

G.C.

Petitioner

AND

D.C.

Respondent

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Ms. Glenda Roker for the Petitioner  
Mrs. Michelle Horton for the Respondent

Ruling Date: 10<sup>th</sup> February, 2023

**RULING**

- 1. By Notice of Intention to Proceed with Ancillary Relief filed 4<sup>th</sup> August 2021, the Petitioner sought various orders relating to the custody, access and maintenance of the child of the family G.C. as well as property adjustment orders over 5 different parcels of land.
- 2. Various orders have been made the ancillary hearings resolving all of the issues except for the property adjustment order on the Gladstone Allotment, Rocky Pine Property (“**the Property**”).

**BACKGROUND FACTS**

- 3. The Parties were married on the 19th April, 2003. There is one child of the marriage as aforementioned. The Petitioner is the owner of Lot C, Gladstone Allotments by virtue of Conveyance dated the 13th day of June A.D., 1997, KEJ Properties Limited to the Petitioner.

4. The Petitioner purchased the property prior to the celebration of the marriage with the assistance of his Mother and other family members and contends that he has been solely financially responsible for the upkeep and maintenance of the property inclusive of servicing a mortgage with Scotiabank.
5. The Parties separated in or around 2018 and a Decree Nisi was granted in March, 2021.
6. The property comprises a triplex which is rented to tenants. The loan for which the property was mortgaged is in default and the facility was sent to the Credit Collections Department.
7. The bank has confirmed this by affidavit.
8. The bank stated that it served a demand letter but the Petitioner denies receiving the same and no proof was provided by the bank of either the letter or evidence of service.
9. Counsel for the bank indicated that the letter was mailed using the postal box on record which was provided to the court.
10. Neither party acknowledged that the box number was theirs.
11. The property has been valued at \$149,672.00 and the equity in the property is computed as \$62,875.57 as the balance owing is \$86,796.43.
12. Initially the Respondent queried the appraisal value and sought to have an independent appraisal obtained, however she advised the court that she would accept the appraisal value as obtained by the Petitioner.

### **SUBMISSIONS**

13. The Petitioner submits that the Property was not a matrimonial asset as it was purchased prior to the marriage with the financial assistance of his mother.
14. The Petitioner maintained that he alone was responsible for the mortgage payments and the upkeep and maintenance.
15. He accepts that the Respondent assisted with the collection of rents and with the tenants as an agent for him. Further, because of her mismanagement, the property fell into a state of repair and the mortgage fell into arrears.

16. The Respondent submits that because of the length of the marriage the significance of non-matrimonial property diminishes over time. She maintains that the Property is a matrimonial asset.
17. She submitted that the intention of the parties was to treat the property as a matrimonial asset. Her contributions confirmed this as she oversaw the construction of the third unit and managed the rental of the units alone as the Petitioner worked in Abaco.
18. She further submitted that the Property was used for the benefit of the family as they had lived in one of the units for many years.
19. The joint bank account of the parties bears the address of the Property to support this contention.
20. The submission by the Petitioner that his mother injected \$40,000.00 into the Property is without supporting documents to prove same.
21. The proceeds from the rental totals \$1300.00 per month and over a 5 year period should have totaled \$78,000.00 which in fact it did not do.
22. She claims one half of the equity in the property after the sale by the bank.

### **DECISION**

23. **Section 28 of the Matrimonial Causes Act** ("MCA") enables the Court to make property adjustment orders in divorce proceedings. The Property in question is in the sole name of the Petitioner and is mortgaged. The Court's starting approach in these type of proceedings is the equal sharing principle of matrimonial property unless there exists a compelling reason to depart from it. The Court must take into consideration mandatory statutory guidelines as set out in **Section 29 of the MCA** when making property these orders.
24. 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. 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.
25. Any sharing as determined in **Jupp v Jupp** may only occur after considering Section 29 where 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.

26. 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.”

27. In **A v B [2010] 2 BHS J No.18**, Barnett CJ, reaffirmed **White v. White** by holding that the modern day approach to the division of assets in The Bahamas is equal sharing of property unless there is a compelling reason to depart from it.

28. 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 rises 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.”

29. Section 28(1) provides:-

**“(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —**

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;**
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;**
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or postnuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;**
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;**

**subject, however, in the case of an order under paragraph (a) to the restrictions imposed by section 33(1) and (3) on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.”**

30. Section 29 of the MCA provide:-

**(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.

31. In order to make a fair property adjustment order, I must decide whether the Property is matrimonial property or not.
32. 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.**”
33. 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.**”
34. Further the consideration for the distribution of the matrimonial property begins at the breakdown of the marriage and when mutual support ended. This was enunciated in Rosemary Edit Burrows v Sylvester John Burrows SCCivApp No. 58 of 2021 where Crane Scott JA held:-

“The legal principle is that the date when the marriage broke down and mutual support ended is the point in time at which the property and financial resources of the parties which are or will be available for equitable distribution is to be assessed. That overarching principle is, in our view, well established and not seriously in dispute.”
35. 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 maybe departure if (i) the marriage is short, and (ii) part of the matrimonial

property is "non-business partnership, non- family assets' or if the matrimonial property is represented by autonomous funds accumulated by dual earners; and

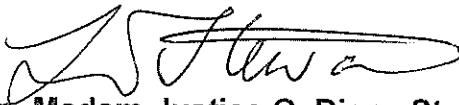
2. the non-matrimonial property is not in fact quarantined or excluded from the court's powers. It simply represents an unmatched contribution by the party who brings it to the marriage. The court must decide whether it should be shared and, if so, the proportions in which it is to be shared. In reality, the longer the marriage, the more likely the non-matrimonial property will become merged with matrimonial property. By contrast, in a short marriage, non-matrimonial assets are not likely to be shared unless needs dictate."

36. I am satisfied upon a consideration of S. 28 and the evidence of the following:
- i. This was not a short marriage. The parties had been married for 18 years prior to the dissolution.
  - ii. The property is held solely by the Petitioner and accordingly I need not address any contribution of a third party in the absence of any proof of same. The Petitioner has not produced any evidence to support his contention that his mother contributed \$40,000.00 to the acquisition of the property.
  - iii. The parties lived in one of the units as husband and wife. For three years, it was the matrimonial home.
37. The Respondent contributed to the development and upkeep of the Property even though the Petitioner maintained that the Respondent mismanaged the same. The Respondent oversaw the construction of the third unit.
38. The mortgage loan is in default. There is no evidence that the property is being sold by the bank.
39. There is no evidence of any disability of either party.
40. The rental income usually paid the mortgage loan but the loan had not been paid for several years before the default. The question then arises as to what happened to the rental proceeds from the triplex and why is the loan not paid?
41. The Property was acquired before the marriage but developed during the marriage through the efforts of both parties. The parties lived in one of the units for three years.
42. I am satisfied that the Property is a matrimonial asset as it was used for the benefit of the marriage. Further I am satisfied that based on the evidence and the law that the Respondent is entitled to an interest in the same however the fairness principle dictates that I depart from the equal sharing principle as there

was no financial contribution by the Respondent and her efforts were substantially to supervise the development and upkeep of the property.

43. Accordingly I award her a 40% interest in the equity of the property which is fixed at \$23,150.23 to be paid within 90 days of the date of this ruling. Should the Petitioner fail to pay the same, the property is to be sold and the Respondent is to receive the sum ordered.
44. Further, if any of the parties fails to sign any documents necessary to give effect to the same, the Registrar of the Supreme Court is empowered to sign the same on their behalf.
45. Each party is to bear their own costs.

**Dated this 10th day of February 2023**

A handwritten signature in black ink, appearing to read "G. Diane Stewart". The signature is fluid and cursive, with a large initial "G" and a long horizontal stroke at the end.

**The Hon. Madam Justice G. Diane Stewart**