

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**2017
FAM/DIV/00024**

Family Division

BETWEEN

R.C.

Petitioner

AND

B.C

Respondent

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Miles Parker for the Petitioner

Mrs. Ramona Farquharson for the Respondent

Judgment Date: 13th January 2023

Ruling

Background Facts

1. The Petitioner, R.C. was married to the Respondent, B.C. on 13th October 2007. There is one child of the marriage, namely I.C born 19th August 2009. The Petitioner filed a Petition on 19th January 2017 seeking the dissolution of the marriage on the ground that the Respondent has treated the Petitioner with cruelty since the celebration of the marriage.
2. A Decree Nisi was granted to the Petitioner on 28th September 2020 on the ground of adultery and ancillary matters were adjourned to Chambers.
3. By a Notice of Application for Ancillary Relief filed on October 15th 2020 the Respondent sought an order that:-
 - i. The Respondent pay \$200.00 a month for maintenance for the child of the marriage;

- ii. The Respondent pay half of the educational expenses, and full medical, dental and optical insurance while the Petitioner will be responsible for all co-payments;
- iii. The Respondent pay all school tuitions for the minor child of the marriage until the Petitioner obtains gainful employment. Thereafter the same shall be shared equally;
- iv. The parties support the child of the marriage financially to ensure that the standard of living that she was afforded during the marriage remains the same; and
- v. There is no property of the marriage

4. The Petitioner in her Affidavit of Means filed on March 11th, 2021 sought and order that:-

- i. The Petitioner have custody of the child of the marriage with reasonable access to the Respondent;
- ii. The Respondent pay a lump sum payment of \$10,000.00;
- iii. The Respondent shall pay to the Petitioner \$600.00 towards the maintenance of the child of the marriage and shall continue until the child attains the age of 18 or completes tertiary education, whichever is latter;
- iv. The Respondent maintain the child of the marriage on his medical insurance and cover the cost of maintaining the insurance coverage until the child attains the age of 18 or completes tertiary education, whichever is latter;
- v. The Respondent pay all educational expenses, including but not limited to school fees, uniforms, books, supplies, field trips and extra-curricular activities up to and including tertiary education;
- vi. The Petitioner and Respondent share equally all medical, dental and optical expenses for the child of the marriage until the child attains the age of 18 or completes tertiary education, whichever is latter

5. By Order dated 13th April 2017 made upon an urgent application of the Respondent, it was ordered that:-

- i. The child of the marriage be surrendered into the custody of her paternal grandmother from 14th April 2017 to 17th April 2017 for the purpose of facilitating their travel to Miami, Florida one of the United States of America;
- ii. The Respondent was to collect the said child of the marriage from the home of the Petitioner at 10:00am on 14th April 2017 and to return her to the home of the Petitioner upon their return to the jurisdiction on the evening of 17th April 2017;

6. The issues outstanding are:-

1. Custody and access of the child of the marriage;
2. Maintenance, inclusive of educational expenses;
3. Property adjustment

Petitioner's Evidence

7. The Petitioner R.C. filed her Affidavit of Means on 11th March 2021. At that time she was employed with the Children's Clinic as an administrator and earned a weekly salary of \$300.00.

8. The Petitioner's monthly expenses were:-

a. School Fees (Q.C)	\$340.67
b. Child's Braces	\$396.00
c. Cable Bahamas	\$100.00
d. B.E.C	\$250.00
e. BTC	\$100.00
f. Water & Sewage	\$56.00
g. Groceries	\$600.00
h. Gas (cooking & house)	\$40.00
i. Girl Guides	\$25.00
j. Tutoring & Aftercare	\$200.00
k. Swimming	\$125.00
l. Credit Card	\$268.00
m. Summer School	\$66.67
n. French Class	\$100.00
o. Insurance	\$118.11
p. Clothing supplies/uniform/books	\$150.00
q. Vehicle maint/ins/lisc/inspection	\$100.00
<u>TOTAL</u>	<u>\$3,035.45</u>

9. The Petitioner maintained that the Respondent was not truthful about his income. The Respondent has an income property located on Rocky Pine Road which is a triplex. He lives in one unit, his mother lives in one unit and the third unit is currently being rented. The monthly rental income from the apartment is \$600.00. The Respondent's mother pays half of the mortgage and the insurance on the apartments.

10. The Respondent failed to inform the Court that he is an independent businessman with numerous streams of income. He is also a certified welder with numerous private welding jobs. He also works for Masqueraders Carnival group building and decorating costumes for various junkanoo groups and individuals for which he is paid.

11. The Respondent had recently started a waste management company which has been in business for the past four to five years.
12. The Respondent has inconsistently contributed towards the child of the marriage's maintenance. On many occasions he has refused to contribute. When the parties separated in 2015 it was their mutual agreement to equally contribute to all of the bills and expenses regarding the child of the marriage. However, the Respondent has been inconsistent and would pay less than half of the school fees and the Petitioner was forced to pay the remainder. The Petitioner recalled on one occasion when the Respondent stated that he was not paying the tuition or buying books for the child of the marriage as he had to take care of his other child. On one occasion the child of the marriage was removed from school due to arrears owed for school tuition.
13. The Respondent has also refused to fairly contribute to the medical and dental expenses of the child of the marriage. To date the Respondent has not contributed to any dental expenses regarding the child of the marriage. The Respondent has also failed to contribute to the medical expenses of the child of the marriage.
14. The Respondent has recently been consistent with paying his \$200.00 maintenance payments. The payments have only been consistent since January 2020. This amount was unilaterally decided by the Respondent.
15. The Respondent has also threatened to remove the child of the marriage from his health insurance coverage which would leave the child uninsured.
16. The Respondent has instructed the Petitioner to not enroll the child of the marriage in any extracurricular activities and that she should stop swimming lessons which she has been doing for the past six years since she was two years old. The child of the marriage currently swims competitively. The Respondent has also objected to paying for any tutoring and extra classes.
17. The Petitioner maintains that she requires more financial assistance regarding the maintenance of the child.
18. Under cross examination the Petitioner maintains that out of her salary she takes funds for gas and utilities and the balance goes to the child.
19. Her father lives in the home with her and the child.
20. She does not receive money from her father for groceries but he brings groceries home.

21. The child has attended summer school at Queens College since she was in primary school and the Petitioner pays the fees.
22. She denies refusing the Respondent staying access to the child and only being concerned with the sleeping arrangements for the child.
23. The Respondent refused to pay for the braces for the child. He had requested a budget for the child's expenses which was provided but then advised that he was only going to pay \$200.00 per month for maintenance.
24. The Petitioner claims that the Respondent takes the child to the junkanoo shack and when she returns home, she is drenched in smoke despite to her expressing her concern that he not smoke in her presence. She maintains that he leaves the child in the car to go and gamble. She has told her daughter when this happens, to lock the door and call the police.
25. She was unemployed for six months from January 2020 and upon her request for help she only received \$200.00 per month.
26. She was unaware of the exact amount that the Respondent had paid towards the school fees.
27. The child's grade point average declined once the school went virtual. She has paid for help with tutoring and the internet.
28. In re-examination, the Petitioner stated that the Respondent advised her that if she did not take the child to Dr. Rollins he would not pay for the braces as Dr. Rollins was his friend.

Respondent's Evidence

29. The Respondent filed his Affidavit of Means on 18th December 2020. At the date of filing the Respondent was employed as an Airport Fire Rescue Officer at the Airport Authority earning a monthly salary of \$2,625.00.
30. The Respondent's monthly expenses for himself and the child of the marriage were:-

a. Mortgage & House Ins.	\$1,842.00
b. Electricity	\$125.97
c. Cable Bahamas (cable, internet, phone)	\$100.00
d. Cell phone	\$150.00
e. Groceries	\$500.00
f. Cooking Gas (20.83 x 12months)	\$20.83
g. Car Gas	\$300.00
h. Car and Truck Insurance (50 x 12 months)	\$50.00

i. Car Maintenance (159 x 12months)	\$159.00
j. Tithes	\$100.00
k. School Fees	
i. Child #1	\$291.00
ii. Child #2	\$333.33
iii. Child #3	\$114.85
iv. Child of the Marriage	\$311.50
l. Pension Fund	\$103.33
m. National Insurance	\$102.34
n. Group medical Insurance (children included)	\$396.52
o. Life Insurance	\$108.54
p. Child of marriage maintenance	\$200.00
q. Clothing	\$125.00
r. Personal Grooming	\$200.00
s. Union Dues	\$25.00
<u>TOTAL</u>	<u>\$5,357.98</u>

31. The Respondent states that he pays for Child #1's college fees ranging from \$273.00 to \$578.00 per month. He makes payments toward educational expenses for Child # 2 although the child is on a tertiary grant scholarship at the University of The Bahamas.

32. The Respondent maintains that his monthly expenses exceed his salary and at times he is unable to fully pay some of his bills as required.

33. The child of the marriage attends Queen's College and he pays half of the tuition. He and the Petitioner have made arrangements to pay the fall semester fees due to the Petitioner not currently working.

34. He prays that:-

- i. There be no order as to monthly maintenance;
- ii. That the Respondent will pay all private school tuitions and educational expenses until the petitioner gains employment;
- iii. The Respondent will pay all dental, optical and medical expenses of the said child;
- iv. That the Respondent be at liberty to apply for variation once the Petitioner has gained employment

35. When cross-examined the Respondent maintained that he and his mother own the triplex.

36. One of the units is rented at \$675.00 per month. His mother collects the rent which is for her exclusive use. The rent collected is not used to pay the mortgage.

37. His mother lives in the second unit and she does not pay rent. His mother works in Lyford Cay. Before the pandemic she had a side job but no longer does. He is unable to demand rent from his mother because she paid the down payment for the triplex and the agreement was that her rent was to repay her the down payment.
38. The mortgage was initially obtained in the sum of \$250,000.00. He does not know what the balance is presently.
39. His mother made payments toward the up keeping of the mortgage in 2013 as the triplex needed renovations.
40. The Petitioner knew of the arrangement between himself and his mother while they were married.
41. He maintains that he does not own any other real property but was a partner in a garbage collection company which never anywhere because they could not get any contracts. The business owns a roll on truck and it was a partnership and not an incorporated entity.
42. The truck was purchased by one of the partners. The business is called Environmental Waste Solutions. The truck is not working. He is not involved in any other business ventures.
43. He admits to taking jobs as a welder outside of his job at the airport. He has never welded for the Airport Authority and sometime lectures in fire safety at various sites.
44. He admitted to carrying out welding work for the Saxons 5-7 years ago but after that he had not done any welding.
45. He charges \$25.00 per person for his safety classes and the number of students vary. In 2021 he gave 4 lectures and did not give any at all in 2020.
46. He does not object to the child swimming, only to the fees which must be paid considering the Petitioner was not working. Previously he paid his half of the fees at Barracuda Swim Club.
47. He was responsible for paying all of the child's school fees when the Petitioner was not working.
48. His objection to paying for the braces was because the doctors had advised against the child getting them and the Petitioner went ahead despite this.

He maintains that he always pays his half of the child school fee and any late fee if he is late in making payment.⁵⁰ He maintains that the child's monthly expenses were \$400.00, hence his monthly payment of \$200.00 which is the agreed half.

51. In re-examination, the Respondent confirmed that the Petitioner never contributed to the mortgage of the triplex. The mortgage was paid from his salary.

Petitioner's Submissions

Section 29 of the Matrimonial Causes Act (MCA) sets out the various factors which must be considered by the Court when exercising its power to make orders pursuant to Section 27. Section 27 enables the Court to make provisions for the maintenance of a child.

52. In consideration of S. 29 the Petitioner states:-

a. the income, earnings capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

The Petitioner is privately employed earning \$1,200.00 per month. The Respondent is privately employed on earning a salary of \$2,625.00 and makes additional moneys teaching private fire safety classes.

b. the financial needs, obligation and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

Without the Respondent's assistance, the Petitioner will continue to struggle to maintain herself and to meet school tuition payments, maintenance and associated expenses for the child, and will likely exhaust any savings that she may still have in the process.

c. the standard of living enjoyed by the family before the breakdown of the marriage;

The family enjoyed a reasonable middle-class lifestyle and the Petitioner has had to struggle financially since the parties have separated.

d. the age of each party to the marriage and the duration of the marriage;

The Petitioner is 42 and the Respondent is 46 years old.

e. any physical or mental disability of either of the parties to the marriage;

Neither party gave evidence that they suffer from a disability.

f. the contribution made by each of the parties to the welfare of the family, including any contribution by looking after the home or caring for the family;

Initially, the parties both contributed to the welfare of the family, however after the Petitioner left the matrimonial home in 2015, the Respondent paid half of the child's school fees and swimming fees and only intermittently made payments of \$200.00 per month to the Petitioner towards the child's

maintenance, which payments were only regularly made as of 2020. Otherwise, the Respondent left the Petitioner to fend for herself financially with respect to both the household expenses, child maintenance and educational expenses for the child of the marriage.

g. in the case of proceedings for divorce or nullity of marriage, the value of 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.

There was no evidence of a loss of such benefit.

25. The relevant mandatory considerations outlined in s. 29 (2) as they relate to the facts of the case are as follows:

a. the financial needs of the child;

The child is enrolled in a private school, attends swimming lessons and girl guides and has recently been fitted with braces by a private dentist.

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

The child is a minor and is totally dependent on the Petitioner and Respondent.

c. any physical or mental disability of the child;

There is no evidence that she suffers from a disability.

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

The parties enjoyed a reasonable middle class life style prior to their separation. Living together in the Respondents triplex with the child enrolled in private school and both parents gainfully employed.

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

The child has always been enrolled in a private school and it is clearly the //expectation of the parties that she continues her education in this manner.

53. The Petitioner has stated that the Respondent would call her when he wants to collect the child and all the Petitioner asks is that she comes home at night.

54. At the date of the hearing, the Respondent was paying the Petitioner a monthly some of \$200.00 which amount was unilaterally determined by the Respondent to represent a sufficient contribution towards the child's maintenance, with such payments only being consistently made by the Respondent since January 2020. Prior to January, 2020 the Respondent would fail to contribute to the child's maintenance for months at a time. The Respondent has refused to consistently make any financial contribution

to the child's extra-curricular activities. He has also threatened to remove the child from his health insurance.

Respondent's Submissions

55. The Respondent submits that the guiding principle is that the welfare of the child is of paramount importance. The **Child Protection Act ("CPA")** sets out the factors which may be taken into consideration concerning children:-

- i. **the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;**
- ii. **the child's physical, emotional and educational needs;**
- iii. **the likely effects of any changes in the child's circumstances;**
- iv. **the child's age, sex, background and any other circumstances relevant in the matter;**
- v. **any harm that the child has suffered or is at the risk of suffering;**
- vi. **where relevant, the capacity of the child's parents, guardians or other persons involved in the care of the child in meeting his or her needs."**

56. In **Forsythe v Jones JM 2001 CA 21** the court explains that:-

"A court which is considering the custody of the child, mindful that its welfare is of paramount importance, must consider the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surrounding, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child and its welfare."

57. The Respondent highlights that the Petitioner has admitted to being unemployed during cross examination, therefore the Respondent has been solely meeting the child of marriage's educational needs and that he has always been active in the child's life, including meeting her financial needs.

58. The Petitioner has made it difficult for the Respondent to have access to the child of the marriage. The Respondent submits that it is unfair and unreasonable to have such a restricted access to the child of the marriage. The Petitioner determines when and if the child can go out. The Petitioner refuses tutoring help that the Respondent's other children and his partners child can offer to help the child improve her grades.

59. In **Dipper v Dipper [1981] Fam 31** Ormrod L.J at page 45 opined that:-

"Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong."

“The parent is always entitled whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.”

60. Although the Petitioner is the custodial parent, the Respondent is still entitled to assist in making decisions as it relates to the child, particularly educational decisions.

61. Pursuant to **Section 14 (1) and (2)** of the CPA:-

“(1) The mother and father of a child, subject to sections 16, 19 and 21 and any order of the court, each shall be guardian of and subject to subsection (2) each shall have a right of access to the child.

(2) A Court shall when considering the issue of custody or access have regard to the past contribution of the parent to the care, maintenance and upbringing of the child.”

62. The Respondent has a right to have access to the minor child of the marriage considering his position as a parent and his contribution to the care, maintenance and upbringing of the child.

63. In **Re O (a minor) [1995] 2 FLR 124** Sir Thomas Bingham Mr. at page 128 stated that:-

“...where parents of a child are separated and the child is in the day-to-day care of one of them, it is almost always in the interest of the child that he or she should have contact with the other parent. The reason for this scarcely needs spelling out. It is or course that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent that is the parent in whose day-to-day care the child is not.”

64. Further in **P v P and another [2012] 1 BHS J. No. 73** Turner made reference to the word ‘welfare’ which was defined by Lindley J in **Re McGarh (infants) (1893):-**

“The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only... The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

65. The Respondent submits that he should have joint custody to the minor child with day to day primary care and control to the Petitioner with reasonable/ liberal access to the Respondent.

66. According to **Section 33 of the CPA** which states:-

“...every man is hereby required to maintain his own children and also every child, whether born in wedlock or not, which his wife may have living with her at the time of marriage to him so long as such children are unable to maintain themselves.”

67. The Respondent has maintained the minor child since birth. The Respondent presently contributes \$200.00 monthly towards maintenance of the child. The

Respondent has also paid the minor child's school fees in full while the Petitioner is unemployed and wishes that they return to that 50/50 contribution as previously agreed.

68. The Respondent submits that his monthly \$200.00 is sufficient to the maintenance of the minor child.

69. In the exercise of powers to make a property adjustment order, the Court is also to have regard to the provisions of **Section 29 (1) of the Matrimonial Causes Act**, as aforementioned. Section 29(1) was also reaffirmed in **Pinard v Pinard TT 2009 HC 143** which states:-

"The court exercises its 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."

70. The parties were married for a relatively short period. The parties were married on 13th October 2007 and the breakdown of the marriage occurred sometime in July 2015 when the Petitioner left the matrimonial home.

71. The starting principle in relation to the division of matrimonial assets is the fairness sharing principle as established in **White v White [2000] UKHL 54**.

72. In the case of **Miller v Miller; and McFarlane v McFarlane [2006] UKHL 24** Lord Nicholls opined that:-

"...the 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... 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 of equality is to be applied as an aid, not a rule."

73. In **A v B [2010] 2 BHS J No.18**, Barnett CJ, reaffirmed the principle established in **White v. White** that:-

"in my judgment the modern day approach to a division of property in a marriage is that fairness is an equal sharing of property unless there is a compelling reason to depart from that equality."

74. The Respondent and his mother acquired the property on or about 3rd December 2003 and obtained a mortgage on 14th October 2004. Of the 3 units on the property, the Respondent resides in one unit, his mother resides in the second unit and the third unit is rented for \$675.00. The Respondent submits that majority of the rental

proceeds goes directly to his mother as she contributed the lion's share in obtaining the property. Based on the evidence, the Respondent acquired the property along with his mother prior to the said marriage, thereby entering the marriage with this asset. The Respondent also asserts that prior to and during the said marriage, the mortgage payments were deducted directly from his salary. The Respondent also paid all of the household bills however, the Petitioner would contribute towards the groceries for the home.

75. In the case of **Smith v Smith 2018/FAM/div/605**, Thompson J referenced *Edward Munroe v Avis Loise Munroe* SCCIV App No.120 of 2018 where Sir Michael Barnett J.A., delivered the decision stating that **"...it is clear that not every case requires an equal division of assets. There may be good reason to depart from an equal division. Equality should be regarded as an aid and not a rule. The objective is fairness."**
76. Winder J in **GB v VB [2018] 1 BHS J. No. 87** found that the equal sharing principle could not be applied. The matrimonial home was not to be considered as matrimonial property because it was the Court's findings that the wife acquired the home prior to the marriage, in previous property adjustment proceedings in her first divorce. The home was completed and not a shell at the time of the marriage and the husband's contribution was not referable to the acquisition of the home but in the nature of the general living expenses of the marriage.
77. The Respondent submits that the triplex should not be considered or determined a matrimonial asset.

DECISION

78. By virtue of **Sections 27 and 28 of the ("MCA")**, the Court is enabled to make financial provision and property adjustment orders in divorce proceedings.
79. Sections 27(1) and (2) of the MCA provide:-
- 27. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —**
- (a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;**
 - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;**
 - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;**

(d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;

(e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

(f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) to the restrictions imposed by section 33(1) and (3) on the making of financial provision order in favour of children who have attained the age of eighteen.

(2) The court may also, subject to those restrictions make any one or more of the orders mentioned in subsection (1)(d), (e) and (f) —

(a) in any proceedings for divorce, nullity of marriage or judicial separation, before granting a decree; and

(b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal.

80. The Court must take into consideration the established guidelines as set out in **Section 29 of the MCA** when making maintenance as well as property adjustment orders.

81. **Section 29** provides:-

“29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27(1)(a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say —

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

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

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension)

which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(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.”

82. Under the MCA, the objective of the Court in ancillary proceedings is to achieve a fair result between the parties based inter alia on a number of factors which include the factors outlined in Section 29. The equality principle as established in this jurisdiction in A v B #320 of 2008 is considered the starting point when dealing with property adjustment. This principle however may be departed from in order to ensure that the matrimonial assets are distributed to each party of the marriage based on need, contributions made and to ensure fairness.

83. Any sharing as set out in Jupp v Jupp may only occur after considering Section 29. In Jupp v Jupp the Court of Appeal held:-

“It must be remembered that authorities from the United Kingdom cannot trump what the statute law of the Bahamas says. It is only if these cases are consistent with the statute law can they apply. Section 29 is very clear as to what a judge must take into consideration when considering whether to exercise her powers under section 27 or 28 or even section 25

of the Act. Any sharing principle enunciated by case law must be construed in this light. The statute requires you to look at all the circumstances and you make the order which puts the parties in the financial position so far as it is practicable that they would have been in if the marriage had not broken down. The division of the assets must be fair in its entirety. It is not the role of the trial judge to list the assets of the family and to divide them one by one. The trial judge must look at the circumstances on the whole, examine the entire context of the case and make an award accordingly, stating sufficient reasons for the same. “

84. Further, in *White v White* [2001] 1 AER 1, Lord Nicholls states:-

“Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome of these matters, whether by agreement or by court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone’s life is different. Features which are important when assessing fairness differ in each case. And sometimes different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eyes of the beholder.”

85. Further in *Miller v Miller*; and *McFarlane v McFarlane* (2006) 3 All ER 1 the House of Lords stated:-

“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 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.”

CUSTODY

86. Further considerations governing the custody, access and maintenance of children are outlined in the CPA and include:-

- i. **the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;**
- ii. **the child's physical, emotional and educational needs;**
- iii. **the likely effects of any changes in the child's circumstances;**
- iv. **the child's age, sex, background and any other circumstances relevant in the matter;**
- v. **any harm that the child has suffered or is at the risk of suffering;**
- vi. **where relevant, the capacity of the child's parents, guardians or other persons involved in the care of the child in meeting his or her needs."**

87. The child was 11 years of age at the date of the hearing of the application. She was not interviewed by the court so as to ascertain her wishes. No evidence was led of any reluctance to have access to either parent. The only reluctance or concern was expressed by the Petitioner in terms of staying access and general access during the pandemic.

88. Both parties seek custody of the child. The Petitioner seeks sole custody and the Respondent seeks joint custody with day to day care and control to the Petitioner and liberal access to the Respondent.

89. Having considered all of the facts, the evidence and the submissions and particularly being guided by the dicta in *Re O and P v P*, I hereby grant joint custody of the child IC to both parties with day to day care and control to the Petitioner and access to the Respondent.

90. The issue which must be determined is the quality and quantity of the access to be granted to the Respondent.

91. As the paramount consideration is the welfare of the minor child, considering the factors under both the MCA and the CPA and the evidence and submissions presented by both parties, it is in the best interest of the child that the Respondent be granted staying access every other weekend. The parties are to alternate public holidays to be agreed between themselves. The Respondent shall be granted full access to the minor child during Father's Day weekend and the Petitioner shall have full access on Mother's day weekend. All other holidays including but not limited to Easter, Christmas and Summer are to be shared equally between the parties. The parties are to alternate the commencement of their access time between them during each particular holiday period.

92. Considering the age and sex of the child, and the safety of the minor child, as it has been admitted during cross examination that the Respondent resides with his male best friend, and although I see fit to grant staying access to the Respondent, I order that the child on the weekends she spends with the Respondent, is to spend the nights

with her paternal grandmother. If the grandmother cannot accommodate her, then the child shall not stay overnight with the Respondent and is to be returned to the Petitioner. Further, the child is not to be left alone in a vehicle at any time. Should the living arrangements of the Respondent change with the confirmation of the Petitioner, the restriction on the overnight access shall be lifted. If the parties fail to agree this, then the appropriate application can be made to the court.

Maintenance

93. Both parties have outlined in their evidence, their income, earning capacity and financial obligations. These include the financial needs of the child and the Respondents' other children. Both parties income is limited. The only additional source of income apart from the Respondent's salary and income from lecturing is the rent obtained from one of the units in the triplex. There is also the existence of the Respondents garbage disposal business, but there is no evidence that it is functioning at this time or earning any income.
94. During cross examination the Respondent also confirmed that he took on additional independent work, teaching fire safety and charges \$25.00 per person for these classes. He also took on private welding jobs in the past, all of which he was paid for. He also is a partner in the garbage disposal business he states is not in operation.
95. The Petitioner is seeking an order that the Respondent pay \$600.00 monthly towards maintenance of the child of the marriage; and also that the Respondent pay the Petitioner a lump sum payment of \$10,000.00 representing arrears in maintenance payments; that the Respondent pay all educational expenses, including but not limited to school fees, uniforms, books, supplies, field trips and extra-curricular activities for the child of the marriage up to and including tertiary education; that the Petitioner and Respondent do share equally all medical, dental and optical expenses for the child of the marriage until the child attains the age of 18 or complete tertiary education whichever is the latter. The Respondent on the other hand seeks an order that the parties share the expenses inclusive of the educational costs equally.
96. I have reviewed all of the evidence and submissions am satisfied that the Respondent can afford to pay the Petitioner the sum of \$400.00 per month for the maintenance of the child. I am satisfied that some of the income from the rent should accrue to his benefit particularly as he is paying the mortgage as well as his receiving additional funds from lecturing and as such he should contribute more to the upkeep and maintenance of his child and I so order. The maintenance payment shall continue until the child reaches the age of 18. The Respondent is to continue to keep the child medically insured until she reaches the age of 18.

97. I am not minded to award any arrears of maintenance as apart from general statement, no actual proof was produced by the Petitioner to justify arrears of \$10,000.00. I do order however that the Respondent shall pay to the Petitioner one half of the costs of the braces and treatment for the child. Such sum shall be paid within 3 months of the date of this ruling.
98. Both parties shall equally share all educational expenses, including but not limited to school fees, uniforms, books, supplies, field trips agreed for the child of the marriage up to the age of 18 and all extra-curricular activities which the child is currently enrolled. The Respondent is to contribute the sum of \$100.00 per month towards tutoring costs for the child for 1 year from the date hereof.
99. Any existing arrears of tuition shall be paid by the Respondent.
100. The Petitioner and Respondent shall share equally all medical, dental and optical expenses for the child of the marriage not covered by the medical insurance until the child attains the age of 18.

Property Adjustment

101. **Section 28 of the Matrimonial Causes Act** allows the Court to make property adjustment orders in divorce proceedings. The parties do not jointly own the triplex which is the only property owned by anyone of the parties and which falls to be considered if it is determined that it is a matrimonial asset. The Court's starting approach in these type of proceedings is the equal sharing principle unless there exists a compelling reason to depart from it. The Court again must take into consideration the established principles as set out in **Section 29 of the Matrimonial Causes Act.**
102. This property was acquired prior to the marriage. The title is held in the name of Respondent and his mother.
103. The Respondent's mother provided the down payment for the acquisition of the property.
104. The property is mortgaged and the mortgage is paid solely by the Respondent.
105. The Respondent's mother lives rent free and benefits from the collection of the rent from one of the units. The purpose of which was to repay her for her contribution to the acquisition of the triplex. It is clear therefore that the intention is that the property will eventually be beneficially owned by the Respondent.

106. The issue to be determined is whether the triplex is a matrimonial asset or not.
107. In order to determine whether a property must be regarded as matrimonial property the Court considers Charman v Charman (2007) 1 FLR 1246 which defined matrimonial property as “**property of the parties generated during the marriage otherwise than by external donation.**”
108. Further in Watchel v Watchel 1973 FAM 72 Lord Denning described family assets as “**those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.**”
109. In Rossi v. Rossi [2006] EWEC 1482 (Fam), Judge Nicholas Mostyn QC provides useful guidance on the distinction between non-matrimonial and matrimonial property:-
“1. the matrimonial property is likely to be divided equally, although there may be departure if (i) the marriage is short, and (ii) part of the matrimonial property is “non-business partnership, non- family assets’ or if the matrimonial property is represented by autonomous funds accumulated by dual earners; and
2. the non-matrimonial property is not in fact quarantined or excluded from the court’s powers. It simply represents an unmatched contribution by the party who brings it to the marriage. The court must decide whether it should be shared and, if so, the proportions in which it is to be shared. In reality, the longer the marriage, the more likely the non-matrimonial property will become merged with matrimonial property. By contrast, in a short marriage, non-matrimonial assets are not likely to be shared unless needs dictate.”
110. In Jupp v Jupp SCCrApp No.37 of 2011, the Court of Appeal held that Section 29 clearly states what a Judge must take into consideration when exercising his discretion to make property adjustment orders. The Judge must consider all circumstances of the case and make a decision which puts the parties in a financial position, as far as practical, that they would have been in had the marriage not deteriorated. The division of assets must be fair to all parties involved.
111. The parties were married for approximately seven years before they separated. The Respondent had acquired the property before they were married. The parties lived in the triplex until the Petitioner left in 2015. The Petitioner’s affidavit of means does not address the triplex as a matrimonial asset as she does not seek any interest in the triplex. Even during her oral evidence no claim is made for an interest.
112. While I do not deny that the Petitioner has contributed in some aspect to the home, I do not find that her contribution to be sufficient enough such that the property may be considered as matrimonial property. Her contribution was by way of the normal living expenses of a family and not to the development and acquisition of the triplex. Further, it is apparent that she accepts this as no claim is made for an interest.

113. Accordingly I do not find that the property is a matrimonial asset and therefore not subject to any sharing.

114. Each party is to bear their own costs.

Dated this *13th* day of *January* 2023



The Hon. Madam Justice G. Diane Stewart