

COMMONWEALTH OF THE BAHAMAS

2021/FAM/div/00526

IN THE SUPREME COURT

Family Division

BETWEEN:

JC

Petitioner

AND

AC

Respondent

Before: The Honourable Madam Justice Camille Darville Gomez

**Appearances: Mrs. Kelpheene Cunningham for the Petitioner
Ms. Judith Smith for the Respondent**

Hearing Dates: 22nd and 30th November, 2022; 5th December, 2022

RULING

Darville Gomez, J.

Factual Background

1. The Petitioner and Respondent were married on the 15th November, 1992 in the city of Nassau, New Providence, The Bahamas and are parents to three (3) children all of whom are now adults.
2. After the marriage in 1992 the parties lived in an apartment and later moved to Sea Beach Estates, in the Western District of the Island of New Providence sometime in 1997. The Sea Beach Estates property is a triplex and the parties lived as a family in one of the units. To date, both parties continue to reside in that unit each living separate and apart. One of the children of the parties resides in one of the units with his family.
3. The Petitioner filed the Petition on the 26th July, 2021 on the ground that the parties have lived separate and apart for a continuous period of over 5 years immediately preceding

the presentation of this Petition. The Decree Nisi was granted on that ground on the 7th September, 2022.

4. It is undisputed that the breakdown of the marriage occurred sometime in 2013 when the parties began living apart in separate bedrooms in the home.
5. The Petitioner is 61 years old and the Respondent is 63 years old. The Petitioner is employed as a senior officer in the Financial Services Industry and the Respondent is a former Police Officer (having left the Royal Bahamas Police Force in 1999) and is now engaged in security work.
6. It is pellucid from the evidence by both parties that the Petitioner earned significantly more during the marriage than the Respondent and therefore, paid the lion's share of the expenses of the family.

Petitioner's Evidence

7. The Petitioner stated at paragraphs 3 and 4 of her Affidavit filed on November 11, 2022 as follows:
 3. *That I wish to say at the outset that I was always an extremely ambitious, self-motivated person. After I completed University and returned home I got a good job and I was careful in saving my money. In 1990 I went to Gold Circle and purchased a lot in Sea Beach Estates solely in my name without help from the Respondent. We were not married at that time. I was single and living by myself in an apartment at that time. The Sales Agreement for the property is in my maiden name. See exhibit "JYCI". I commenced drawing a Plan for a townhouse on the property with two (2) units to rent and one single unit for me to live in. This is dealt with again later when I answer to the Respondent's allegations.*
 4. *The Respondent on the other hand was not ambitious and displayed a lazy attitude. I felt that with my encouragement and prodding he would have changed after we got married. That did not happen. Instead when he saw that I was a striving, ambitious person he totally took advantage of the situation by failing to contribute to the marriage, and he spent whatever money he had on gambling.*
8. Therefore, the Petitioner acquired the property situate in Sea Beach Estates prior to the marriage and built the townhouse to belt course and then acquired a mortgage in her own name in 2004 for \$330,000 to complete the construction. She asserted that the property was purchased for investment purposes and that she has met the mortgage payments from 2004 until now. The Petitioner produced evidence to corroborate this.
9. She further stated that when they first got married, they moved into the one-bedroom unit and then later the two bedroom which was converted for use; the other two bedroom

unit was available for rent. However, that unit is now occupied by her son who got married in 2021 and it has a separate electrical meter.

10. She explained the reason why they never obtained a marital home as follows:

"9. That unfortunately, we never got a marital home because after the marriage and the children came I was primarily the sole bread winner burdened with paying the mortgage, real property tax, house insurance, maintenance of the property, utilities, food, school fees and supplies, life and medical insurance, medical expenses, household supplies, vacations, house keeper's salary etc.

11. The Petitioner, a Certified Accountant in her Affidavit of Means filed on September 23, 2022 stated that her monthly income is \$16,226.92 and that her monthly expenses total \$16,409.65.
12. She has several accounts set out in her Affidavit filed on November 30, 2022 including five savings accounts with an aggregate total of \$18,000 (rounded up), a brokerage account with assets totaling \$260,000 (rounded up), a pension plan with her employer totaling \$250,000 (rounded up) and two time share properties with each having outstanding balances. The value of the time share properties was not provided.
13. She owes \$2,100 (rounded up) for one of the time shares and \$1,200 (rounded up) for the other in addition to the balance on her Scotiabank Mortgage of \$330,000 (rounded up) and \$7,305.87 on her RBC Credit card and \$7,144.25 on her Scotiabank Credit card.
14. In her Affidavit of Means, the Petitioner stated that her husband has worked and continues to provide Security Consultant services for several businesses in New Providence. Some of his contracts are with companies such as BTVI, We Buy U Sell, Chinese food stores and restaurants, convenience stores, and a cleaning company. She added that she has witnessed the Respondent on conference calls and Zoom meetings about his Security Consulting business.
15. The Petitioner provided the Court with evidence of the payment of university fees for the children which excluded incidentals such as, books, groceries and transportation expenses.
16. Additionally, she produced invoices for 2021 and 2022 for home renovations and maintenance which were all paid for by her.
17. The Petitioner conceded in her Supplemental Affidavit filed on November 21, 2022 that the Respondent purchased some furniture shortly after they got married; namely a sofa and love seat in 1996; a twin bedroom set for the first two children when they were three and four years old in 1997; a dinette set and a television in 1999. She did not accept that the 20" flat screen television and a computer purchased in 2003 was for the family on the basis that they were for the Respondent's personal use. The Respondent also

produced evidence of the chattel agreements totaling some \$8,231.81. However, her argument is that his contribution in this regard does not warrant a 50/50 split of the home.

18. The Petitioner confirmed that in 1996 the Respondent consolidated their loan payments into one consumer loan in the sum of \$40,000 at British American Bank which he paid via salary deduction when he was employed as a Police Officer. However, this arrangement ceased after the Respondent left the Police Force; she was then forced to assume the remaining balance of \$38,761.83 which was added to her mortgage. Therefore, the Petitioner has assumed payment of this liability.
19. As it relates to the Petitioner's mortgage, she drew the Court's attention to the remaining mortgage balance in the amount of \$329,106.06 and that the mortgage is scheduled to end on 10th January, 2039.

Respondent's Evidence

20. The Respondent was a former police officer and presently collects a pension from NIB of \$676 per month. Additionally, he stated in his Affidavit of Means that he has other income of \$195 and when added to the NIB pension his monthly income is \$871. His monthly expenses total \$2,580.83.
21. The Respondent has Type 1 diabetes and high blood pressure and is enrolled in the National Health Insurance. He is prescribed medication for both ailments. However, neither of these conditions have been substantiated by the evidence and even if accepted, none of these conditions are life threatening. What has been inferred from the evidence of the Respondent is that his earning capacity has not impacted by them and he has been consistently employed since resigning from the police force including starting his own security business and acting as a Consultant. Therefore, his plight is not as dire at all as is being suggested by his counsel.
22. He also maintained that during the marriage he contributed to the welfare of the family. For example, he noted that he was the parent responsible for school drop- offs and pick-ups.
23. Prior to leaving the Royal Bahamas Police Force, the Respondent began working at the British Colonial Hilton where he remained until 2002. Between 2003 and 2017, the Respondent worked at or with seven different companies including South Ocean Beach Hotel; Bahamar; Federal Management Systems Inc, ICS; Atlantis, Security Masters and an unnamed security company. He claimed that for diverse reasons the employment ended for each of them.
24. In 2018, the Respondent set up In-House Security which had several contracts however, because of the pandemic the business ceased. He would then return to ICS in 2020 as a consultant however, this was terminated in 2022. His evidence is that In-House

Security has re-commenced business doing background checks. It would appear that this is current, and I have interpreted this as such. This believe is corroborated by the Respondent's claim for maintenance to grow this business (see paragraph 26).

25. The Respondent also stated that in 2021 he obtained a contract with BTVI for two months at \$4,000 per month; that contract has ended.

26. I set out below the Respondent's claim:

"... I am asking the court to divide all assets accumulated during the marriage 50/50; including but not limited to savings, bonds, property, shares in Cable Bahamas, Commonwealth Bank, Bank of the Bahamas, pension to be shared 50/50. In order to transition I will need alimony for 3 years in the amount of \$1,000 per month whilst I grow In-House Security to be able to provide for myself."

Issues 1(a): Whether the home situate Sea Beach Estates, West Bay Street is the matrimonial home.

27. The Petitioner argued that the property is not the matrimonial home, and on the other hand the Respondent maintains that it is.

28. Having assessed the evidence before this Court, I accept the Petitioner's evidence (i) that the property was purchased prior to the marriage and is owned solely by her; (ii) that her intention when she purchased the property was for investment purposes; and (iii) that the Respondent never contributed to the mortgage, maintenance or upkeep of the property.

29. I also accept the Petitioner's evidence that due to her being the sole bread-winner, the parties were unable to obtain a marital home.

30. In **Miller v Miller [2006] 3 All ER 1**, the court observed at paragraph 22 that:

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

31. This position was affirmed by Sir Barnett, P in **Julius Dianza Chisholm and Ophelia Arnette Chisholm (nee Bateman) SCCivApp. No. 127 of 2020** as he stated that:

“It is not the law that assets acquired before a marriage are irrelevant to determine fairness.”

32. Therefore, despite the Petitioner having acquired the property prior to the marriage, fairness requires this court to still determine whether it is matrimonial property. In other words, it does not matter than the property is owned solely by the Petitioner and the mortgage in her name. I have considered the **Chisholm case** on this issue where the appellate court also referred to paragraph 22 of **Miller v Miller**.

33. In **Watchel v Watchel [1973] 1 All ER 113**, Lord Denning defined family assets in this way:

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

34. In my view, it is clear (i) that the parties moved into the property early in the marriage (the being sometime in 1995); (ii) the parties lived and raised their children and shares their lives there for over twenty years; and (iii) despite the breakdown of the marriage in 2013, the parties continue to reside in the home.

35. The law set out above is clear. I find that the home situate in Sea Beach Estates, West Bay Street is the parties' matrimonial home.

Issue 1(b): If the home situate Sea Beach Estates is determined to be the matrimonial home whether the Respondent has entitlement to a beneficial interest in the said home and/or any marital assets.

36. The Petitioner submitted that the Respondent is not entitled to an interest in the said home and alluded to the case of **GB v VB (2018) 1 BHS. J. NO. 87** where then Winder J. found that the husband's contributions did not amount to a 50% equitable interest and awarded a lump sum payment of \$100,000.

37. I find the above case to be clearly distinguishable from the instant case despite its similarity that the property in both cases were owned solely by one party prior to the marriage. The major difference is that the parties in the instant case would spend the substantially the entirety of their 20 year marriage in the property, unlike the short marriage in the **GB v VB** case.

38. The Respondent maintains that he has a 50% interest in the said home and also provided the court with authorities to support his claim.

39. Having found that the home is the matrimonial home, I now turn to determine what is a fair division based on the facts and evidence proffered in this case. In doing so, it is necessary to apply **Section 29 of the Matrimonial Causes Act, Chapter 125** which provides useful guidance when determining financial provisions and property adjustments orders. The statutory guidelines are as follows:

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 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.

40. **White v White [2001] 1 All ER 1** established the 'yardstick of equality' or 'equal sharing' principle between the parties to a marriage. Lord Nicholls said:

"In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife. Thus, whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness required that that should not prejudice or advantage either party when considering s25(2)(f) of the 1973 Act. If, in their different spheres, each contributed equally to the family, then in principle it did not matter which of them earned the money

and built up the assets. It followed that before making an order providing for an unequal division of assets, a judge would be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there was good reasons for doing so. The need to consider and articulate reasons for departure from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”

41. The principle of fairness was also affirmed by the Court of Appeal in **Julius Dianza Chisholm and Ophelia Arnette Chisholm (nee Bateman) SCCivApp. No. 127 of 2020** where Sir Barnett, P. noted that:

“ The entire object of the division of property upon dissolution of a marriage is to achieve fairness.”

42. In **Jupp v Jupp SCCrApp No.37 of 2011** then President of Appeal Dame Anita Allen explained that:

“ The statute requires that you look at all the circumstances and you make the order which put 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.”

43. Despite the limited cross examination of the Petitioner and none of the Respondent, I found the following some of which was undisputed by each of the parties:

- (i) Given the Petitioner’s qualification as an accountant, her earning capacity was higher than the Respondent and therefore, she was in a better financial position than the Respondent to contribute to the family’s expenses. Similarly, this put her in the position to provide the majority of the family’s assets.
- (ii) The Petitioner’s mortgage is scheduled to be satisfied on the 10th January, 2039 which is twelve years after the age of retirement (65). This will amount to a continuing obligation to maintain the monthly mortgage payments until well after her retirement (up to 77 years of age). She will have to utilize funds from each or all of her accounts to service this debt.
- (iii) During the marriage the Respondent was employed either as a consultant or an employee and this continues to date. Further, despite his inability to match the Petitioner’s earning capacity or salary, he was still in a financial position to contribute to the family’s expenses throughout the marriage.
- (iv) The Respondent’s contributions were inconsistent, and he contributed much less than he could afford.

- (v) The Respondent is employed as a consultant and given his background as a police officer and his experience; this will provide him some means of income in the future.
- (vi) The Respondent's income is incredible given his expenses, which includes not one, but two loans. One at Bank of The Bahamas with a payment of \$800 monthly and the other at Simplified Lending with a payment of \$400 monthly. The Respondent did not disclose the details of the loans including the purpose, duration and the balance outstanding on them and curiously enough, again the Petitioner did not cross examine him on this. Therefore, the Court was not assisted at all in this regard.
- (vii) It was unclear what the Respondent meant by the source of income termed "freelance work." However, it seems highly unlikely that the Respondent would be able to secure any loan without proof of the ability to repay. Accordingly, I find the evidence of the Respondent regarding his income untruthful.
- (viii) There was no evidence that he held any savings, checking or other accounts and he was unhelpfully not cross examined on his Affidavit of Means by the Petitioner.
- (ix) The Respondent contributed to the purchase of furniture totaling approximately \$9,000.
- (x) The Respondent solely assumed the consolidation of their loans in 1996 and was responsible for the monthly payments via salary deduction which ended when he resigned from the Police Force in 1999. In 1999 approximately three years later, he defaulted in the loan payments although he alleged that the loan was paid off by the time that he left the Police Force, however, the Petitioner provided evidence that the outstanding sum of \$38,761.83 was added to her mortgage on the 17th August, 2001.
- (xi) The Respondent claimed that he has diabetes and high blood pressure however, even though this was not proven, I do not agree with his Counsel that this is a disability. He is enrolled in the National Health Insurance.
- (xii) The marriage broke down ten years ago and the parties have each been leading separate lives with the Respondent maintaining himself save for continuing to reside in the matrimonial home.

44. Barnett, CJ as he was in **A v. B [2010] 2 BHS J. No. 19** at paragraph 19 said:

“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. The law is perhaps best summarized in the judgment of the English Court of Appeal in Charman v Charman [2007] 1 FLR 1246. “The yardstick of equality of division”, first identified by Lord Nicholls in White at p. 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of “reasonable requirements”. The origins of the yardstick lay in s.25(2) of the Act, specifically in s.25(2)(f), which refers to the parties’ contributions: see the preceding argument of Lord Nicholls at p. 605D-E. The yardstick reflected a modern, non-discriminatory conclusion that the proper evaluation under s.25(2)(f) of the parties’ different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.....”.

45. The circumstances above permits this Court, and in accordance with the law, to depart from the equal sharing principle as there is sufficient reason so to do.

Issue 2: Whether the Respondent is entitled to spousal maintenance.

46. Counsel for the Respondent referenced the case of **SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)** where the Court outlined the relevant principles to be considered on an application for spousal maintenance at paragraph 46 of its judgment. They are follows:

- (i) *A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the Claimant. Here the duration of the marriage and the presence of children are pivotal factors.*
- (ii) *An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.*
- (iii) *Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.*
- (iv) *In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.*
- (v) *If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.*

- (vi) *The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.*
- (vii) *The essential task of the judge is not merely to examine the individual items in the Claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the Respondent's available income that should go to the support of the Claimant.*
- (viii) *Where the Respondent's income comprises a base salary and a discretionary bonus the Claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.*
- (ix) *There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.*
- (x) *On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.*
- (xi) *If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.*

47. The difference between SS v NS, supra and the present case is that the wife ceased work and devoted herself to the care of the children and the family. The husband accepted that she was a 'fantastic mother' and this was the arrangement made between the parties.

48. In accordance with all the considerations outlined in section 29, (1) I find that the Respondent still has earning capacity; (2) that he worked throughout the marriage; (3) since the breakdown of the marriage in 2013, he has continued to work. Although the Petitioner took on the lion's share, the Respondent was not entirely dependent on her as seen in the distinguishable case above. Therefore, I find no reason at all to award spousal maintenance to the Respondent.

Findings/ Disposition

49. In MM and GM BS 2017 SC 74, then Winder J noted that,

"...While the marriage was of long duration and the respondent made some contributions to the home, fairness would not be achieved by maintaining the equal sharing principle."

50. I also considered the Court of Appeal decision in **Sherwin Anthony Dames v Levette Subraina Dames SCCiv App. O. 64 and 65 of 2021** in the calculation of the interest in the matrimonial home. I award the Respondent a 35% in the net value of the home. The property has been appraised at 750,000 (rounded figure) less the amount of the mortgage of \$330,000 (rounded figure) \$420,000, therefore, is \$147,000.
51. I have determined that the time shares are marital assets for the same reasons as I did for the matrimonial home. Therefore, I find that the Respondent is also entitled to an interest in the timeshares as he would have enjoyed such leisure had it not been for the breakdown of the marriage. Therefore, I award the Respondent a 35% interest in the net value of the timeshares to be calculated in the same manner as the matrimonial home.
52. The Respondent also claimed that he is entitled to 50% of the Petitioner's savings accounts, brokerage account, and pension account however, he has not provided any authority for this proposition. There was no cross examination of the Petitioner regarding when these accounts were opened, save for the pension fund which I address later.
53. The relatively modest balances on the savings account leads me to conclude that they were opened recently, that is, after the breakdown of the marriage approximately ten years ago in 2013. Certainly, there has been nothing proffered by the Respondent to lead me to the conclusion that they are marital assets for which he has an entitlement to share. His sole contention is that as the spouse of the Petitioner he is entitled to share in everything that she owns. In any event, one of the accounts presently services the mortgage payments. Therefore, I do not find that the Respondent is entitled to a percentage in any of the various accounts held by the Petitioner.
54. Further, the Petitioner has four years until her retirement, after which she will be saddled with the mortgage payments well past her 75th birthday. Therefore, she will have to fund the future payments from her brokerage account.
55. I find the case of **Henry Gay and Lorraine Gay SCCivApp. No. 292 of 2016**, instructive on the issue of the pension fund. The Court of Appeal found that the trial judge was entitled to find that the husband had no interest in the pension fund which started when the marriage was effectively broken down. Having assessed the evidence, the Petitioner's pension fund date of plan entry noted that it had commenced on the 1st January, 2015. It is undisputed that the parties' marriage had broken down in 2013.
56. Accordingly, I make the following orders: -
- (i) That I find that the Respondent is not entitled to the payment of any spousal maintenance from the Petitioner.

- (ii) That the Respondent is entitled to a 35% interest in the equity of the matrimonial home.
- (iii) That the Petitioner do pay to the Respondent a lump sum payment representing 35% in the said interest in the equity of the matrimonial home within ninety days from the date of the said Order.
- (iv) That the Respondent vacate the said matrimonial home within seven days of receipt of the lump sum payment or any date mutually agreed by the parties.
- (v) That the Respondent is entitled to a 35% interest in the equity of the timeshare properties.
- (vi) That I find that the Respondent is not entitled to an interest in any of the Petitioner's bank accounts including her pension fund.
- (vii) Each party to bear their own costs with respect to these proceedings.

Dated this 24th day of February, A. D., 2023



**Camille Darville Gomez
Justice**