupon the husband shall execute a deed transferring all of his right, title and interest in the said property to the wife. The wife shall then assume the mortgage and indemnify the husband. The Husband shall be paid by the wife for her interest as has been determined by this court upon the transfer of title to her.
- 5) If after One Hundred and Forty (140) days neither the husband, nor the wife purchased the other's interest in the said matrimonial property then the property shall be placed for sale on the open market. Upon its sale the net proceeds of sale shall be shared between the husband and wife on the percentage 40% to the wife, 60% to the husband basis, established by this court in this ruling.
- 6) That up to and until either of the parties buys the other's interest in the said property or the said property is sold, the net proceeds, after the payment of the mortgage, real property taxes and other obligated outgoings generally of the apartment units, all rents received shall be shared as on the sharing basis of Sixty Per Centum (60%) to the husband and Forty Per Centum (40%) to the wife by way of periodical payments. Such payments to cease upon either party purchasing the other's interest or sale of the said property and the wife has received her share of the proceeds of sale.
- 7) That up to and until either of the parties buys the other's interest in the said property or the said property is sold the wife shall have the right to operate her beauty salon in the Unit she has been operating from under the Consent Order dated 28th September 2023. The wife shall pay for her own utilities during this period and shall have Unit Number One (1) to live and reside in. Accordingly the Husband shall pay his own utilities and shall have one (1) of the units to reside in.
- 8) The Husband shall continue to collect the rents from the remaining Four (4) units and pay all of the financial obligations of those units including the mortgage and the utilities from those rents.

- 9) The Court declares that pursuant to Section 73(1)(a) of the Matrimonial Cause Act, there are no children of the family to whom the section applies.

Dated this 11th day of June A.D. 2024



C. V. Hope Strachan
Justice

