

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division
FILE NO. FAM/div/00342/16

BETWEEN

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Before: **The Hon. Madam Justice Donna D. Newton**

Appearances: Ms. Roshar Brown for the Petitioner
 Mrs. Cathy Hassan with Mrs. Khadra Hassan for Respondent

Hearing dates: 30th November, 2017; 27th February; 8th & 12th May, 2018

Dated: 10th December, 2018

RULING

NEWTON, J:

The Facts

1. The instant application is by Notice filed for Ancillary Relief filed 27th February, 2018 on behalf of the Petitioner. After a twenty year marriage the parties divorced on the ground of the Respondent Husband's (H) cruelty to the Petitioner Wife (W).
2. There are two children of this marriage, a 21 year old who attends university and a 16 year old.
3. The W's application is for sole custody of the minor child with reasonable access to the H in addition to maintenance from the H for both children. The H on the other hand is requesting that the parties have joint custody with day to day care and control to the W and liberal access to him. He is also asking for an order that he pays maintenance for the said minor child. Both are requesting a property adjustment order.

The facts

4. The matrimonial property consists of the matrimonial home in Eastwind Gates Estates in New Providence with a two bedroom apartment unit attached in addition to a lot in Freeport, Grand Bahama. It is accepted that during the marriage both parties purchased the properties and the Freeport property is now mortgage free. It is to be noted that the equity in the Freeport property was used as security in obtaining the mortgage over the matrimonial home. However there is conflicting evidence as to the contribution of each party to this mortgage.

Petitioner's Evidence

5. The W's evidence is contained in her Affidavits of 5th April and 4th May 2018 respectively. She is employed with the Ministry of Education and earns a monthly salary of \$2,525.00 and her average income is \$3,475.00. It is worth noting that she states that her total monthly expenditure is \$5,737.41 which is roughly more than \$2,262 her monthly income.
6. She explained that she supplements her income by collecting the rental of \$950 from the apartment unit which is attached to the matrimonial home, which she says she uses to *"live off"*.
7. The property was purchased in 2009 and the mortgage was obtained at the same time. She stated that for some 16 years during the marriage she worked overtime earning an extra \$2,700 monthly in order to supplement her salary.
8. The W explained that she carried the financial burden of the family for most of the life of the marriage because as she stated the H *"was often unemployed."* That on occasions she has had to takeover payment of loans that he had commenced as they had fallen into arrears. She also stated that she had arranged several jobs for him and that he lost one because he was made redundant, and another because he was fired. In addition, she stated that she assisted him in establishing a concrete design business which lasted for some five years but because of his poor health he could not continue with the business.

9. She said that the mortgage payments are made by direct deductions from her salary and that the H does not contribute.
10. In her affidavit she described the H's relationship with the children as "*tenuous and infrequent*". She stated that both children participate in swimming. She went to great lengths to explain the expenses she has to meet to ensure they "*remain healthy in order to compete*". Expenses include physiotherapy sessions, personal fitness training, purchase of swim suits and competitive racing suits, vitamin and mineral supplements, swim club membership fees totaling some \$1,825 annually, and personal expenses when the boys travel to swim meets overseas.
11. She further stated that the elder son was in boarding school in the United States for four years and while there the H showed no interest. That he obtained a partial scholarship to attend a university in the United States but remained there for only one year due to lack of finance, before transferring to the University of the West Indies in Barbados. She stated that he obtains financial assistance in the form of a \$1,000 subvention from The Bahamas Government. Additionally 80% of his university fees are paid by government. However she said that since there is no structured swimming programme in Barbados he has to attend additional training when he comes home in order to maintain his swimming times, which training is funded solely by her.
12. The W says the minor child attends a private school and because she was meeting all the other expenses she had asked the H to pay the entire school

fees, but instead he pays half. However she said she pays all the other school expenses.

13. She admitted under cross examination that the H became ill in 1999 and had to undergo back surgery in 2011 and shortly after was diagnosed with kidney failure. She explained under cross examination that prior to his illness he contributed to the family's finances and that he had a *"fair relationship with the children"*.

14. Under cross examination she also stated that when the H was employed he made contributions to the family by paying the small expenses like groceries.

15. The W is asking that she is granted the matrimonial home and that both parties transfer their respective interests in the Freeport property to the children.

Respondent's Evidence

16. The H in his affidavits filed 23rd and 28th February, 2018, respectively refuted the fact that he was unemployed for the majority of the marriage. Instead he maintained that he was employed throughout the marriage and even having multiple sources of income. He said that at one point in the marriage it was he who bore the financial burden of the family.

17. That he carried on the concrete business and that he continued to be so employed until his severe health issues arose and subsequent surgery.

18. He explained that it was while he was hospitalized for 85 days that the W arranged with the bank to have the mortgage payments deducted directly from her salary. That he continued to give W his half of the payments. While he exhibited copies of a bank statement showing withdrawals they do not specify the purpose.
19. He said he has been in his current full time employment since 2013 and that he earns a monthly salary of \$1,000 with expenses totaling \$1,490.28 per month.
20. The Freeport property, he said, was used as collateral to purchase and build the matrimonial home. He claimed that the loan was not sufficient to complete the matrimonial home and as a result he provided the majority of the financing to complete the home. He explained that as he loved and trusted his wife he did not retain the documentation to prove his contribution.
21. He stated further that he obtained a loan to purchase a car for the family which is used exclusively by the W. This is not refuted, however the W said that because of the H's unemployed status the loan fell into arrears and she has had to continue the payments.
22. He said that only since his health deteriorated that the W began to bear the majority of the expenses.
23. He is asking for a joint division of the property, joint custody of the minor child and that he is made to pay \$100 per month as maintenance in addition to half of the school fees.

24. Under cross examination he explained that he attends the hospital for dialysis three times a week which leaves him exhausted. He said he opted to take the treatment in the evenings so that he will not have to take time off from work.

25. He said he has a good relationship with his boys and that he previously travelled with them to swimming competition overseas. However he admitted that he does not, on a consistent basis, send the elder son money to assist him.

Property Adjustment – Matrimonial Property

26. When making a property adjustment order the court is required to take into consideration the factors as outlined in Section 29 Matrimonial Causes Act (MCA) which includes

(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;

27. At the outset of the marriage I am satisfied that each party possessed equal earning capacity. However, it is accepted that the H's health has prevented him from earning as he used to. In fact the W admitted that because of his failing health he was unable to do the lifting that the concrete business required thus, one of the reasons for its closure.

28. The court is also required to consider the contribution to welfare of the family by the parties to the marriage.

29. Counsel for both parties invited the court to consider Lord Nicholl's decision in *White v White (2001) IAER* where he referred to the principles governing the court's discretion as it relates to a property adjustment order. That is, that the court should seek to achieve a fair outcome. That if each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets, that there should be no bias in favour of the money earner against the homemaker. He explained that,

“.....whatever the division of labour chosen by the husband and wife or forced upon them by circumstances, [emphasis mine] fairness requires that this should not prejudice or advantage either party”

when considering paragraph (f) of Section 25 MCA.

30. The evidence shows that both parties contributed to the welfare of the home. Both parties claim that at one point in the marriage he/she was earning the greater portion and was therefore contributing likewise. This I think only proves that they both contributed and goes to the issue of equality. Applying Lord Nicholls explanation, I determine that the “*circumstances*” that forced the division of labour on the parties was the H's failing health. But for this, it appears that his contribution to the welfare of family would have continued in the amount it was prior to that circumstance.

31. The objective in such matters is to do what is right and just and thus achieve a fair outcome for the parties. In assessing the contribution, as stated in *White v White supra*, there should be no bias in favour of the larger money earner if each contributed equally to the welfare of the family. The W went

to great lengths to explain the added expenses she incurred as a result of the swimming for the children, including having to work overtime.

32. She also submits that the H willfully neglected to contribute to the welfare of the family, this is not supported by evidence. In fact both parties gave evidence that when he was working he contributed, albeit that she stated he was more often out of work.

33. I believe he had sporadic employment but despite this he made his contributions.

34. Other factors to be taken into account are the health, age of the parties and length of the marriage. The H's deteriorating health is accepted by both parties. Both are approaching middle age, namely 46 years and 51 years respectively which makes it rather difficult in terms of obtaining financing in order to start over. Additionally the parties have had a fairly lengthy marriage of 22 years.

35. The H's health affects his earning capacity as well as his future financial needs, which he describes as the requirement for a replacement kidney. On the other hand because of the H's health the W would be required to continue to carry the burden of the financial needs of the minor child as well as the child in college.

36. The W is also relying on the decision in *White v White 2001 AER 1* where it was stated that the court is not to discriminate between the H and the W

but to make fair financial arrangements between the parties in the absence of an agreement.

37. The court is required to exercise its powers to achieve fairness between the parties as outlined by Lord Nicholls in *Miller v Miller : McFarlane v McFarlane (2006) UKHL*. This begins by taking into consideration the financial and housing needs of the parties. He noted that in most cases, (as in the instant case) the available assets are insufficient to provide for two families adequately, he emphasized that ***“the court seeks to stretch modest finite resources so as to meet the parties’ needs”***.

38. On explaining the ***“sharing”*** principle Lord Nicholl’s said it is derived from the basic concept of equality which today permeates a marriage. He likened marriage to a partnership. He said...

“parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasize the qualifying phrase: unless there is good reason to the contrary. The yardstick is to be applied as an aid not a rule”.

39. W’s submission is that the court should depart from the equality principle for the reason that the H had willfully neglected to support his family therefore he should not have an equal share in the assets. In fact she is requesting that he is not entitled to anything from the family’s assets. She is also asking that the court makes an order that the Freeport property is transferred to the children.

40. The H said that the properties were all purchased jointly and it was intended that they will be owned jointly. This I believe as both properties are in the joint names of the parties.

41. It is worth noting that the W collects a monthly rental income from the apartment unit and uses it exclusively for her and the children.

42. From the evidence presented and taking into consideration, all of the circumstances mentioned above I am satisfied that the intention of the parties on the joint purchase of the home was that their respective interests are equal.

43. The W asked the court to depart from the equality principle for the reason that her contribution to the welfare of the family was greater. To do this would mean to discriminate between the parties in favour of the greater earner, a point which as has been noted in the cases is discouraged.

44. I find that to achieve fairness in this case there is no reason to depart from the equality principle. I find that the parties contributed equally to the family. The matrimonial properties which include the home and the Freeport property are to be divided equally between the parties.

Custody and Maintenance

45. The W has requested sole custody of the minor child with reasonable access to the H. It appears that the parties live well above their means. The W is employed as a Registration Officer with the National Accreditation and Equivalency Council of The Bahamas, a unit of the Ministry of Education

and as stated earlier, she gives her average monthly salary of \$2,525 and gives her average monthly income as \$3,475.00 and lists her monthly expenses as totaling some \$5,737.41. Even with the extra income she is still some \$2,000 over her increase. She explained that the overage is supplemented by her parents and a credit card. As mentioned earlier she also collects rental from the apartment and uses it exclusively for her and the boys.

46. The H on the other hand is employed with the National Sports authority with a monthly salary of \$1000.00 and lists his monthly expenses as \$1490.28 some \$490 per month above his income.

47. The W is requesting sole custody care and control of the minor child to her and reasonable access to the H. Additionally she is seeking an order for maintenance in the amount of \$400 per month for each of the children until the minor child attains 22 years or until he completes tertiary education and for the elder until he completes tertiary education. Also, that the H pays half of the educational, medical, dental and optical expenses of the children until they each complete their tertiary education.

48. It is unrealistic for the H who's salary is \$1,000 per month to contribute a total of \$800 towards the maintenance of both children in addition to sharing equally in their educational, medical, dental and optical expenses. I wish to note here that both parties admit that the Respondent currently pays half of the school fees for the younger child which is some \$1,846 per term with the H admitting under cross examination that he borrowed the funds to pay this term's fees.

49.The W has admitted that the older son is on partial scholarship in addition to obtaining a subvention from The Bahamas Government.

50.The H stated in his affidavit that he has no medical insurance therefore he has to meet his medical expenses out of pocket which averages \$800 monthly.

52.The H has demonstrated that he still has a relationship with the minor child therefore I shall order that custody is shared jointly with day to day care and control to the W and reasonable access to the H.

53.The H is to pay \$200 per month maintenance for the minor child. Having considered the parties' financial standing, I think it is not prudent at this time to make an order with respect to private school fees. Hence, the parties are to share equally the educational (excluding school fees), medical and dental and optical expenses of the minor child.

54.It is not practical for the H to be made to contribute to the welfare of the elder son, considering the H's income, earning capacity and future financial obligations.

55.A Declaration is granted pursuant to Section 73 (1) (b)(i) of the Matrimonial Causes Act that arrangements have been made for the minor child and are the best that can be devised in the circumstances.

56.Each party is to bear its own costs.

DONNA D. NEWTON

Justice