



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2022: No. 45

BETWEEN:

WIFE

Petitioner

- and -

HUSBAND

Respondent

JUDGMENT

Before: Hon. Alexandra Wheatley, Acting Justice

Appearances: Nicole Cavanagh of MJM Limited, for the Petitioner
Georgia Marshall of Marshall Diel & Myers Limited, for the Respondent

Dates of Hearing: 17, 18 and 19 April 2024
Date of Submissions: 23 May 2024
Date Court Requested Further Submissions on Points of Law: 12 December 2024
Date of Further Submissions: 22 January 2025
Date Draft Circulated: 30 January 2025
Date of Ruling: 31 January 2025

Ancillary Relief; Matrimonial Assets; Section 29 of the Matrimonial Causes Act; Financial Needs and Obligations; Financial Resources; Property Adjustment Order; Pension Sharing Order; Child Maintenance; Fairness; Mesher Order; Clean Break

WHEATLEY, ACTING JUSTICE

INTRODUCTION

1. This matter was initially heard by another judge (the Hearing Judge) on the dates set out herein. The Hearing Judge was not able to render a final decision prior to the Hearing Judge being out of office from 12 July 2024 to date. No date has been set for the Hearing Judge's return. As it was neither party's conduct which led the Court to be in a position where it cannot surmise when a decision could be rendered, the Court considered it was necessary to bring resolution to this matter by other means. Rather than the parties' applications being reheard in their entirety by another judge, various options were presented to Counsel to best determine how a decision could be given.
2. By way of a Consent Order dated 23 September 2024, both parties agreed for this matter to be determined on the papers by a new Judge. The following items were agreed to be considered by the Court for this determination: (i) Transcripts of the hearings which were produced by the Court and subsequently approved by Counsel (subject to minor changes); (ii) the CourtSmart recording of the hearing of the evidence and submissions; and (iii) all pleadings filed. The provisions of the Consent Order, *inter alia*, included that Counsel may be required to appear in court for the Judge to hear them on a specific issue if necessary. The Consent Order also provided that the Court would be responsible for the costs related to this "re-hearing" given the circumstances which led to this matter having to be determined by another judge.
3. It should be noted that on 9 October 2024, Mrs Marshall for the Petitioner sought to include fresh evidence by way of a photograph of a retaining wall located at the former matrimonial home. By letter dated 18 October 2024, Ms Cavanagh for the Husband confirmed consent for the photograph to be introduced into evidence. This fresh evidence was, therefore, also taken into consideration.
4. During the writing of this decision, there were legal points that I wished for Counsel to address. As such, the Acting Registrar wrote to Counsel on 12 December 2024 asking them for submissions in relation to the following legal points:

1. *As there is no power to require the sale of property in Bermuda under the Matrimonial Causes Act 1973 (unlike the UK), if a Mesher Order was being considered to be made, does this Court have jurisdiction to make such an order when Mesher Orders are predicated on the sale of property at the end of a defined timeframe? If so, what authorities support this? If not, can the Court make such an order under its inherent jurisdiction?*
 2. *If the argument is that there is no jurisdiction to make a Mesher Order, is there an alternative remedy that can achieve a similar outcome? For example, if the property is transferred to one of the parties, can a lien or charge be placed against the property which would not be realized until the expiration of a certain timeframe for the benefit of the other party? If so, should a value of the lien or charge be attached or would it be sufficient to confirm a beneficial interest in the property to the value of half of the net equity?*
 3. *If a Mesher type order is granted, or alternatively, one of the parties is required to transfer his or her share to the other party, what jurisdiction does the Court have to require the other party to vacate by either the expiration of the Mesher order or prior to the completion of any transfer?*
5. Counsel subsequently attended Court on 22 January 2025 in order to present their respective submissions addressing the points raised in paragraph 4 above.

BACKGROUND

6. The parties met in 2000 and were married on 8 June 2002. There are three children of the family who are 22 years old, 13 years old and 6 years old respectively. The Petitioner (hereinafter referred to as the **Wife**) filed the petition for divorce on 18 May 2022 on the basis that the marriage had broken down irretrievably as a result of the Respondent's (hereinafter referred to as the **Husband**) unreasonable behaviour. The Wife says the parties separated in May 2022 after an alleged incident of domestic violence perpetrated against the Wife by the Husband at the FMH. The Husband denies the allegation of domestic violence and contends that he never vacated the FMH.
7. The Decree Nisi was pronounced on 30 September 2022 when the parties were awarded joint custody of the two younger children and interim, joint care and control. Decree Absolute was pronounced on 15 November 2022.
8. The Wife is now 49 years old the Husband is now 50 years old.

9. The current issues before the Court were commenced by Notice of Application for Ancillary Relief filed on behalf of the Husband on 21 July 2023 (**Husband's Application**) by which he seeks a property adjustment order in relation to the former matrimonial home (**FMH**). In addition, he seeks such other order as may be just and an order for costs in his favour.
10. On 24 October 2023, the Wife filed a Summons (as subsequently amended) (**Wife's Application**), by which she seeks the following relief:
- i) Child maintenance.
 - ii) A property adjustment order in relation to the FMH whereby the Wife resides at the FMH with the two youngest children until such time as the youngest child attains the age of 18 years old at which time will be sold and the net sale proceeds divided equally.
 - iii) The Husband pay the mortgage and the loan taken up to purchase the FMH.
 - iv) The Husband vacate the FMH.
 - v) The Husband transfer all his interest in the family motor vehicle to the Wife.
 - vi) Pension sharing provision in her favour.
 - vii) Costs to be awarded to the Wife.
11. The Wife subsequently changed her overall position to seeking the following relief:
- i) The Husband shall vacate the FMH within thirty-five days.
 - ii) The Wife shall retain the contents of the FMH, including the furnishings and appliances, save that the Husband shall remove his person belongings upon vacating.
 - iii) Upon the Husband vacating the FMH, the Wife shall become responsible for the mortgage payments.

- iv) The FMH be transferred into the sole name of the Wife, the Husband shall be paid a lump sum equal to half the net equity, being \$12,500.
 - v) The Wife will use her best endeavours to have the Husband released from the mortgage liability and shall have the existing mortgage with the bank transferred into her sole name within three months.
 - vi) The Husband shall continue to be liable for the monthly payments of the Promissory Note and shall indemnify the Wife against any liability arising therefrom.
 - vii) Each party shall retain their respective pension provisions.
 - viii) Each party shall retain the vehicles registered in their sole names, the Wife retaining the car and the Husband retaining his motor bike.
 - ix) The Husband shall pay child maintenance to the Wife in the sum of \$1,800 per month, which represents one half of the minor children's general expenses with a deduction for half the children's health insurance which is paid by the Husband.
 - x) The Husband shall continue to be responsible for the children's health and dental insurance which shall be maintained under his current policy.
 - xi) The Husband shall be responsible for the costs of these proceedings.
12. The Husband filed two affidavits which he relies on which were sworn on 22 September 2023 (**Husband's First Affidavit**) and 23 February 2024 (**Husband's Second Affidavit**) respectively. The Wife filed one affidavit which was sworn on 24 October 2023 (**Wife's Affidavit**). Both parties attended the hearing and gave *viva voce* evidence under cross-examination and had written submissions filed by their respective counsel.

INCOME AND EXPENSES

Income

13. The Husband, a firefighter earning approximately \$86,525 annually, claims to have consistently met expenses related to the FMH without contribution from the Wife. The Wife disputed the Husband's earnings as since separation in 2022 she notes that he has earned significantly more

in over-time given the reduced care he provided for the children. The Husband's average net pay for 2023 was \$7,976.92 and for the first two months in 2024 was \$13,379.00.

14. On cross examination, the Husband revealed that he had taken \$9,800.00 in cash withdrawals from his bank account over the period of one month. The Husband stated that he had removed the cash from his account to pay his attorney and was not "stashing" it, despite having paid \$3,000.00 to his attorney on the same day that he removed \$5,000.00 in cash. When asked in re-examination when he would be depositing the funds with MDM, he replied "*by the end of April*".
15. Attention was also drawn, by the Wife, to the Husband's evidence relating to the Ironkids accounts which he states in his replies to the Wife's financial disclosure requests had been cashed in during 2018. Upon review of his bank account statements, deposits were still being made to those accounts in 2020; however, under cross examination the Husband could not provide details of how the funds were removed from the accounts, nor the destination of those funds, which were said to total approximately \$11,000.00. The Husband's evidence was that these funds were for the home improvements carried out in 2018. The Wife's says that there were no renovations carried out post 2018.
16. The Wife, a Registered Nurse in training with a projected increase in earnings, has been supported by the Respondent through her educational journey. At the time of the hearing, the Wife earned less than the Husband but as of July 2024 qualified to receive a higher income which will increase annually for a number of years. As of July 2024, the Wife's gross income increased to \$77,819 or \$6,484 gross per month and explained that if she was to work one 10 ½ hour shift, she would be paid an additional \$897.85 gross. The Husband says that her earnings are not capable of allowing her to cover all expenses of the FMH and that he is in a far better position to do so.
17. Additionally, the Husband alleged that the Wife had been sending funds through MoneyGram to Jamaica. The Wife denies having a MoneyGram account and gave evidence that she has only received funds from her brother by way of assistance when she has struggled financially as a result of the divorce. The Wife provided a letter from MoneyGram evidencing the Wife had not held an account with them within the last five years.

Expenses

18. After the divorce decree in September 2022, the Husband estimated monthly household expenses for himself and the children at \$5,502.69, which includes \$800 for groceries. His personal expenses are projected at around \$1,050 per month, and he has been paying a mortgage

of \$3,092.25 and a loan of \$886.00, consuming most of his monthly income of \$5,100. Additionally, he covers health insurance for the children, totaling nearly \$700 monthly.

19. The Wife's revised monthly expenses were documented as totaling around \$7,272.60, which she requests the Husband to contribute to, particularly for their children's costs, totaling approximately \$1,800. This sum is based on the Husband continuing to include the children on his health insurance, and half of which is credited to the Husband within the Wife's calculations; i.e. the total sum of \$297.86 divided by 2, equals \$148.93 a half share.
20. In relation to the oldest child's health insurance, the Wife submits that the Husband should continue to make the payment as she has not taken into account this child's expenses in her request for \$1,800 per month in child maintenance payments from the Husband. The Wife notes that their eldest child is largely financially independent, and lives rent free with the Wife.
21. The Husband disputes many of the Wife's claims regarding her expenses, asserting that she had not accurately reported her financial contributions during the marriage. He argues that her claims should be significantly lower based on shared expenses and payments he made that she did not acknowledge. It was submitted by the Husband that the Wife's outgoings seem to total approximately \$8,871 per month while her income is only \$5,061, indicating a significant shortfall. This suggests ongoing financial struggles following the separation.
22. The Husband proposes that he keep one child on his health insurance while the Wife covers the other two children. He says this is fair and reasonable, particularly given that he has paid this without the Wife's assistance throughout the marriage. Moreover, the Husband asserts that now that the Wife will have a greater income than him, the Wife should meet this expense from her gross pay.

ASSETS

23. The court differentiates between matrimonial assets, created during the marriage by either party's efforts, and non-matrimonial assets, sourced outside the marriage. In this case, both parties agree all assets are matrimonial since they were created during the marriage. However, there is minimal equity to divide, primarily consisting of each party's pension savings and the FMH.
24. The undisputed matrimonial assets are as follows:

<u>Asset</u>	<u>Net Value</u>
FMH	\$25,000.00
Husband's Pension	\$185,924.50
Wife's Pension	\$114,222.58
Family Car	\$3,000.00
Husband's motorbike	\$6,200.00

FMH

25. It is accepted by both parties that the FMH was purchased in 2017 in joint names for \$585,000 with the aid of a joint mortgage of \$445,000 with HSBC and an unsecured Promissory Note of \$105,000 to be repaid over a fifteen-year period.

26. The value of the FMH has decreased and was valued at \$500,000 for these proceedings by virtue of an appraisal carried out on 12 August 2022. The current outstanding mortgage was in the region of \$371,000.00 at the date of the hearing and the Promissory Note had approximately \$68,000 outstanding and would be repaid within eight years at the current repayment rate. Therefore, this valuation estimates that there is a net equity of approximately \$25,000 in the FMH.

27. In addition, the Husband's evidence is that there is a boundary wall at the property which at the time of the hearing was in disrepair and has now subsequently collapsed, with estimated rectification costs between \$50,000 and \$100,000. The Husband plans to repair it using personal effort which he says will cost the lower sum and has highlighted the urgent need for repair. In contrast the Wife does not accept the cost for the repair would be this high and notes that this estimate is only based on what the Husband has estimated. No estimates were provided by any contractors or the like who would be in a position to accurately estimate the cost. The Wife also says that the wall has been in this state since 2017 and as such contradicts the Husband's assertion that the repairs are required urgently.

28. During the marriage the Husband has paid the monthly mortgage payments of \$3,092.25 as well as the monthly loan payment of \$886.00. He has also met the land tax obligation, and the insurance cost until recently when he was unable to do so and the insurance policy temporarily lapsed. He is now in the process of reinstating the policy. The Wife says that she can pay the monthly home insurance payments of approximately \$200 per month if the FMH was transferred to her.

29. The Husband seeks to take over the mortgage and associated debts with the hope of transferring the Wife's interest in the FMH to him, giving the Wife time to relocate. Mrs Marshall submitted that the Husband has shown he can manage the existing mortgage and has received pre-approval from HSBC for a potential mortgage up to \$400,000. The Husband also says that he has been responsible for most household expenses post-separation and he expresses intent to reside in the FMH with the children if the Wife's interest in the FMH was transferred to him.
30. In contrast, the Wife has changed her stance during the proceedings, initially seeking to delay the sale of the FMH until 2036 and requesting that the Husband manage all existing payments. However, she later indicated her improved financial situation following her expected qualification as a Registered Nurse would increase her income.
31. The Husband argues that he has consistently fulfilled his financial responsibilities regarding the FMH, while the Wife's viability to take on those responsibilities appears questionable, especially given her reliance on overtime to meet proposed expenses.
32. The Husband also asserts that the parties jointly care for their children and plan to share their expenses, with the Husband proposing that the Wife cover health insurance for their younger children, given her higher income. Thereby, neither party would be required to pay the other any sum each month for child maintenance. The Wife contends that the Husband has exaggerated the FMH's condition to falsely portray himself as the only one capable of its upkeep.
33. The Wife argues that the Husband's housing needs have been met, as he has secured alternate living arrangements with his girlfriend during the eighteen months he was absent from the FMH from September 2022 to February 2024. She asserts that she has been the primary caregiver during the separation and says she can pay the mortgage on the FMH given her salary increases, along with assistance from her brother. The Husband's evidence is that he remained living at the FMH as he would attend only when the Wife was working, so she would not be aware of his continued presence.
34. Ultimately, the Husband says that the Wife lacks the funds to maintain the FMH due to required repairs, making it practical for her to find a new property that requires less maintenance.

Pensions

35. The Husband has a Superannuation pension with a value of \$184,155. He will retire at the mandatory age of 55 for fire fighters but may be able to continue in the fire service for a few

years thereafter working on annual contracts. Thereafter he plans to meet his financial needs by recourse to his pension and to income which he will be able to derive from carpentry work.

36. The Wife has a pension with a value as at the date of separation of \$114,222.58. It is noted that from July 2024 the Wife will be contributing at a higher rate to her pension between now and when she reaches retirement age in seventeen years. This is due to the incremental, annual increases she will obtain subsequent to qualifying as a Registered Nurse in July 2024.
37. The Wife was initially seeking a pension equalization of approximately \$35,000 from the Husband's pension. The Husband objects, citing that he has supported the Wife through her journey to becoming a Registered Nurse, which has significantly increased her earning potential and will enhance her pension over the next seventeen years. By the time she retires, her pension is estimated to reach a minimum of \$260,000, factoring in her salary increases and overtime. In contrast, the Husband's current pension is valued at \$184,000, and he expects it to grow to about \$236,000 by retirement at age 55.
38. The Husband argues that transferring \$35,000 would leave him with only \$200,000 at retirement while the Wife would benefit from an inflated pension of at least \$300,000, which he believes is unfair and would present him with significant financial hardship. Therefore, he advocates for no pension equalization order, asserting that it would be inequitable given the circumstances and lead to a financial imbalance favoring the Wife.
39. Subsequently, on the basis that the Wife adjusted the relief she is seeking in her application to require the Husband to take on all the debt of the Promissory Note which is approximately \$68,000, the Wife is no longer seeking a pension sharing order. The Wife submitted that as one half of the outstanding sum owed for the Promissory Note, i.e. \$34,000, essentially equates to the \$35,000 initially being sought as a pension sharing order as the Husband would be taking on her portion of the debt.

Motor vehicles

40. The Husband owns a motorbike purchased for approximately \$6,000 the debt for which has been settled by use of the payout of the cash value of a life insurance policy which was cashed in with both parties receiving fifty percent of the cash value of approximately \$6,500 each. The family car which is utilized by the Wife is agreed to have an approximate value of \$3,000.

THE LAW

Division of assets

41. When considering an application made under section 28 (a) of the Matrimonial Causes Act 1974 (**the Act**) for a property adjustment order, the Court is required to have regard to the check list of factors specifically listed in section 29(1) of the Act which are as follows (hereafter referred to as **the Section 29 Factors**):

“ ...

- (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 marriage 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 contributions 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 practical 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.

[Emphasis added]

42. Once the evidence relevant to the Section 29 Factors is considered, the Court must consider the tailpiece to section 29(1). The tailpiece requires that the Court 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.

43. This tailpiece no longer exists in the UK legislation but in determining what the aim of the court should be when exercising its discretion under sections 27 and 28 of the Act, the House of Lords in the *White v White* [2001] 1 AC 596 decision determined that the aim of the court is to come to a fair outcome as between the parties. At paragraph 24 of *White* we are told that the starting point is equality without discrimination between husband and wife and their respective roles within the marriage:

“There is one principal of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party If, in their different spheres, each contributed equally, to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the homemaker and the child-carer”. [Emphasis added]

44. This aim has been adopted in interpreting the tailpiece which remains in our legislation and the court has concluded that the tailpiece has the same meaning as the concept of fairness enunciated in *White*. A key feature of fairness is that there shall be no discrimination between the parties’ respective roles.
45. Whilst Counsel did not cite the House of Lords case of *Miller v Miller; McFarlane v McFarlane* [2006] UK HL24, both Counsel would be very familiar with this landmark case, particularly as both presented this case as being a “needs” based case. For the avoidance of doubt, Miller confirmed that in all ancillary relief proceedings, the objective is fairness. In distributing the assets “fairly” the court must have regard to the considerations of needs, compensation and sharing. As to needs, Lord Nicholls stated as follows in paragraph 11:

“This element of fairness reflects the fact that to a 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 obligation of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs taking into account a wide range of matters such as the parties ages, their future earning capacity, the family’s standard of living and any disability of either party. Most of these needs will have been generated by the marriage but not all of them.”. [Emphasis added]

46. Again, whilst Counsel did not make reference to this case, for the purpose of completeness, the case of *C.R.M.R v K.L.R.* [2019] SC Bda 7 the former Chief Justice Narinder Hargun

confirmed that the objective in ancillary relief proceedings is to achieve a fair outcome and that the task of the court was not affected by the tailpiece continuing to be present in Bermuda. The principles in *Miller* were also confirmed to be followed in the Bermuda Courts.

Supplemental Submissions on Mesher Orders and alternate relief available

As there is no power to require the sale of property in Bermuda under the Matrimonial Causes Act 1973 (unlike the UK), if a Mesher Order was being considered to be made, does this Court have jurisdiction to make such an order when Mesher Orders are predicated on the sale of property at the end of a defined timeframe? If so, what authorities support this? If not, can the Court make such an order under its inherent jurisdiction?

47. Mrs Marshall submitted that whilst Bermuda courts have implemented Mesher-type arrangements, the legal basis for such orders was not explored in the published decisions and as a result those cases cannot be considered in any way binding on this court. There is no express statutory authority for orders for sale whether immediate or delayed to the happening of a future event or the passage of a specific time period.
48. The case of *Minton v. Minton* [1979] A.C. 593 was relied on by Mrs Marshall in that it established that courts should aim for finality in financial settlements between divorcing couples where possible. Lord Scarman explained the public policy behind encouraging "clean break" settlements: "*The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind and to begin a new life which is not overshadowed by the relationship which has broken down.*"
49. This principle was reinforced by the Privy Council in *De Lasala v. De Lasala* [1980] 1 A.C. 546. Lord Diplock spoke of the desirability of a "clean break" as articulated in *Minton*. These decisions emphasize the finality of court-approved financial arrangements and discourage prolonged financial disputes between former spouses.
50. Both Mrs Marshall and Ms Cavanagh emphasized the importance of considering the clean break principle, reflecting the courts' aim to provide fair and final resolutions to financial disputes in divorce case. This aligns with the principle established in *Minton v. Minton* [1979] A.C. 593 and by the Privy Council in *De Lasala v. De Lasala* [1980] A.C. 546.
51. Considering the limited (if any) equity in the home, the parties' acrimonious relationship, and the need for a final resolution, a definitive property transfer order would be more appropriate

and effective, ensuring fairness and finality while allowing both parties to move forward independently.

52. Alternatively, Ms Cavanagh submitted that the Court has the inherent jurisdiction to make a *Mesher* Order which she says was demonstrated in the cases of *Trott v Trott* and *S v S* operate pursuant to the Court's inherent jurisdiction and is most recently demonstrated in *B v B* [2010] Bda L.R. 80.

If the argument is that there is no jurisdiction to make a Mesher Order, is there an alternative remedy that can achieve a similar outcome? For example, if the property is transferred to one of the parties, can a lien or charge be placed against the property which would not be realized until the expiration of a certain timeframe for the benefit of the other party? If so, should a value of the lien or charge be attached or would it be sufficient to confirm a beneficial interest in the property to the value of half of the net equity?

53. Both Counsel accepted that there are alternative remedies which can be employed to achieve a fair and equitable resolution, the ultimate aim of the court being to achieve a fair outcome to both parties.
54. One potential alternative is to order a lien or charge over the property through the court's power to make property adjustment orders, where there is equity in the home to divide. This approach would allow the court to:
- ii. Transfer ownership of the property to one party by property adjustment order; and
 - iii. Impose a lien or charge on the property in favour of the other party to be paid at a future point in time.
55. Mrs Marshall submitted (which Ms Cavanagh subsequently confirmed her agreement in responding submissions) that this option is not viable due to the following reasons:
- ii. There is very limited or nil equity currently in the FMH.
 - iii. The collapsed boundary wall requires costly repairs, further reducing any potential equity to be divided.
 - iv. Imposing a lien in a sum greater than the existing equity would be unjust, particularly as any equity created post-separation would be non-matrimonial property and not subject to division between the parties.

- v. Managing a lien over time, the value of which cannot correctly be quantified may prove complex, especially if the FMH requires significant repairs or renovations and will likely require the consent of the Bank under the provisions of the mortgage.
 - vi. Enforcing a lien could lead to future disputes over property maintenance, value fluctuations, and eventual sale terms. Such enforcement would also be subject to the consent of the Bank.
 - vii. As both parties grow older, a lien will exacerbate financial and emotional strain, hindering their ability to move forward independently particularly if the Bank refuses to release the mortgagee from the covenants under the Mortgage which itself likely precludes either party from borrowing further funds by way of mortgage to purchase alternate property. It will bind the parties both to that one property with the result that in due course neither one of them will have a home. The lien will need to be paid and in the absence of funds to do so the FMH will need to be sold. In the meantime, the other party will not be able to borrow further funds if no release from the covenants under the mortgage is forthcoming.
56. Based on the above Mrs Marshall argued that imposing a lien on the FMH would likely create more complications than benefits and would keep the parties financially connected, contradicting the clean break principle. She went on to propose that a more appropriate solution would be to transfer the FMH outright to the Husband who has demonstrated that he can assume the mortgage and the loan releasing the Wife from the covenants under the mortgage and he can restore the wall with the assistance of friends and his own sweat equity. This approach would achieve a clean break and allow both parties to move forward independently.
57. In contrast, Ms Cavanagh submitted that the more appropriate solution would be for a clean break to be gained by the Husband transferring his interest in the FMH to the Wife. Ms Cavanagh reiterated that the Wife has provided confirmation that she can remortgage the FMH into her sole name and thereby release the Husband from the current mortgage. She also reiterated the desire to for the Wife to remain caring for the children in the FMH, of which the youngest child has only ever known to be home.

If a Mesher type order is granted, or alternatively, one of the parties is required to transfer his or her share to the other party, what jurisdiction does the Court have to require the other party to vacate by either the expiration of the Mesher order or prior to the completion of any transfer?

58. Counsel submitted that under a property adjustment order where one party transfers his or her interest to the other party, an order can be made for the party who no longer holds interest to vacate the property.

FINDINGS

59. There are significant inconsistencies in the Husband's evidence as well as what appears to me to be a lack of transparency of his financial resources based on his answers in cross-examination and re-examination. On the contrary, the Wife's evidence was consistent and logical. As such, where there is conflicting evidence, I prefer the Wife's evidence to that of the Husband's.
60. As it relates to the Husband's purported continued presence at the FMH from May 2022 to February 2024, I do not accept that this is even plausible. Albeit the parties' respective employers require them to complete shift work, it is simply unbelievable that the Husband for a period of eighteen-months was attending the FMH when the Wife was working, without her knowledge, and purporting to take care of the children on those occasions. It may have been that the Husband did attend the FMH on occasion in this manner, but I do not accept that it was with such regularity that he would be deemed to have still been residing at the FMH or that he should be considered to have been caring for the children equally and jointly during this period.
61. I take particular note of the Husband returning to the FMH in February 2024 with bin liners of clothing and personal belongings. In my view, had the Husband continued to reside at the FMH he would not have had to return his belongings in such great quantity.
62. Furthermore, the sudden return to the FMH by the Husband in February 2024 appears to have been motivated by the fact that this matter was before the courts and moving towards a final determination. I accept the Wife's view that this was done in an effort to bolster his "needs" position as well as an attempt to appear as if he had been caring for the children jointly with the Wife during this period. The Husband clearly had an alternative residence with his girlfriend during this eighteen-month period. I find it to be very disingenuous of the Husband to have done this, but more importantly he has effectively placed the children of the family in the tenuous position of being caught in the parties' acrimony in a situation where findings have been made that the marriage broke down irretrievably as a result of his unreasonable behaviour towards the Wife.
63. I, therefore, find that the Wife was the primary carer of the children for the period May 2022 until February 2024 when the Husband returned to the FHM and believe that she will continue to be the primary carer for the children as soon as the parties are living separately.

64. I find that both parties have presented evidence to support their respective positions that they are both able to obtain the necessary financing to remortgage the FMH into their respective sole names.
65. Furthermore, both parties have satisfied me that they are financially equipped to maintain the FMH. As it relates to the purported estimate for the repairs to the boundary wall being in the region of \$50,000 to \$100,000, this simply cannot be accepted. The “estimate” was merely engineered by the Husband who subsequently relayed his “estimate” to the surveyor who carried out the valuation of the FMH. The Husband had ample opportunity to obtain a quote from a contractor or other such appropriate professional.
66. As it relates to the child maintenance payments, I accept that \$1,800 per month is a reasonable sum for the two youngest children of the family, i.e. \$900 per month, per child, based on the expenses presented by the Wife.
67. I believe that the Husband used the benefit of the approximately \$11,000 from the children’s Ironkids accounts for his own benefit and not for carrying out repairs or the like at the FMH. In a similar manner, had the Husband not had his bank statements analyzed by Counsel for the Wife, the Husband would at no point have disclosed the cash sums he had saved by amassing cash from various bank withdrawals.

APPLYING THE FACTS TO THE LAW

68. Bringing a fair resolution to this matter where both parties will be satisfied with the outcome is extremely challenging. Both parties have contributed to the twenty-year marriage in different ways. The Wife has primarily taken on the roles of caregiver and homemaker while also providing financial support within her means. Although the Husband was the higher earner until recently, the Wife's income has consistently been directed towards household expenses. The family's resources are described as modest, highlighting a "small money" case where the available assets are inadequate for both parties.
69. The starting point for the division of assets is that they are divided equally between the parties unless there is good reason for an unequal division. The parties have very minimal assets with the main asset being the FMH which only has a net value of approximately \$25,000 (not taking into account the repairs needed to the boundary wall) and the parties’ respective pensions.

70. A fifty-fifty division of the net equity in the FMH amounts to \$12,500 to be attributed to each party. Taking into account the need for the boundary wall to be repaired, which even though there is no proper evidence before the Court as to this cost, it is reasonable to conceive that \$12,500 will be fully utilized to carry out the repairs. This effectively leaves a Nil balance in the equity of the FMH.
71. I had initially considered that despite the Wife vacating her application for a *Mesher* Order for the FMH, that a *Mesher* Order would in fact provide the fairest outcome given the parties' respective financial positions. Envisaged was a scenario where both parties would be able to obtain a realizable equity in the FMH at the time the youngest child reached the age of eighteen years old at which time the FMH would have amassed a far greater net equity than its current net position. Both parties would have the benefit at that time to a capital asset that would have a far greater value with one retaining a fifty percent of the FMH's net equity by retaining ownership of it whilst the other would be provided a lump sum equal to its value. This would be in contrast as opposed to effectively giving one party the only matrimonial asset now which has little to no value and the other either being paid a diminutive or no lump sum.
72. Having said this, I was subsequently convinced by Counsel at their appearance on 22 January 2025 that not only is there no jurisdiction under the Act to make an order for sale which would not be enforceable until some future event, i.e, a *Mesher* Order, but that even if the Court did have jurisdiction, it would not be a fair outcome for this matter.
73. With this said, I will, however, address one point raised by Mrs Marshall in her supplemental submissions. Mrs Marshall submitted that the Court did not have the ability to make a *Mesher* Order firstly, as the application for one had been withdrawn and secondly, that the parties had not given evidence on such an application which would have been tested through cross-examination. I do not agree. The relief available under the Act, in my view, would not be restricted as there was no application for that specific relief. If the Court deems that an alternative form of relief would produce fairness, it is impossible to see that the Court would not be able to make an order in that regard. Indeed, the parties' evidence would be identical to that for the consideration of any relief being sought under either section 27 or 28 of the Act. There is no additional evidence that would be required to be submitted outside of what is relevant to the Section 29 Factors.
74. Both Counsel submitted that this is a case where a clean break should be made between the parties, particularly given the high level of acrimony between them, and I agree. Mrs Marshall suggested that the Court must determine which party is better positioned to meet the financial

obligations of the FMH. Whilst this is a logical proposition, this is not the legal test. This does not take the Court further if the Court is satisfied that both parties are in a financial position to maintain the FMH.

75. The Section 29 Factors and fairness are the principles to be applied which must also facilitate what is in the children's best interests. Both parties and the children of the family require housing. The division of the matrimonial assets cannot not fully provide for each of the parties' and the children's respective needs. The needs of the children, however, are first and paramount which requires the court to consider the impact that any ancillary order will have on the children in these circumstances.
76. In the supplemental hearing, Mrs Marshall raised the question, "Why is it that both of the parties want to retain the house?". She submitted that the Husband wishes to retain it for the garden and purports the Wife's motivation is only to prevent the Husband from having it. Even, if this were true, I do not see how this gets us any further.
77. Albeit, the current position is that the parties have interim joint care and control of the children, this does not prohibit the Court from making an order for child maintenance. Having found that the Wife was the primary carer of the children in the parties' eighteen-month separation and that the Husband only returned to the FMH based on ulterior motives, I see no reason why the Wife should not continue to be the primary carer of the children in the FMH. This is also taking into consideration that this has been the youngest child of the family's only home known to him.
78. Curiously, the Husband argues that as the Wife earns more than him now that she should be responsible for payment of the children's health insurance, yet a key factor in his argument as to why he should retain the FMH rather than the Wife, is that he says he is in a better financial position than the Wife. In any event, I accept the Wife's position that the two youngest children shall remain on the Husband's medical and dental insurance as half this cost is credited to the Husband in the calculation of the \$1,800. Additionally, I accept that the eldest child has not been included in the Wife's expenses given his largely financial independence and so it is a matter for the Husband to continue that insurance policy if he so wishes.
79. As it relates to the pension, taking into consideration the needs of the parties, given Wife's progressive increase in her earnings on an annual basis which will provide her with a greater income than the Husband for the remainder of her career, fairness would be best met with each party retaining their respective pensions with no sharing order made.

CONCLUSION

80. Having taken into consideration the Section 29 Factors and that fairness requires the Court to consider the needs of the parties and the children of the family, I grant the following relief:
- i) The Husband shall transfer his interest in the FMH to the Wife within thirty-five days from the date hereof, after which the Wife shall retain the FMH as her property absolutely, free from any claim by the Husband. The costs of the said transfer shall be borne equally between the parties.
 - ii) The Husband shall vacate the FMH within thirty-five days from the date hereof.
 - iii) The Husband shall be responsible for the payment of the monthly mortgage payment as well as the monthly payment for the Promissory Note until such time he vacates the FMH. Thereafter, the Wife shall be responsible for the monthly payments in relation to both these debts and shall in any event indemnify the Husband and hold him harmless against any potential claims regarding these debts.
 - iv) The Wife will use her best endeavours to have the Husband released from the mortgage liability secured against the FMH and shall have the existing mortgage with the bank remortgaged into her sole name within three months from the date hereof unless it is possible to incorporate the said remortgage at the time the Husband transfers his share to the Wife.
 - v) The Wife shall retain the contents of the FMH as hers absolutely, including the furnishings and appliances, save that the Husband shall remove his personal belongings upon vacating in accordance with paragraph ii) above.
 - vi) Each party shall retain his and her respective pension policy as his and hers absolutely, free from any claim by the other party.
 - vii) The parties shall retain his and her respective motor vehicles in their sole name as theirs absolutely, free from any claim by the other party.
 - viii) The Husband shall pay child maintenance to the Wife in relation to the two youngest children in the sum of \$1,800 per month, i.e. \$900 per month, per child. This shall be effective from the date the Husband vacates the FMH and shall be payable on the 1st of each month thereafter until such time the determination of the

Wife's application for sole care and control of the children or until further order of the Court.

- ix) The Husband shall continue to be responsible for the children's health and dental insurance which shall be maintained under his current policy until such time as the determination of the Wife's application for sole care and control of the children or until further order of the Court.

COSTS

- 81. It is trite law that the starting point for family cases, is that there should be no order as to costs. In this case, I see no reason why this usual order should not be made. I therefore, order as such. Should the parties, however, wish to be heard separately on the issue of costs, the Court must be notified within seven (7) days from the date hereof of such a position. Thereafter, it will be considered if court hearing would be required or if the application can be determined on the papers. Either way, Counsel are asked to provide a brief accounting of their respective fees in order that costs can be summarily assessed so as to avoid further costs being incurred by the parties in taxation proceedings.

DATED this **31st** day of **January 2025**



ALEXANDRA WHEATLEY
ACTING JUSTICE OF THE SUPREME COURT