

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2014/CLE/gen/

BETWEEN

RG

Petitioner

AND

AG

Respondent

Before: The Hon. Madam Justice Donna D. Newton

**Appearances: Mr. Leon Bethell for the Petitioner
Mrs. Cheryl Bazard for the Respondent**

Hearing Date: Heard on submissions

**Divorce – Property adjustment – Whether property is matrimonial property–
Whether spouse can acquire an interest in a home in which she never resided –
Rationale for equal sharing principle – Matrimonial Causes Act 2001 s. 29**

The Petitioner Wife seeks, among other things, a declaration that she has an interest in two properties which the Respondent holds as a joint tenant with his mother. The Petitioner Wife argues that the court should declare that she has an interest in both properties in question as they are both matrimonial properties to which the equal sharing principle applies. The Respondent Husband, on the other hand, maintains that the Petitioner has no interest in either property because (i) the properties were acquired before the marriage, (ii) the Petitioner made no financial contribution and (iii) the properties were purchased by the Respondent's mother; he holds them as joint tenant with his mother to give effect to her intention for them to pass to him upon her death. He maintains that it was understood as between himself and his mother that it would be for her benefit during her lifetime.

RULING

Newton J:

Introduction

1. The Petitioner Wife ("W") applied by Notice filed 20th February, 2017 for the Court to declare her interest in two properties and to make an order for sole custody of the only child of the family with liberal access to the Respondent Husband ("H") and that the H be made to pay maintenance for the child.
2. As the child has, since the date of this application is now sui juris the issue of custody has fallen away. However, the issue as to her maintenance remains a live issue as she is enrolled in tertiary education.

Facts

3. After a seven year marriage, the parties divorced on the ground of the H's cruelty to the W.
4. There is one child of the marriage, a 20 year old who is enrolled in tertiary education.
5. After the celebration of the marriage in 2007, the parties, along with the child, lived in one of the units of the Lexus Court apartments.

6. The W contends that during the marriage, the H purchased additional property on Rose Close on which he built a house which the H intended to be the new family home. The H denies the existence of this.

The Application

7. The W's application is that:
 - (a) The H pays \$600.00 per month in maintenance for the child in addition to paying half the college fees and \$1,000.00 annually to assist with school preparation.
 - (b) The court declares the W's interest in the matrimonial home and costs.
8. The properties in issue include a five unit apartment complex on Hanna Road ("Lexus Court") and a four bedroom home on Rose Close ("Rose Close"). Lexus Court owned by the H as a joint tenant with his mother. The H denies the existence of the Rose Close home and no evidence as to title was produced. The W provided a loan approval letter for Rose Close in the name of the H and guaranteed by his mother. There is conflicting evidence as to the non-financial contributions of the W and therefore vastly conflicting assertions as to the W's interest or lack thereof.

Issue

9. The issue to be determined is whether the W has an interest in either property. To answer this, it must be determined:
 - (i) Whether the property was matrimonial and
 - (ii) If yes, whether there are reasons to depart from the equal sharing principle.

The Petitioner's Evidence

10. The W's evidence is contained in her Affidavits of 16 March, 2017, 28th February, 2017 and 21st February, 2018. She is employed with the Ministry of Education and earns a monthly salary of \$1,962.00.

11. She deposed that before the marriage, the H led her to believe that he “owned” the Lexus Court units and that he advised her of his plan to “secure” from his Aunt the property west of Lexus Court to build a bigger home for the family.
12. Her contributions were the purchase of furniture in preparation for moving into the Lexus Court unit, payment of monthly utilities and food. She stated that she exhausted her entire income on the maintenance and management of the home for the benefit of the family.
13. Additionally she claimed that she directed and paid the gardener for the upkeep of the premises, that she communicated with tenants, gave tours of vacant units, prepared lease agreements and collected rent on the H’s behalf. She stated that she provided coins to the tenants for the washing machines and dryers that were supplied by the H.
14. She stated that during the marriage, she maintained the home by cooking, cleaning and preparing all meals for the family daily.
15. With respect to the Rose Close home, the W stated that sometime in or around September 2008 or 2009, the H advised her that he secured a loan from his Aunt for the property west of Lexus Court and he began building the four bedroom home. She further stated that he assigned a bedroom for them, a bedroom for the child and a bedroom for their unborn child. She produced a copy of a letter from RBC confirming a loan in the name of the H and guaranteed by his mother for the refinance and purchase of the property at Rose Close.
16. She stated that the H paid for her sister, an interior decorator, to travel from Grand Bahama to assist with decorating the new home. She also stated that she, along with her mother and sister, chose tiles, paint and a front door and that she travelled with the H to Miami to select various fixtures and appliances for the new home.
17. She explained that she assisted the H with lifting and measuring and holding supplies in place while he installed them and when the home was near completion they invited their priest to bless it. The Priest, who married the couple, also swore an Affidavit that he was invited by the H to bless the family home which was near completion.

18. The W stated that notwithstanding that the home was completed and it was blessed, the H insisted that they not move in until the electric gate and alarm were installed. After the alarm was installed the H insisted that they not move in until all the furniture was in place. She was convinced that the H was stalling the process of moving in

Respondent's Evidence

19. The H's evidence is contained in his affidavit of 7 February, 2018. He is employed with ZNS and earns a monthly salary of \$3,833.33.
20. He says that the W's request for \$600.00 per month as maintenance for the child is grossly exorbitant having regard to his expenses and his existing contributions to the child. He offers \$200.00 as reasonable maintenance for the child.
21. He deposed that he owns Lexus Court with his mother as joint tenants and that it was acquired more than six years prior to him meeting the W and some 13 years before the marriage.
22. With respect to the contributions of each party, he stated that he travelled to Florida approximately six times per year to purchase groceries, household goods, cleaning supplies, and toiletries and the W did not contribute. In response to the W's Affidavits, the H deposed that the W only spent \$120 – \$150 per month on food for three and a half of the five year marriage.
23. He said that they shared cooking and cleaning duties and that the W did not direct the gardener, but that he (the gardener) worked for his mother.
24. The H altogether denied purchasing any properties after 2007 and building a home and all of the W's assertions with respect to the Rose Close home. He denied that the Priest prayed for the new home and went on to explain that the Priest visited the home to pray for the W's mother and bless her bed.

Evidence of H's Mother

25. The H's mother swore an affidavit to explain her interest in the properties. She stated that she purchased a portion of lot 64 and put it in the joint names of herself and the W.

26. She confirmed that she entered a mortgage with H for the construction of the unit and that she paid the mortgage payments until construction of the units were completed by her husband. She said the rent paid the mortgage and that the H paid a reduced rent of \$400 for the unit he and his family occupied.
27. She deposed that in 2002 she acquired another part of Lot 64 from her sister at a purchase price of 30,000 and again put it in the joint names of herself and the H. She said that she commenced construction of a six unit rental complex rental that is currently under construction.
28. She stated that the W never contributed financially to the development or construction neither did she have any involvement in the management of the properties.
29. She explained that the properties were part of her retirement plan and she had put it in her son's name as part of estate planning. It was her intention, she said, that it will vest in him on her death. It was always understood as between herself and the H that the properties would be for her benefit during her lifetime.

Law

30. The law in this area is well settled. Section 29 of the Matrimonial Causes Act ("MCA") provides the considerations to which the Court must have regard in exercising its discretion to make financial provision and property adjustment orders.
31. The overriding objective in property adjustment cases is to be fair. The starting point for the division of property is the general rule that all property which is "matrimonial property" is subject to the equal sharing principle. In **White v White**, **Lord Nicholls** gave guidance on how to achieve fairness in property adjustment proceedings. He explained that to achieve equality, discrimination as to the contribution of the parties must be avoided. The rationale for the equal sharing principle is that the assets are the product of both parties' contributions, both financial and non-financial.

“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..... 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 parties' contributions..... There should be no bias in favour of the money-earner and against the homemaker and the child-carer.

32. In **A v B**, Barnett CJ (as he then was) declared that the modern day approach to division of assets in The Bahamas is equal sharing of property unless there is a compelling reason to depart from it.

33. Barnett CJ (as he then was) affirmed the position of the English Court of Appeal in **Charman v Charman** that the equal sharing principle applies to matrimonial property:

“To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for 'redistribution.....but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality”.

Matrimonial Property

34. In order to determine how the properties in issue ought to be dealt with, it must first be determined whether it is matrimonial or non-matrimonial property. Matrimonial property was defined in **Charman v Charman** as **“property of the parties generated during the marriage otherwise than by external donation”.**

35. In determining how the assets of a divorced couple were to be divided to achieve fairness, Lord Denning in **Watchel v Watchel** defined “family assets”, which is effectively the same as matrimonial property at page 836: he said

“The phrase “family assets” is a convenient way of expressing an important concept. It refers to those things which are acquired by one or the other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.”

36. The definition of matrimonial property was best summarized by Lord Nicholls in **Miller v Miller** at page 1289:

“Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance.”

37. Intention has been the determining factor for the classification of matrimonial versus non-matrimonial property in some cases. The approach of Lyons J in **Roberts v Roberts** for circumstances where property is in the name of only one of the parties is for the party claiming an interest therein to produce evidence of intention:

38. The matrimonial home has been treated in a special way, calling for even more equality with respect to this asset. In **Miller v Miller**, at page 1290:

“The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.”

39. Where a party to the marriage shares an interest in property with a person who is not a party to the marriage, the MCA section 29 (4) requires that the person who is not a party to the marriage be given an opportunity to make representations with respect to the order. Hence the affidavit of the H’s mother.

40. In summary, the principles that can be derived from the above cases are:

(a) The approach for division of assets in The Bahamas is that matrimonial property should be shared equally unless there are compelling reasons to depart. Achieving fairness is the overriding objective: **A v B**.

(b) The rationale for the equal sharing principle is that the acquisition of matrimonial property is the production of their joint efforts regardless of whether the contributions are financial or non-financial. Discrimination between financial and non-financial contributions has no place in property

adjustment: **White v White; Miller v Miller; s. 29 of the Matrimonial Causes Act.**

(c) "Matrimonial property" is property generated during the marriage: **Charman v Charman; Watchel v Watchel; Miller v Miller.**

(d) Where one party claims an interest in property legally owned solely by the other party, the party claiming an interest must prove some joint intention: **Roberts v Roberts.**

Discussion, analysis and findings

Lexus Court Property

41. With respect to Lexus Court, Counsel for the W submitted that it was matrimonial property since one of the units was used as the matrimonial home and that the W took on a managerial role while there. Accordingly, he said the W has an interest in the property. Counsel for the H, on the other hand, submitted that the property is not matrimonial property for several reasons. The property was acquired 13 years prior to the marriage; it is held jointly with his mother; and that the mother paid all the loans associated with it.

42. I accept the W's evidence that she assisted to facilitate the running of the complex as an investment property. However, I believe that she has exaggerated the extent to which she assisted. I accept the H's evidence that the property was acquired well before the marriage.

43. I accept the evidence of H's mother that she paid the mortgage payments on the property without the financial assistance of the H notwithstanding that she entered the mortgage with him jointly. I also accept her evidence that she allowed the property to be placed in their names as joint tenants with a view to estate planning. I accept also the evidence that the H paid a reduced rent of \$400 to his mother. I further accept her evidence that it was understood as between herself and the H that the complex was intended to be for her benefit only, during the course of her life.

44. The H properly relied on the **Yasmine Johnson v Andrew Johnson**. However, the case did not turn on the fact that the property was brought into the marriage,

as the H suggested. It turned on the fact that there was every intention that the state of affairs (Wife holding property with her mother) would remain during marriage. The Respondent in that case was prevented from paying the mortgage while the Petitioner expressly told him that the property was hers and that he was to have no interest in it. The positive acts by the Petitioner to continually indicate the intention that the property was only the Petitioner's, excluded the property from equal division. The intention that the property was not for the couple's joint benefit was irrefutable and unequivocal by their conduct. No such fact exist in the instant case.

45. The H also properly relied on **Roberts v Roberts** that where the property in issue is held in the name of only one of the parties to the marriage, the other party must show sufficient evidence of the expression of common intention that the property was or is intended to be held jointly. In fact, the facts disclosed the opposite – a common intention for the property to be the benefit of the H's mother during her lifetime and the benefit of H only upon her death. I agree with the H that the W has not adduced sufficient evidence to demonstrate a common intention. It is clear that the property was intended for H's mother's benefit, the H's payment of rent indicative of same. In any event, the few contributions made by the W (all of which non-financial) were not sufficiently substantial to have proved a common intention.

46. As it was acquired well before the marriage and the W could not produce evidence to demonstrate a common intention for the property to be held jointly. I do not find that Lexus Court was matrimonial property as defined. Accordingly, whether the equal principle should be applied is not a matter that I need to consider.

Rose Close Property

47. It was argued on the H's behalf that the W has no interest in the Rose Close home. It was argued for the W that she did have an interest. She went to great

lengths to establish the H's intention for the home to be for the family. I accept her evidence that the H deliberately prolonged the moving of the family into the Rose Close home.

48. With respect to this property, I prefer the evidence of the W over that of the H, although I believe that she exaggerated the degree to which she assisted with the manual labour.

49. It should be noted that the W never lived in the home. Therefore it must be considered whether the contributions made by the W to the family during the marriage while they lived at Lexus Court can be applied to the Rose Close home. That is, the fact that W did not reside at the Rose Close house disqualify her from an interest in the it notwithstanding her contributions while the lived at Lexus Court.

50. The question requires due consideration of the equal sharing principle and emphasis on the principle of fairness, which is demanded in all of the property adjustment cases.

51. One of the primary rationales of the equal sharing principle emphasised in **Miller v Miller** was the sharing of the fruits of the matrimonial partnership.

52. In **RP v RP** [2007] 1 FLR 2105, Colridge J had this to say about the fruits of the combined contribution at paragraph 63:

“at the end, both are entitled to a full share of the fruits of the combined and equal contribution.”

53. Section 29 of the MCA expressly states that in dividing the assets, the court must have regard not only to the financial contributions of the parties, but also the non-financial contributions. I accept the W's evidence that she took care of the family and that she spent most of her income on maintaining the home (although at that time, the home was at Lexus Court). The contributions referred to are not

contributions to a physical location, but to the marriage and to the family. Notwithstanding that the W did not live in the Rose Close home. The W contributed to the family in her own sphere, which was homemaking as well as earning money albeit to a lesser degree than the H. Therefore, there should be no bias against her.

54. The Courts have reiterated that the most important consideration is fairness. The Court of Appeal in **Jupp v Jupp** in paragraph 9 stated that ***"The division of assets must be fair in its entirety"***. Barnett CJ (as he then was) in **A v B** at paragraph 18 said that ***"the objective of the court is to be fair"*** Having regard to the circumstances, it would be extraordinarily unfair that the W is not be awarded an interest in a home which was acquired during her marriage to the H; a marriage to which she contributed substantially. The acquisition of the Rose Close property and home was undoubtedly the fruit of the matrimonial partnership.

55. By the **Miller** definition of matrimonial property, the Rose Close home is matrimonial property by virtue of it being purchased during the subsistence of the marriage.

56. I am satisfied that the H acquired it during the marriage and it was ***"the financial product of the couple's common endeavor"***. In any event, the W has succeeded on the intention test, proving that the H had every intention for the Rose Close home to be for the family and for her to have an interest therein.

57. Further, I accept the W's evidence that it was the H's plan to build the house for the family and that it was intended to be a **"continuing provision"** for them. That it was to be for their benefit and that they should both have an interest in it. Further I accept the Priest's evidence as confirming the H's intention that the house which he blessed was to be used as the family home,. Fairness would not be achieved by any other result.

58. The H's assertion that the W should be disentitled to both properties by reason of the marriage being a short one is untenable. The general approach in this

case should be to consider whether and to what extent, there is good reason to depart from equality. As already indicated, in short marriages, there will often be a good reason for departing substantially from equality “**with regard to non-matrimonial property**”. The length of the marriage is only relevant when considering the sharing of non-matrimonial property.

59. The Court of Appeal in **Jupp v Jupp** emphasised that the outcome of property adjustment should be to put the parties in the same position they would have been had the marriage not broken down. Further, section 29 of the MCA requires the court to consider the standard of living enjoyed during the marriage when determining how property should be divided. I find that the parties lived at a modest standard.

Conclusion

60. For all of the reasons above, the W's application for an interest in the Rose Close home is granted. She is entitled to a 50% interest in the Rose Close Home.

61. As to the child, the parties have to share the expenses of the college equally until the child completes tertiary education.

62. The H to contribute \$250.00 per month as maintenance until she completes tertiary education.

63. **AND THE COURT DECLARES** that it is satisfied that the only child who is or may be the child of the marriage to whom **Section (73) (1) (b) (i) of the Matrimonial Causes Act Chapter 125** applies is **Asjah Arthurnique Alexandra Green** and that arrangements for the welfare of the said child have been made and are satisfactory.

DONNA NEWTON

Justice