In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2022: No. 20

BETWEEN:

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Petitioner

and

N

Respondent

RULING

Date of Hearing: **8 November 2024**
Date of Ruling: **6 January 2025**

Petitioner: **In person**
Respondent: **Georgia Marshall of Marshall Diel & Myers Limited**

RULING of Elkinson, AJ

1. This matter comes before me as an application for ancillary relief subsequent to the grant of a Decree Nisi given on 29 April 2022. The Decree Absolute was pronounced on 18 July 2022. The issue before the court is one of financial adjustment as between the parties.

2. Mrs Marshall, counsel for the Respondent had prepared a Schedule of Assets for the court and whilst not fully agreed by Petitioner it is a practice to be encouraged in these matters.

3. The usual starting point would be an equal division of the assets, in this case subsequent to a 19 year relationship, six years of which were in marriage. The seamless transition between the relationship and formal marriage gives strength to the position that this was a long relationship and that it is appropriate to aim for an equal division of the assets.

4. In summary, as set out in the Schedule of Assets, the assets of the parties incorporate various bank accounts, two investments accounts, a car, two properties and each with a pension. On the liability side, there are mortgages on both properties.

5. When considering an application under section 28 (a) for a property adjustment order, which this is, the court is required to have regard to the check list of matters specifically listed in sections 29 (1) of the Matrimonial Causes Act 1974 (the MCA), which provides as follows:

> *"29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters-*
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> *(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;*
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> *(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;*
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> *(c) the standard of living enjoyed by the family before the breakdown of the marriage;*
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> *(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 contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;

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."

6. The objective is to place the parties insofar as it is possible and practicable to do so in the position that they would have been in if the marriage had not broken down and each party had discharged their respective financial obligations to the other. The UK legislation no longer contains this provision but in determining what the aim of the court should be when exercising its discretion under sections 27 and 28 of the MCA, the House of Lords in **White v White [2001] AC 596** determined that the aim of the court is to come to a fair outcome as between the parties. A key feature of fairness is that there shall be no discrimination between husband and wife and their respective contributions during the marriage.

7. Further, in considering what is fair, the court distinguishes between two types of assets, matrimonial assets on the one hand and non-matrimonial assets on the other. Matrimonial assets are those assets which have been created by the efforts of the parties or either one of them during the marriage. They arise out of the efforts of the parties during the marriage. Non-matrimonial assets are different in character as they originate from sources exterior to the marriage. They include the preowned assets of the parties, gifted assets and inherited assets.

8. There is one notable exception to the general rule set out above regarding the distinction between matrimonial and non-matrimonial assets and that pertains to the matrimonial home

of the parties. In the House of Lords decision in **Miller v Miller; McFarlane v McFarlane [2006] 3 All ER 1**, Lord Nicholls of Birkenhead said the following:

> *"The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquit but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. 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 the marriage. So it should normally be treated as matrimonial property for the 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."*

9. The property in Marl Lane is property inherited by the Petitioner from her mother. This property comprises four separate units. In the course of the marriage, extensive renovation was carried out. There was a mortgage on the property. In the time which the parties spent residing in Marl Lane, the Petitioner went away for educational purposes, including to obtain a postgraduate degree. From the evidence, the court learned that the parties had discussed about the Petitioner wanting to retire at 55 and that for many years the parties were together in a relatively harmonious relationship. The Respondent acknowledged in his evidence that the Petitioner was a good wife.

10. Both parties have children from other marriages who are now all adults.

11. A principal area of dispute between the parties is in respect of the source of the monies used to pay off the mortgages of the two properties. Another issue in dispute is whether Marl Lane is the matrimonial home. Petitioner takes the position that it is an asset which was in her possession by way of inheritance and account should not be taken of it in the division of the marital assets.

12. During this period when they were residing in Marl Lane, a second property located at Leacraft Hill was acquired which was held in their joint names. This property was purchased on 15 December 2020 and Respondent says it was purchased from his savings. This, it should be noted, was not in dispute. The Respondent viewed it as an investment property and 'a project' being a 'fixer-upper' albeit that it was the Petitioner who gave a lot of her time supervising 'the project' by attending on site and dealing with the contractors. He wanted it as something for his children. The Respondent had paid for the Leacraft Hill property from his savings and had transferred the sum of $150,000 and further amounts of $10,000 and $19,000 for the renovations and closing costs to the Petitioner. The $150,000 was not used by Petitioner to pay off the contractors as she used $100,000 of it to pay off some of the mortgage on Marl Lane in respect of which the Petitioner also collected the rent from the other 3 apartments at that location.

13. The Respondent's position is that not only did Petitioner pay $100,000 towards the mortgage without his knowledge but that she was then getting the benefit of a reduced monthly mortgage payment and that she was also collecting rents. In relation to the outstanding balance of $275,000 on the mortgage, $200,000 of that related to the educational expenses for the degree and post-graduate degree which the Petitioner had obtained.

14. This resulted in them both then taking out a mortgage of $210,000 on the Leacraft Hill property which up to that time had been debt free. This money was used to pay for the renovations of that property.

15. The position of the Respondent in evidence as regards the two properties was that, as he helpfully said in evidence, *"I should keep what's mine and she should keep what's hers."* He stated that he paid for the vast majority of the household expenses including utilities, maintenance and land tax and insurance for both properties. He also paid for Petitioner's health insurance and he provided the parking in Hamilton for the Petitioner through his

employment. Petitioner challenged this by saying that some amounts were indeed paid by Respondent but from her account in respect of which he had full online access.

16. Petitioner considered as regards the $100,000 that this was a gift from Respondent based on the discussion she had with him at the time when he discovered that she had put it to the mortgage on Marl Lane rather than to pay the contractors working on Leacraft Hill. Her view was based on the conversations she had with him at the time when he had said that he wasn't worrying about it. Petitioner suggested that he was expressing that he had no issue with her having it. His position in these proceedings now is that it was taken surreptitiously. In cross-examination the Respondent sought to explain that his reaction to her at the time he learnt that the money had gone to pay down some of the mortgage of Marl Lane was that he didn't want to focus on the issue then but that he had not given it away to her as a gift. He was challenged by the Petitioner that he had changed his mind about her keeping the money that he had agreed to move in to the larger apartment in Marl Lane and pay off the mortgage and he had not raised the issue until these proceedings nearly two years later.

17. Petitioner's evidence to support that it was a gift was that he had said repeatedly to her that "I was his wife and we were working together." On the balance of probabilities, and as submitted by the Petitioner, it does seem more likely than not that the Respondent did give it away as a gift based on the fact that the first time, from the evidence before me, the issue of the money being 'taken' was raised was in his first affidavit. The issue of repayment arises two (2) years after the event and post-divorce.

18. On the balance of probabilities, it does seem to me to be more likely than not that it was a gift. I make this determination on the basis that the parties were in a good relationship at that time and that it is agreed in the evidence that the Petitioner had always expressed to him that she wanted to be retired by 55. She could only do that if she was relatively debt free. I have in mind also Respondent's evidence that he had paid all the household bills as referred to above. However, that is not supported in a review of the voluminous disclosure including his credit card statements. Further, the long period between the issue arising,

2021, and the time when the Respondent said that the money should be returned, September 2023, lends some strength to Petitioner's position. I find that this money was a gift from the Respondent to the Petitioner to help her achieve her goal of an early retirement. To that extent and in accordance with the expressed position of the parties I find that while Marl Lane was the matrimonial home, the Petitioner should retain that property.

19. I am satisfied having heard the evidence that Leacraft Hill was never the matrimonial home and while it could be considered a matrimonial asset, that the arrangement as between Petitioner and Respondent was that he was embarking on its acquisition as his own project and the possibility that it would at some stage devolve to his own children. This property should be retained by the Respondent in his own name.

20. In summary, in relation to the properties, the Petitioner is to have full title of Marl Lane, with sole responsibility for whatever debts and liabilities attach to it and the Respondent is have full title to Leacraft Hill, with sole responsibility for whatever debts and liabilities attach to that property. The parties are required to co-operate in whatever arrangements are needed to ensure that this happens, in particular if conveyances need to be signed, failing which application can be made to the Registrar who is empowered to sign the conveyance or other transfer documents in the defaulting party's place.

21. In relation to the car, there does not appear to be any real dispute as to its value and that the value should be shared equally – the half value is $15,388 and the parties should determine if they wish to sell it and split the proceeds or that one of them is to pay the other the $15,388.

22. The other substantial asset which requires consideration as to its disposition is made up of two investment accounts named the Hansard Investment Portfolios, number 5783530F, which I shall call Account A, and 558772Y, which I shall call Account B. At trial the amount of money in the accounts was $$85,039 and $57,222, respectively, totalling $142,000. Counsel for the Respondent suggested in the helpful Position Statement which she provided that as regards Account A, this had been funded by them both. That as regards

Account B, Petitioner said that she had funded this with monies she received from her pension fund and the position taken by Respondent was that this was not correct and would be resolved on cross-examination. Unfortunately it was not and the court is left to try and fathom the records which are not complete due to issues which Petitioner had in getting the information. This was the subject of complaint by the Respondent as well as being a general complaint from him about the extent of Petitioner's disclosure. It does mean that the court has to make the best of what evidence it has been provided and, in the context of equality between the parties, I have determined that each of the parties should get half of the combined value of the accounts. I have taken onto account that there is some marginal disparity between the two property values and in an attempt at some equalization and fairness as between the parties, I hold that they are to be liquidated by the Petitioner, with the full co-operation of the Respondent should that be necessary, as soon as possible but in any event no later than 1 month from the date of this judgment. Thereafter the Respondent is to be paid 50% of the payment or payments from Hansard in respect of these.

23. I should note Petitioner's submission to the court which was that the court should decide the issues before it simply on the basis of equity and fairness. It was on that basis that Petitioner submitted that the proposals of the Respondent as to how the assets should be divided *"can't be right"* in particular that the Respondent, on the proposals being put forward on his behalf, would have him benefitting by having a property mortgage free. Petitioner says that there were various agreements and discussions before he moved into the larger apartment on the property which led her to believe that she would always be able to keep Marl Lane free and clear of any claim by Respondent against it and that discussions took place prior to formalising their long relationship by marriage in 2015. Petitioner said that in and about 2017 but then Respondent started associating with people such that Respondent was drinking too much and it introduced a level of toxicity into the relationship which led her to struggle mentally and financially and caused her to leave a position of secure employment where she enjoyed her work. Obviously this is a factor relevant to the breakdown but is not relevant as to how assets should be apportioned on this application - blame is no substitute for evidence.

24. The problem which Petitioner's suggested approach would create for the court is that even in the family jurisdiction this remains a court of law and whilst principles of equity and fairness are principles which all judges of this court acknowledge and abide by, they are principles which can only be applied to facts presented by way of evidence, having full regard to statute and precedent. In this case, there is a paucity of documentation relating to what was agreed as regards the properties. I am fully cognisant that in a marriage or in a close relationship which is based on mutual love and respect that the parties don't rush to either commit what they are doing to writing or call a lawyer. However, the issues which are created on separation, and in this case the parties have the advantage of being in a relationship recognised by the law of Bermuda, can be legion. To that extent, the issues which arise in the judgments of this court in relation to financial apportionment should be taken as a salutary lesson for all couples, regardless of the formal or informal nature of the relationship, when it comes to sharing income or contributing to property, be it real property or chattels. To the extent that there is anything useful to the publication of judgments such as these, I would offer up the suggestion that parties contemplating relationships of marriage should be direct with their partner where they have concerns about the property they are coming to the marriage with, or might acquire, be it through inheritance or other means. If feasible, they should obtain legal advice which might lead the parties into entering a pre-nuptial agreement about all the possible matters which will need to be determined should there be a breakdown in the relationship.

25. Counsel for the Respondent had asked for a hearing on costs and application should be made for a date and time for that to be fixed by the Registrar.

Dated this 6th day of January 2025

THE HON. JEFFREY ELKINSON
ASSISTANT JUSTICE