

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division
2013/FAM/div/0084
BETWEEN**

**JT
Petitioner**

AND

**GT
Respondent**

AND

**SH
Co-Respondent**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mrs. Gail Lockhart-Charles along with Mrs. Lisa Esfakis for the
Petitioner
Ms. Michela E. Ellis for the Respondent

HEARING DATES: April 15, 2015, April 20, 2016, July 8, 2016, December 1, 2016, December
21, 2016, January 20, 2017, April 4, 2017, April 28, 2017, May 1, 2017,
June 9, 2017, December 4, 2017, January 26, 2018, April 5, 2018, April 20,
2018, February 12, 2021, August 9, 2021.

JUDGMENT

Hanna-Adderley, J

This is an application for Ancillary Relief

Introduction

1. The parties, British Citizens, were married in Middlesex, Great Britain on October 19, 1985. The Petitioner was 25 years old and the Respondent was 29 years old. The Petitioner is now 61 years of age and the Respondent is 65 years old. There are 3 children of the

marriage who are all sui juris. The parties both reside in the City of Freeport, Grand Bahama. The Petitioner and the youngest child of the marriage NT reside in the former Matrimonial Home. The Respondent has remarried and the Petitioner has not.

2. The Decree Nisi was granted herein on September 18, 2013 by Her Ladyship The Honourable Mrs. Estelle Gray Evans on the ground that since the celebration of the marriage the Respondent had committed adultery with the Woman Named herein and had treated the Petitioner with cruelty. The Certificate of Making Decree Nisi Absolute was filed on December 29, 2020. The parties were married for 28 years up to the date of the grant of the Decree Nisi. A Notice of Application for Ancillary Relief was filed by the Petitioner on April 15, 2014 and an Amended Notice of Application for Ancillary Relief on June 12, 2017. A Notice of Application for Ancillary Relief was filed by the Respondent on January 19, 2016. The Petitioner relies on the Affidavits filed as follows: September 5, 2013, 4th Affidavit filed April 17, 2014, 2nd Affidavit of Sharanna A. C. Bodie filed May 4, 2016, Affidavit of Niketa Isaacs filed May 25, 2016, 3rd Affidavit of Sharanna A. C. Bodie filed July 6, 2016, 6th Affidavit filed December 1, 2016, 7th Affidavit filed December 16, 2016, 8th Affidavit filed April 28, 2017, 9th Affidavit filed December 4, 2017, 10th Affidavit filed May 2, 2018, September 17, 2020, October 9, 2020, and October 15, 2020.
3. The Respondent relies on the Affidavits filed as follows: July 25, 2013, November 22, 2013, 2nd Affidavit filed December 6, 2013, 6th Affidavit filed October 1, 2014, April 15, 2016, July 4, 2014, November 30, 2016, December 20, 2017, Affidavit of Marcia Woodside filed March 13, 2018, April 5, 2018, October 7, 2019, July 16, 2020, September 8, 2020, 3rd Affidavit filed October 19, 2020, 3rd Affidavit filed June 18, 2020, and August 9, 2021,
4. Both parties were cross-examined on their affidavit evidence. The Petitioner also relies on Submissions dated August 6, 2021 and the Respondent relies on Financial Provisions and Ancillary Relief Final Submissions laid over on August 9, 2021.
5. The Petitioner's application is for the award of the Matrimonial Home, an equal share of the Respondent's 2 pensions ("**P & O**" and "**Devco**"), together with a lump sum to repair the former Matrimonial Home and for one of the pensions to be used to finance NT's tertiary education up to the completion of his bachelor's degree at Florida Atlantic University ("**FAU**") or the Bahamas Technical and Vocational Institute ("**BTVI**"), together with the costs of these proceedings.

6. The Respondent's application is for an order conveying his interest in the Matrimonial Home to the Petitioner and that he retains the full benefit of the Devco, P & O and UK State Pensions. Alternatively, that the P & O Pension be cashed out and that the Petitioner use those funds to pay him for his interest in the Matrimonial Home, that she retains the balance of the cash amount and the monthly income therefrom and his costs, if the Court is minded to grant costs.

Statement of Facts

7. On December 9, 2013 Justice Estelle Gray Evans made the following Orders as pertaining to the Petitioner's and NT's maintenance pending the conclusion of the ancillary relief proceedings ("**the Interim Order**"):

"15

6. The Respondent shall pay the Petitioner the sum of \$4,000 per month in maintenance pending suit commencing 28th December, 2013.

7. The Respondent shall continue to pay all of the household expenses set out in paragraph 34 of the Petitioner's Affidavit filed on 5th September, 2013.

8. That the Respondent shall continue to pay the Petitioner's medical, life, and auto insurance as set out in her Affidavit filed on 5th September, 2013.

9. That the Respondent shall consult his medical insurers and make whatever arrangement is necessary to ensure that the Petitioner's claims to recover sums paid by the Petitioner in respect of outstanding dental treatment to be received by the Petitioner and the Minor child of the family is processed by the Respondent's insurers without delay.

10. That the Respondent shall pay the Petitioner and the minor child's costs of travelling to Florida to receive the outstanding dental treatments.

.....13."

8. Paragraph 34 of the Petitioner's Affidavit filed on 5th September, 2013 states that the Respondent was to be responsible for payment of the following expenses on an interim basis totaling at that time approximately \$9,687.00 per month:

Mortgage

Homeowners' Association Fees

Homeowners' Insurance

Telephone (landline)

Mobile phone
Cable and Internet
Electricity
General home repairs
Floral arrangements
Bedroom, bathroom, kitchen expenses
Groceries
Pet care
Port Authority Service charge
Vonage

9. Paragraph 35 of the Petitioner's Affidavit dated September 5, 2013 identifies Insurance costs as Medical Insurance, Life Insurance and Auto Insurance totaling \$488.00 per month.
10. The parties agree and the Court accepts that there are 4 issues for determination by the Court, (1) a division of the former Matrimonial Home situated at No. 74 Doubloon Road, Shoreline, Fortune Bay Subdivision, Freeport, Grand Bahama ("**the Matrimonial Home**"); (2) a division of the Respondent's Pensions; (3) the provision for the tertiary education for NT and (4) settlement of the amount of the arrears of maintenance and provision for the payment of the same.
11. The following facts are gleaned from the numerous Affidavits filed herein, the parties' viva voce evidence and the written and oral Submissions of their respective Counsel and are not essentially in dispute. I will indicate where the parties differ.
12. The parties moved to Grand Bahama from Great Britain in 1997 when the Respondent was hired as Project Manager for Hutchinson Whampoa Limited. In 2001 the Respondent was appointed as President and Chief Executive Officer of The Grand Bahama Development Company Limited ("**Devco**") effective August 1, 2001, earning a salary of \$225,000.00 per annum (\$18,750.00 per month) in addition to allowances, commissions, benefits and bonuses, until his retirement on February 28, 2019. The Respondent is a Permanent Resident with the unrestricted right to work.
13. The Respondent's severance package from Devco amounted to \$444,807.69 inclusive of his retirement package, 3 months' notice pay and vacation pay for 59 days payable in a lump sum. The Respondent's monthly income is presently from the Devco Pension in the sum of \$5,789.00.

14. The Petitioner was married to the Respondent immediately following from university in England, where she had obtained a degree in business studies. Since the celebration of the marriage she was a full-time Homemaker and Housewife. The Respondent became a Permanent Resident of the Bahamas during the marriage and the Petitioner and children of the marriage were endorsed on his Certificate of Permanent Residency. She has the right to reside in The Bahamas but not to work. Her only income shortly after the commencement of these proceedings has been the sums that the Respondent was ordered to pay to her pursuant to the Interim Order, that is, \$4,000.00 per month, together with certain household expenses and insurance costs. On August 11, 2021 this sum was reduced to \$3,000.00 by this Court pending the determination of the ancillary relief application and the Respondent was ordered to pay the Shoreline Homeowner's Association \$1,000.00 per month on the arrears of homeowner association fees, all from the monthly income from his Devco Pension and leaving him to live off of \$1,789.00 per month until the determination of this matter.

Matrimonial Home

15. The matrimonial property was purchased by the parties in 1997 and in 2009 mortgaged to Scotiabank Bahamas Limited to cover advances up to the sum of \$400,000.00. The Mortgage fell into arrears during these lengthy proceedings and was in danger of being foreclosed upon. The Respondent used a large portion of his severance package from Devco to pay off the Mortgage in the sum of \$192,536.99 on April 8, 2019. The Respondent believes the Matrimonial Home to be valued approximately \$640,000.00 according to a previous appraisal in 2018. The Petitioner has obtained a more recent appraisal on the Matrimonial Home in the sum of \$317,356.00. She claims that the Matrimonial Home is in need of repair and that in order to fetch a better price at sale the Respondent ought to provide her with a lump sum to enable her to effect said repairs. The Respondent disputes this. The Respondent fixes the value of the furniture in the Matrimonial Home at approximately \$60,000.00.
16. Mrs. Gail Lockhart-Charles Counsel for the Petitioner submits that the Petitioner's needs require considerations such as purchasing a new home and possibly relocating to the United Kingdom or the United States where the older children live. That the Respondent should convey his interest in the Matrimonial Home to the Petitioner. That the Respondent is now remarried and in a home with his new wife. Ms. Michela Ellis Counsel for the

Respondent submits that the Respondent should receive the consideration of \$158,678.00 for his interest in the Matrimonial Home. That as the Matrimonial Home is free and clear the Petitioner can sell the home and downsize to a condo that is more manageable or sell the home and return to the UK or live in the United States near the 2 older children.

Pensions

17. The Respondent is eligible to receive 3 Pensions:
- (1) The Retirement Plan for Managerial Employees of the Grand Bahama Port Authority Group of Companies ("**the Devco Pension**") from which he receives \$5,789.00 per month. This Pension cannot be cashed out.
 - (2) The P&O Pension Funds Investment Limited ("**the P&O Pension**") can be cashed out but there would be a significant reduction in value. The approximate value of the plan is £517,531.20 (\$707,688.09 BSD). The maximum cash sum available is £124,948.88 (\$170,859.01 BSD) with a reduced monthly payment of £1,561.87 (\$1,561.87BSD). If the plan is not cashed out the monthly payment is £2,156.38 (\$2,948.70 BSD).
 - (3) The UK State Pension as of March 2022 in the sum of £538.96 (\$736.99).
18. Mrs. Lockhart-Charles submits that the Petitioner should be awarded an equal share of the 2 pensions and that one of the pensions should be used to finance NT's tertiary education. Ms. Ellis submits that there should be a clean break division of the assets. That in consideration for conveying his interest in the Matrimonial Home to the Petitioner that he retains the full benefit of the P&O Pension. Alternatively, if the P&O Pension is cashed out that the Respondent be paid for his 50% interest in the Matrimonial Home and the Petitioner collect the reduced monthly pension of \$1,561.87.

Arrears of Maintenance

19. The Petitioner claims in her Affidavit filed on September 17, 2020 that the Respondent owes her maintenance pursuant to the expenses awarded to her by the Interim Maintenance Order. At the hearing of an Interlocutory application for an Attachment of Earnings Order the parties were able to agree that certain expense items payable under the Interim Maintenance Order were in arrears. The following items could not be agreed upon and the Court was asked to determine whether the same were covered by the Interim Maintenance Order:

6	BTC/VIBE Bill	150.00
8	Vonage	198.78

58	Service to connect router	150.00
67	Repair to AC service	1,330.00
70	Pelican Bay Power	190.58
71	Sabour Restaurant	44.10
72	Pelican Bay	40.86
85	Phone bill for NT	5.00
101	Phone bill for NT	5.00
131	Fed Ex to Life Insurance Co.	65.00

In her Affidavit of September 17, 2020 the Petitioner claims that the sum due for these arrears is \$34,373.91. Ms. Ellis submits that most of the items set out in the Petitioner's 6th Affidavit filed herein on December 1, 2016 do not flow from the Interim Order. I hereby find that items 6, 8, and 58 were covered by the Interim Order. Items 67, 70, 71 and 72 should have been discussed with the Respondent before the charges were incurred and items 85, 101, and 131 were not covered by the Interim Order. I am of the view that surely the Petitioner could have absorbed these 3 small costs from her monthly sum of \$4,000.00. The total sum due from the Respondent for these historical arrears is \$498.78.

20. Further the Petitioner claims in her September 17, 2020 Affidavit that the Respondent owes her the following:

- (1) \$11,000.00 in arrears of maintenance. I accept Ms. Ellis's submission that the Petitioner's evidence does not demonstrate this.
- (2) Refund from the insurance company. The Respondent has denied this allegation repeatedly. There is no evidence before the Court that the Respondent received any refund from the insurance company.
- (3) Maintenance for November 2016. The Petitioner filed her 6th Affidavit on December 1, 2016. Any arrears of Maintenance for November 2016 surely ought to have been addressed during the hearing for an attachment of earnings order and during the discussions that followed between Counsel. That claim is disallowed.
- (4) Other claims for arrears of maintenance (September 2020 and October 2020), household expenses (BTC/Internet/Aliv/Skype for which, Ms. Ellis submits, no invoices were ever presented to the Respondent) and home repairs in 2020, after the Respondent's retirement, cannot reasonably be considered by this Court as the

Respondent would not have been in the financial position to meet them. I do not believe that it was in the contemplation of Justice Evans that the Interim Order would be in place for 8 years after it was made.

NT's Tertiary Education

21. NT is now 20 years old. The Petitioner submits, in part, that based on the Affidavits of the parties the manner in which NT was to be educated was discussed and he should expect nothing less than the education that the older children of the marriage received. That notwithstanding the Respondent's allegations that he is now retired, lives on a reduced income and has remarried, he is still under an obligation to pay for NT's tertiary education. That NT continues to be a child under the Act as he is unable to withdraw from his parents' charge and unable to obtain the necessities of life without their assistance. She referred the Court to **Farden v Farden** (1993) 48 R. F. L. (3d) 60 and the test laid down by Master Joyce (as he then was) and **Jackson v Jackson** (1972), 29 D.F.L. 172. That the Respondent and NT had agreed that he would enroll in FAU. That the fact that he was delayed by these proceedings does not change the fact that during co-habitation as a married couple the parties intended for him to attend a tertiary institution. NT decided recently that if he can get the Respondent's financial assistance he would enroll in BTVI because he has an interest in obtaining a trade. The cost of BTVI is markedly less than FAU. The parents have permanent residency but not the children. That it is because of the Respondent's actions and his attitude towards NT that NT has not enrolled in university after completing his high school education.
22. The Respondent submits, in part, that NT graduated from Lucayan International School and since then he has not pursued tertiary education. NT has told the Respondent that he does not want to go to university. The Respondent wanted NT to go to FAU, coincidentally the same university that the Petitioner now submits NT says he wants to go to. That at the commencement of these proceedings the Respondent was gainfully employed and in a better position to make financial provision for the education of NT. That the financial landscape had changed. The Respondent is no longer earning an income. The Respondent has set aside £15,000.00 currently held in the UK for NT's educational expenses. Ms. Ellis submitted that the Court must take into consideration the Respondent's financial means and that of the Petitioner when making an Order for the payment of tertiary education. If the parties do not have the means to pay for tertiary education then the Court ought not

to make an order compelling them to pay for tertiary education. She referred the Court to **C v M** [2014] 2 BHS J No. 14; **K v O** 2008 3 BHS J No. 5 and **Thurston v McKenzie** 2011/App/MAG/00001.

23. Ms. Ellis submits that when the Respondent was solely responsible for the university expenses of the two older children of the marriage all of the family's assets were vested in the Respondent. Once the assets are divided and the Court is satisfied that the parties can afford to pay for NT's university costs then the expenses should be shared equally between the parties. Ms. Ellis also pointed out that there is no evidence that NT has been accepted into university. Further, that if NT is not a part-time or full-time student then the Respondent ought not to be responsible for NT's medical insurance or daily maintenance expenses and once the assets are divided the parties should both be liable to share these expenses equally.

Analysis and Conclusions

The Law and Discussion

24. Sections 25 and 28 of the Matrimonial Causes Act ("**the Act**"), empowers the Court to make property adjustment orders.
25. Both Counsel have referred the Court to Section 29 (1) of the Act and the considerations that the Court should take into account when determining a division of the matrimonial assets.

(a) The income, earning capacity and other financial resources.

Mrs. Lockhart-Charles submitted that the Petitioner was totally financially dependent on the Respondent for the duration of the marriage. The Respondent a former Chief Executive of Devco has several pensions. At age 65 he will be entitled to Bahamas National Insurance. The parties have paid off their mortgage over the Matrimonial Home and are debt free. Ms. Ellis submitted that the Petitioner is a permanent resident of The Bahamas without the right to work. The Respondent is also a permanent resident of The Bahamas and is retired.

The Court recognizes that the parties' respective positions are entirely different since the breakdown of the marriage. The Respondent still has an income from the pensions and the Petitioner has none, save for what he was ordered to pay her monthly. If he chooses, due to his working experience, it is likely that the Respondent can find employment. The Petitioner has a degree in business studies but has not worked outside of the Matrimonial

Home. She cannot work in The Bahamas without a work permit. She is handicapped on the labour market in any event and it is unlikely that she can find gainful employment.

(b) The financial needs, obligations and responsibilities of the parties in the foreseeable future.

Mrs. Lockhart-Charles submitted that both parties are not in the position to provide for their respective means. The Petitioner will need a lump sum to support her transition and NT will need financial support for tertiary education. Ms. Ellis submitted that the Petitioner has since 2013 received \$4,000.00 per month from the Respondent. The Respondent has been solely responsible for the maintenance and upkeep of the Matrimonial Home which is occupied by the Petitioner and NT. The Respondent is retired and is on a fixed income which is substantially less than his working income. He intends to purchase a home and he has recently remarried.

The Court recognizes the Petitioner has no means of income except what she receives from the Respondent. The Respondent's means has been drastically reduced since his retirement. The Respondent's own monthly expenses just about equal his monthly income from his Pensions. The Petitioner cannot afford to maintain the Matrimonial Home but she needs a roof over her head. The Respondent will also need a roof over his head. The Respondent's Pension income cannot support both parties.

(c) The standard of living enjoyed by the family before the breakdown of the marriage.

Mrs. Lockhart -Charles submitted that the standard of living enjoyed by the family before the breakdown of the marriage. The Petitioner remains dependent upon the Respondent's monthly maintenance payments to provide herself and the child of the marriage the necessities of life. Ms. Ellis submitted that prior to the breakdown of the marriage the family enjoyed an upper middle class standard of living. The 2 eldest children went to university immediately after high school.

The Court recognizes that the standard of living of the parties before the breakdown of the marriage must be considered and for the party seeking a financial provision to be maintained in the comfort and style to which he or she and the children of the marriage were accustomed to. It is rarely possible to make financial provisions to maintain the same standard of living where the financial wherewithal of the parties or of the main breadwinner in the marriage is drastically altered downward. That is the case here.

(d) The age of each party of the marriage and the duration of the marriage.

Counsel submitted that the Petitioner is 61 and the Respondent is 65 years old. Mrs. Lockhart-Charles submitted that the marriage subsisted for 16 years and 7 months and Ms. Ellis, for 28 years.

The Court accepts that the marriage lasted 28 years and that it was a long marriage. While being in ones 60s is not nowadays considered being "old", whether one can be an income earner depends on one's profession or training, one's health and the prevailing conditions in the labour market. As hereinbefore discussed, it will be difficult for the Petitioner to find employment. The Respondent still possesses marketable skills and is likely to find employment if he chooses to come out of retirement.

(e) Any physical or mental disability of either of the parties to the marriage.

Mrs. Lockhart-Charles submitted that neither of the parties have any diagnosed physical or mental disability. Ms. Ellis submitted that the Respondent is a cancer survivor.

The Court accepts that neither party is presently undergoing any medical treatment and appear to be in good health.

(f) The contributions made by each of the parties to the welfare of the family and any contributions made by the parties in looking after the home or caring for the family.

Mrs. Lockhart-Charles submitted that the Petitioner was a homemaker and the Respondent worked out of the home and supported the family financially. Ms. Ellis submitted that the Petitioner was a stay at home mother and the Respondent was the sole income earner of the family.

The Court accepts and the law is well settled that the homemaker's contribution in looking after the home and caring for the family is an equal contribution to that of the income earner who works outside of the home. (See Wachtel v Wachtel [1973] Fam. 72, [1973] 2 WLR 366, [1973] 1 All ER 829)

(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

Mrs. Lockhart-Charles submitted that the Respondent receives a pension of \$5,000.00 per month and is entitled to the benefit from 4 pensions namely Devco, UK Pension, P&O

Pension and National Insurance pension upon attaining his 65th birthday. That the Petitioner is entitled to half of the value of these pensions as assets of the marriage. Ms. Ellis submitted that the Respondent has 2 pensions, 1 with Devco, which is paid monthly and cannot be cashed out and 1 with P&O which can be cashed out at a reduced value. The Court accepts that the Petitioner loses the benefit of the income from the Respondent's pensions upon the dissolution of the marriage.

26. Section 29 (1) of the Act stipulates the manner in which the Court ought to exercise its powers under this section: "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. "

27. Section 29 (2) provides as follows:

"(2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that it to say —

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage;

(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him."

28. Section 33 of the Act provides:

"33. (1) Subject to subsection (3) no financial provision order and no order for a transfer of property under section 28(1)(a) shall be made in favour of a child who has attained the age of eighteen.

(2) The term to be specified in a periodical payments or secured periodical payments order in favour of a child may begin with the date of the making of an application for the order in question but shall not in any event, subject to subsection (3) extend beyond the date of the child's eighteenth birthday.

(3) Subsection (1) and subsection (2), shall not apply in the case of a child, if it appears to the court that —

(a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with either or both of those provisions.”

Matrimonial Home

29. Lord Nicholls of Birkenhead in his Judgment in **Miller v Miller; McFarlane v McFarlane** [2006] UKUL 24 at paragraphs 4-16 considered which are accepted as the general principles and the modern-day approach applicable to the division of matrimonial property:

“ The requirements of fairness

4. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

5. At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

6. Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach.

7. This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance. As Lord Cooke of Thorndon said in *White v White* [2001] 1 AC 596, 615, there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice.

8. For many years one principle applied by the courts was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant's award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling thus put in place was shattered by the decision of your Lordships' House in the *White* case. This has accentuated the need for some further judicial enunciation of general principle.

9. The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a supplicant. Each party to a marriage is *entitled* to a *fair* share of the available property. The search is always for what are the *requirements* of fairness in the particular case.

10. What then, in principle, are these requirements? The statute provides that first consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (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'.

11. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

12. In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.

13. Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.

14. When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176, 182, is an example where this was recognised expressly.

15. Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

16. A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R* [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The 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 emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

Conduct

30. Lord Nicholls at paragraphs 63-65 goes on to consider the effect of a parties conduct during the marriage in regard to the division of the matrimonial property thus:

"63. Parliament gave effect to this recommendation in paragraph (g) in the new section 25(2) introduced by the Matrimonial and Family Proceedings Act 1984. One of the matters to which the court should have regard is 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. It is implicit in this provision that conduct outside this description is not conduct which should be taken into account.

64. This history is well known. I have mentioned it only because there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the

factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.

65. This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

31. In **Charman v Charman** [2007] 1 FLR 1246 and in the Bahamian Judgment of Barnett, CJ, as he then was, in **A v B** [2010] 2 BHS J No. 18, the Courts accepted the equal sharing principle as the modern approach to the division of matrimonial property and that matrimonial property be shared equally between the parties unless there is a compelling reason to the contrary. Mrs. Lockhart-Charles referred the Court to these authorities and the equal sharing principle but she also referred the Court to the opinion of Lord Nicholls above on the issue of conduct and to the authorities of **C v T** [2009] All E R(D) 43(Jun) and **F v F** [2008] Fam Law 183 and submitted, in part, that the Respondent's conduct led to the destruction of the marriage and his conduct in failing to maintain his obligations under the Interim Order has led to the Petitioner and the child of the marriage suffering hardship and amounts to the grossest breach of trust. That in considering the matters in Section 25 and 29 of the Act the Court should place significant weight on the fact that the Respondent has treated the Petitioner and the children of the marriage unjustly. He has failed to fully disclose his financial position (value of pension, bank accounts) to date, been inconsistent in paying monthly maintenance. Further that it was inequitable to not depart from the equal sharing principle and award the Petitioner a lump sum so that she could provide herself the necessities of life and establish a standard of living based on her financial outlook upon final resolution of these proceedings.
32. Ms. Ellis submitted that it is in the best interests of the parties for there to be a clean break division of the assets. That in consideration for conveying his interests in the Matrimonial Home to the Petitioner that the Respondent would retain the full benefit of the P & O Pension. That the Petitioner has made countless applications and had the Respondent

cross-examined exhaustively in a search for missing funds. That there has been no finding of missing funds by the Court.

33. The Court accepts that the equal sharing principle is the correct starting point but having considered the factors in Section 29 (1) (a) – (f) of the Act, there is good reason to depart from the principle and award the Petitioner in excess of 50% of the matrimonial assets. This award is not based however on the conduct of the Respondent as alleged by the Petitioner. Having considered the Affidavit and viva voce evidence of the parties, I was not persuaded that the Respondent failed to disclose his assets or sought to hide his money. He was slow to produce his Pension information and bank account information but they were eventually produced. There were times when he fell into arrears before his retirement but for the most part these matters were rectified between Counsel. He did fall into arrears after his retirement, but it was pellucidly clear from his Affidavit evidence that his decreased income could not meet the Interim Order as well as cover his daily needs.

Pension

34. Section 29 (1) (g) of the Act empowers the Court to consider the loss by a former spouse of pension benefits retained by the other spouse. The question is whether an equal sharing of the Respondent's Pensions, either the monthly income or the cash out value, would be fair and just to the parties. A division of the monthly income would amount to each party as of March 2022 deriving a monthly income of approximately \$4,733.84 from the pensions. The parties' monthly needs greatly exceeds this sum, with no foreseeable additional income to meet these expenses. The shared income from the Pensions would not meet the monthly needs of either of the parties. Further, having determined, after considering all the factors in Section 29 (1) (a) – (f) of the Act that the equal sharing principle would not best meet the Petitioner's needs and that in addition to a roof over her head a lump sum was required, and taking into account that the Respondent had utilized almost half of his severance pay from Devco to pay off the mortgage over the Matrimonial Home, it would have been unfair and unjust to deprive the Respondent of half of all or of 1 of his Pensions. The parties do not communicate. It would be untenable for them to have to communicate in the future about money on a monthly basis or at all. A clean break in all the circumstances of the case is most desirable.

35. Section 29 (2) of the Act and Section 34 of the Act empower the Court to make financial provision orders, property adjustments orders and periodical payments for the children of the marriage. Mrs. Lockhart-Charles referred the Court to **Farden v Farden** (1993) 48 R. F. L. (3d) 60, a Judgment from Supreme Court of British Columbia, as a guide in respect of the factors that the Court ought to consider when determining whether NT, who has attained the age of majority, continues to be a child under the Act as he is unable to withdraw from his parents' charge and unable to obtain the necessities of life without their assistance, and as such his tertiary education should be paid for by the Respondent.
36. The factors often applied to this question by the Supreme Court of British Columbia include: (i) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies; (ii) whether or not the child has applied for, or is eligible for, student loans or other financial assistance; (iii) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do; (iv) the ability of the child to contribute to his own support through part-time employment; (v) the age of the child; (vi) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies; (vii) what plans the parents made for the education of their children particularly where those plans were made during cohabitation; and (viii) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated their relationship from the parent from whom support is sought.
37. Ms. Ellis has referred the Court to the Judgments of Hall, CJ as he then was in **K v O** (supra) and Barnett, CJ as he then was in **Thurston v McKenzie** (supra) where both Learned Justices held that a parent ought not to be compelled to school fees at a private school in the absence of evidence that such parent can afford to do so and that in considering school fees at private school the court had to take into account the resources of the parents and the need of the child.
38. While the case of **Farden v Farden** is not binding on this Court, the application of the "test" in this case does not support the position taken by the Petitioner. NT has not been accepted nor has he enrolled in any university or trade school. There is no evidence as to whether he is eligible for or has tried to get a student loan anywhere. Other than mentioning that he is interested in carpentry he has not provided the Court with a solid career plan. There was some discussion between the parties in 2018 (See Petitioner's

Affidavit filed May 2, 2018) about universities for NT to consider attending but no realistic plan was adduced into evidence in 2020 or 2021. He is not a Bahamian and cannot work in The Bahamas without a work permit but is he still a British citizen which begs the question whether he has prospects of working or attending school there. He has attained the age of majority and completed high school some time ago. Save for some discussion of his performance at the Lucayan International School in 2018 the Court has not been furnished with any information from his high school on his academic performance while there or his academic aptitude for university. It was the intention of the parties during and after the breakdown of the marriage for NT to go to university. The Respondent and NT seem to have an unstable relationship due to what has transpired between the parties these past 8 years but I think it is a relationship that seems to be improving. NT ought to have devised a plan for the completion at the very least of a 4 year degree between the age of 18 and his 22nd birthday. The evidence before the Court fails to establish that the NT is at this time a "child of the marriage".

39. Moreover, as advanced by Ms. Ellis, the Court cannot disregard the resources of the parents. There is no doubt that the financial circumstances of the Respondent since his retirement has changed and not for the better.

Conclusions

40. I accept that the "equal sharing" principle as set out in **Charman v Charman, White v White, Miller v Miller; McFarlane v McFarlane (supra)** is the correct starting point for consideration of the division of the matrimonial assets in this case but I also accept that due to the Petitioner's age, her current handicap on the labour market having been a home maker for most her adult life, her inability to work without a work permit should she stay in the Bahamas, that she and NT need a roof over their heads, she requires more than a 50% split of the assets to get on her feet and to survive, and that these are good reason to depart from the equal sharing principle. I also accept however that the Court should attempt to achieve as a clean break between the parties as is possible. The Respondent is 65 which in professional life today is relatively young and with his work experience and skills set it is totally foreseeable that he can, if he wants to, find employment in the foreseeable future. He is in a home with his new wife. The Court must not lose sight of the fact however that Respondent used a considerable portion of his severance payment to pay off the mortgage, monies he could have been living off of now.

41. Had the marriage survived upon his retirement he and the Petitioner would have found a way to live on his Pension benefits. She has lost those benefits in life and what she may have been entitled to upon his death. But I am sure that the Respondent has worked hard all of his life. He had to have done so to have risen in the ranks at Devco as he did. It would be grossly unfair for him to be stripped of all of his pension benefits and he too must meet his own daily living expenses to survive.
42. I have dealt with the issue of the arrears of maintenance and need say no more.
43. NT has not to date enrolled in either a university abroad or locally as argued by Ms. Ellis. The Respondent had made some provision for his tertiary education but I understand that the Petitioner and NT have withdrawn that money. The reality is that the money is not there to educate NT to the level that his sisters were educated, even if he deserves to be treated in the same way as is argued by Mrs. Lockhart-Charles. The current financial position of the parties is what is important and cannot be ignored. Neither party is in a financial position to pay for 4 years of expensive tertiary education abroad.

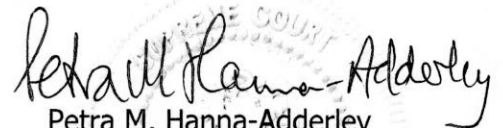
Disposition

44. Having considered all of the affidavit evidence filed herein, the oral evidence, all of the relevant statutes and case authorities, having heard Counsel and having read their submissions I make the following Orders:
 - (1) The Respondent shall convey his interest in the Matrimonial Home situate at No. 74 Doubloon Road, Shoreline, Fortune Bay Subdivision, Freeport, Grand Bahama to the Petitioner and the reasonable cost of the transfer shall be borne by the Respondent so that upon the sale of the Matrimonial Home the Petitioner should be able to purchase suitable living accommodations for herself and NT.
 - (2) The P & O Pension shall be cashed in and half of the cash value (or cash from any other source, eg a loan secured by this Pension) shall be paid pay to the Petitioner in a lump sum, that is, \$85,429.50 within 30 days; the Respondent shall be entitled to receive the monthly income of \$1,561.87 therefrom thereafter. Until payment of the lump sum the Respondent shall pay the Petitioner half of his Devco monthly Pension.
 - (3) Once the Petitioner is in receipt of the said lump sum the Respondent shall retain the entirety of his Devco Pension and his State Pension. The combination of the

monthly income from the 3 Pensions should enable the Respondent to meet his monthly outgoings.

- (4) The Respondent shall settle all arrears of Homeowners Association fees to the Shoreline Homeowner's Association on or before the expiration of 30 days from the date hereof. Thereafter the Petitioner shall be responsible for such fees should she remain in the Matrimonial Home.
- (5) The Respondent shall pay to the Petitioner the sum of \$498.78 representing the arrears of maintenance pursuant to the Interim Maintenance Order on or before November 5, 2021.
- (6) The parties shall also have liberty to apply before NT's 22nd birthday for a variation of this Order should he be accepted by a University or Trade School before his 22nd birthday.
- (7) Each party shall be responsible for their own health insurance.
- (8) Each party shall bear their respective costs in these proceedings.

Dated this ^{29th} day of ^{October} A. D. 2021


Petra M. Hanna-Adderley
Justice

