

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division

2022
FAM/div/No. 00557

BETWEEN

CEDRIC DERECK SMITH

Petitioner

AND

SCARLETTE CLARA SMITH (nee SMITH)

Respondent

Before: **The Hon. Madame Justice J. Denise Lewis-Johnson MBE**

Appearances: Sidney Campbell for the Petitioner

Nadia Johnson for the Respondent

Hearing Date: 8th March 2022, 11th March 2024, 14th March 2024, 2nd April 2024

Family Law-Matrimonial Causes Act-Divorce-Ancillary Relief-Matrimonial Property- Division of Assets

Introduction

1. By a Notice of Intention to Proceed with Ancillary Relief filed 18th October 2022, the Petitioner sought a Property Adjustment Order in relation to the matrimonial property located at 25 Kent Drive, Nassau, Bahamas “the Property”.
2. By Affidavit of Means filed 4th October 2023 and 22nd November 2023 the Petitioner and Respondent, respectively outlined their expenses, income and positions as to their interest in the matrimonial home.

Background

3. The Parties were married 21st April 2011, the marriage lasted for 11 years.
4. Decree Nisi granted the 31st January 2023.

5. The Parties reside at Lot Number 153, Coral Harbour Subdivision.

The Petitioners Evidence

6. That there are no children of the marriage and he receives a monthly pension from the National Insurance Board of \$1,100.00. That the property was acquired prior to his marriage to the Respondent and has an appraised value of \$325,000.00.
7. That before the Respondent move into the home it was made clear to her, two years before the marriage that the property was not to be a matrimonial home but was an inheritance for his son.
8. That he retired from gainful employment in 2020 due to health issues.
9. That he pays and continue to pay all bills associated with the upkeep of the property with the exception for a payment made by the Respondent on the 24th January 2023 in preparation of her Affidavit.
10. That the Respondent paid for two tanks of gas. After his eating habits changed, he only ate fruits, nuts and used the air fryer for his meats and vegetables and that the grocery receipts provided by the Respondent was for her personal use.
11. That the property's electricity was disconnected due to a miscalculation of the balance on his part. That he paid \$100.00 on the 19th October 2021 to keep the account active but was short \$22.00. That on the 5th November 2021 he paid \$300.00 and the electricity was reconnected. The other time was during January of 2023 after the 6th billing which he was reluctant to pay.
12. That the Respondent made no contributions to the matrimonial home and failed to participate with any aspects of the marriage.

The Respondents Evidence

13. That she has always from the commencement of the marriage and currently resides in the matrimonial home and the Petitioner is the legal owner of the home.

14. That she is unaware of the status of the mortgage but was able to obtain information regarding same and that to her knowledge the last appraisal was completed in 2015.
15. That she is employed at the Ministry of Social Service as a clerk earning a gross salary of \$1,500.86 and a net salary of \$761.64.
16. That she is informed that the Petitioner is currently employed at BTVI since June of 2023 as an accountant and making a salary in the mid four range.
17. That the Petitioner was employed by Remnant Tabernacle and was terminated in 2018. He then worked at Temple Christian School until 2020 and received the sum \$15,000.00 in severance. The Petitioner also receives unemployment benefits from NIB in the amount of \$1,081.00 since October 2020.
18. That she contributed to the utilities and groceries throughout the marriage and assisted the Petitioner in getting employment by making calls, sending out resumes and using her personal contacts to assist him.
19. That during the period of 2018-2019 and 2020-2023, when the Petitioner was unemployed, the Respondent paid for groceries, utilities and other expenses in the matrimonial home.
20. That she paid the electricity bill to ensure that the Petitioner was comfortable and despite the funds the Petitioner received he allowed the electricity to be disconnected at some points.
21. The Respondent claims that she is entitled to a 40% interest in the matrimonial home.

The Issues

22. What is matrimonial property?
23. Whether the home the parties resides in is matrimonial property.
24. If it is found to be matrimonial property, whether both parties are entitled to an interest in it and if so, at what percentage.

The Law

The Matrimonial Causes Act “the MCA” S.29 states:-

(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.

Section 28 (1) 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;

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

Decision

25. The Parties, for the duration of the marriage resided at #153 Coral Harbour Subdivision. This was property acquired by the Petitioner prior to the marriage. It must be determined whether this property is to be regarded as matrimonial property. In **Charman v Charman** [2007] 1 FLR 1246 matrimonial property was defined as “*property of the parties generated during the marriage otherwise than by external donation.*” The Court however finds Judge Nicholas Mostyn QC most helpful in **Rossi v Rossi** [2006] EWEC 1482 (Fam);-

“1. The matrimonial property is likely to be divided equally, although there maybe departure if (i) the marriage is short, and (ii) part of the matrimonial property is “non-business partnership, non-family assets or if the matrimonial property is represented by autonomous funds accumulated by dual earners; and

2. the non-matrimonial property is not in fact quarantined or excluded from the court’s powers. It simply represents an unmatched contribution by the party who brings it to the marriage. The court must decide whether it should be shared and, if so, the proportions in

which it is to be shared. In reality, the longer the marriage, the more likely the non-matrimonial property will become merged with matrimonial property. By contrast, in a short marriage, non-matrimonial assets are not likely to be shared unless needs dictate.”

26. The Respondent relied on the cases of **Burns v Burns** [1983] EWCA Civ 4 where the position stated by Lord Justice Fox was *“the house with which we are concerned in this case, 143 Osidge Lane, Southgate, was purchased in the name of the Defendant and the freehold was conveyed to him absolutely. That was in 1963. If, therefore, the Plaintiff is to establish that she has a beneficial interest in the property she must establish that the Defendant holds a legal estate upon trust to give effect to that interest.”* and **Gissing v Gissing** (1971) A.C. 995 which stated *“For present purposes I think that such a trust could only arise (a) by express Declaration or agreement or (b) by way of resulting trust where the claimant has directly provided part of the purchase price or (c) from the common intention of the parties.”*

27. The Court is of the view that those were the legal principles pre 2008 and the Court of Appeal ruling in **Jupp v Jupp** in 2013 is where the present approach was established. In **Jupp v Jupp** [2013] 1 BHS J No 131 President Anita Allen (*Ret.*) stated,

“Section 29 is very clear as to what a judge must take into consideration when considering whether to exercise her powers under section 27 or 28 or even section 25 of the Act. Any sharing principle enunciated by case law must be construed in this light. The statute requires that you look at all the circumstances and you make the order which puts the parties in the financial position so far as it is practicable that they would have been in if the marriage had not broken down. The division of the assets must be fair in its entirety. It is not the role of the trial judge to list the assets of the family and to divide them one by one. The trial judge must look at the circumstances on the whole, examine the entire context of the case and make an award accordingly, stating sufficient reasons for the same.”

28. While the Petitioner states it was his intent to have the home inherited by his son, he moved the Respondent into the home and they resided there as husband and wife for the period of 11 years.

29. The Petitioner can not now seek to claim that the property did not become matrimonial property and thereby deprive the Respondent of a right to which she may be entitled.

30. The Court is satisfied that this is matrimonial property as the parties resided there for 11 years and the Respondent contributed to the maintenance and upkeep of the property, albeit her contribution was minimal.
31. Having determined the property is matrimonial property, the Court must now determine what interest the Respondent has. The Respondent did not contribute to the purchase, development and mortgage payments. By her evidence, her contribution was toward the utilities occasionally, groceries, by all accounts nominal.
32. The appraised value of the property according to the appraisal report submitted by the parties dated the 7th December 2015 is \$340,000.00. The Court would have preferred a more up to date report reflecting its value to date.
33. The evidence suggest that the property is also subject to a mortgage. The Petitioner having acquired the property before the marriage provided no account or evidence relative to the mortgage. The Respondent admitted that she is unaware of the state of the mortgage but provided evidence indicating that the mortgage was with the Bank of The Bahamas and is currently in arrears.
34. The Respondent should be concerned about the mortgage. She is the only employed party. If the mortgage is in arrears she ought to know, if she seeks an interest. The desire for a benefit run concurrently with the burden of a mortgage and other expenses.
35. Per Section 29 of the MCA, among other factors, the Court must also consider the contributions made by both parties towards the matrimonial home during the course of the marriage.
36. The Petitioner is a retired accountant who is sustained by a pension from the National Insurance Board at a rate of One Thousand and Eighty One Dollard (\$1,081.00). The evidence further reflect that subsequent to the retirement of the Petitioner in 2020, he was employed by Remnant Tabernacle, Temple Christian Schools and the Bahamas Technical and Vocational Institute. It is important to note that the Petitioner received a termination package from Remnant Tabernacle and a severance package form Temple Christian School for \$15,000.00, but is currently not employed by any of these institutions. He has health issues that affect his future earning capacity.

37. The Respondent is employed as a Clerk in the Ministry of Social Service earning a gross salary of One Thousand Five Hundred Dollars and Eighty Six cents (\$1,500.86) and taking home a net salary of Seven Hundred and Sixty One Dollars and Sixty Four Cents (\$761.64).

38. Considering the age of the Respondent, she still has earning capacity.

39. In **Floyd Hamilton Sawyer v Flora Pappas Sawyer BS 2018 CA 58**, Sir Michael Barnett JA (Actg.) observed the Hong Kong case of *DD v LKW [2008] 2 HKC 134* stating:-

“On divorce the principle and spirit underlining the union should be reflected in the divisions of the family assets. The division should proceed on the basis of fairness. And this necessarily means that there is no room for discrimination between the husband and wife. The starting point is equality in division unless there is a good reason to depart from it.”

40. The Petitioner contends that he pays the mortgage and he continues to pay for the upkeep of the property. However he admitted that the Respondent on the 24th January 2023 paid a bill but it was only for the purposes of her Affidavit.

41. There is no evidence before the Court that the Respondent assisted the Petitioner with the mortgage payments. In fact the Respondent admitted to having little knowledge of the mortgage.

42. The Petitioner while employed consistently made more money than the Respondent. The Court ought not to only look at the financial obligations of the parties but must also look at the contributions made by the Reponsent that were non-financial.

43. The parties seem to have enjoyed a middle class standard of living. The Respondent does not have a disability (the Petitioner has health issues). They both will need housing. The Petitioner is 66, past the retirement age and the Respondent is 50, with potentially 15 years before retirement.

44. In **Chisholm v Chisholm SCCPV App No. 122 of 2020**, property was acquired prior to marriage and transferred into a company prior to marriage. The husband and wife received benefits from it

during the marriage and thus the trial judge found he was “*entitled to take them into account in determining what is a fair division of assets.*” The Court of Appeal upheld that decision.

45. In **A v B 2008/FAM/div/00132** relied on by the Petitioner, Sir Michael Barnett, then Chief Justice stated “*the objective of the Court is to be fair.*” He further stated:

“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.”

46. The Court is satisfied that the Respondent over the years made some contribution albeit not to the extent of the Petitioner to the home. I am satisfied that this is a case where compelling circumstances demand a departure from the equal sharing principle based on the age of the Petitioner and prospect of future employment, the contribution of the parties, particularly the Petitioner, the health of the Petitioner and the intent of the parties.

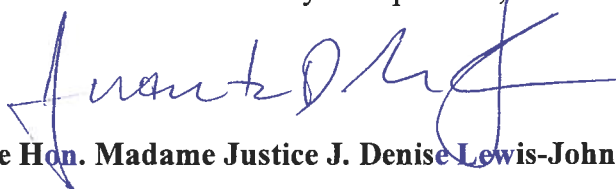
47. As a result of the evidence before the Court, the Petitioner is entitled to an 85% interest and Respondent a 15% interest in the home. Having regard to the law, particularly Section 29 **Jupp v Jupp** in all circumstances of this case, this is a fair division of the matrimonial home. If the parties are unable to purchase the other's interest the matrimonial home is to be sold, the balance of the mortgage paid off and the net balance split between the parties as assigned.

48. For all of the reasons stated above, the Court having considered the evidence, and having considered the relevant law finds as follows:-

- i. Lot 153, Coral Harbour Subdivision is matrimonial property.
- ii. The Petitioner has an 85% interest in the property and the Respondent 15% interest.
- iii. The Petitioner to purchase the Respondent's interest within six months of this Order, failing which the Respondent is at liberty to purchase the Petitioner's interest within six months thereafter.

- iv. If the parties are unable or unwilling to purchase the other's interest, the property is to be sold and the net proceeds divided in the percentages stated above.
- v. Each party is to bear their own cost.

Dated this 5th day of September, A.D. 2024

A handwritten signature in blue ink, appearing to read "J. Denise Lewis-Johnson". The signature is stylized and written over the printed name below it.

The Hon. Madame Justice J. Denise Lewis-Johnson MBE