



In The Supreme Court of Bermuda
DIVORCE JURISDICTION
2017 No: 33

BETWEEN

CIC

Petitioner

-and-

KLC

Respondent

JUDGMENT
(In Chambers)

Ancillary Relief – division of matrimonial assets – fair outcome for both parties to proceedings – section 29 of the Matrimonial Causes Act 1973 – matrimonial gifts from third parties – marital and separate property.

Date of Hearing: 17th and 18th April 2018

Date of Judgment: 23rd July 2018

Mrs. Georgia Marshall, Messrs. Marshall Diel & Myers Ltd., Attorneys for the Petitioner
The Respondent appearing as Litigant-in-Person

Introduction

1. This judgment consists of 89 paragraphs. Pseudonyms have been used for all of the relevant names of people places and any businesses.
2. By way of Notice of Application for Ancillary Relief dated 18 August 2017, the Petitioner (“the Wife”) seeks periodical payments for the one child of the family lump sum provision, and a property adjustment order in relation to the former matrimonial home (“the FMH”).

3. The Wife's application is supported by two affidavits, the first of which was sworn on 18 August 2017, and the second, sworn on 6 October 2017. The Respondent ("the Husband") has likewise sworn two affidavits in relation to this application. The first was sworn on the 8 September 2017, and the second, on 23 October 2017.
4. By Order dated 30 November 2017, the Wife was granted leave to file a third party affidavit; that of her father sworn on 18 August 2017.
5. On 11 December 2017, the Husband by way of Notice of Application for Ancillary Relief filed a cross application seeking the following :-
 - i. A 50/50 split of nursery fees due in respect of the one child of the family until the school year falling on or about August 2018;
 - ii. A lump sum representing nursery fees already paid by the Husband at the rate of \$600 per month as from April 2015;
 - iii. An Order dispensing with periodic payments for the one child of the family;
 - iv. Maintenance payments or lump sum provision in respect of the one child of the family;
 - v. A pension sharing Order; and
 - vi. A property adjustment order in relation to the former matrimonial home, namely (i) the sale of the former matrimonial home and lump sum provision upon division of the net equity remaining in the property or (ii) if the former matrimonial home is transferred to the Wife, a lump sum in respect of the net equity in the property.
6. Both parties' applications were listed simultaneously where, at the hearing, oral evidence was heard from both parties, and the Wife's father.

Background

7. The parties experienced love at a young age. The Wife was 18 years old when she first started dating the Respondent. The Wife is now 32 years old and the Husband is 40 years.

They married in 2009 having previously lived together some six years prior to the marriage.

8. However, throughout the period of living together, and during the subsequent marriage, the Wife and Husband were each employed full time. In addition to working full time, the Wife managed the day to day operations of the FMH. The Wife's mother often assisted the parties with the chore of cooking. The Wife is an administrator and the Husband is a self-described 'top end tradesman'.
9. Their union produced one child of the family. Whilst the Wife and Husband worked full time, the Wife's mother cared for the child. At the age of three years, the child was enrolled in a fee paying nursery. Up until recently, the Husband paid the associated nursery fee. The child is now 5 years old and will commence public primary school in September 2018.
10. Unfortunately, difficulties arose and the marriage broke down. The Wife petitioned the Court for divorce and Decree Nisi was pronounced in June 2017. It was made absolute in August 2017. The Wife and Husband were granted joint custody of the one child of the marriage.
11. It is accepted that throughout the parties 14 year relationship the Wife's father from time to time assured her certain lifestyle comforts. To this end, the Wife's father refurbished fixtures and replaced 'old and decrepit' furnishings in the Husband's one bedroom rental apartment upon the cohabitation of the parties.
12. Nor, is it disputed that once married, the Wife's father, from time to time, provided the Wife and Husband with amenities such as monies for the purchase of a second hand motor car, annual overseas vacations to his overseas home and unfettered access to an assortment of marine pleasure crafts.

13. In fact, it is accepted that in 2010 the Wife's father provided in excess of \$375,000 to offset the purchase price and associated closing costs of the FMH.
14. As at the hearing of the applications, the parties continued to reside together in the FMH with the one child of the family.

The Law

15. The Court's jurisdiction to grant ancillary relief is governed by the Matrimonial Causes Act 1974 ("the Act"). In particular, Sections 27 and 28 of the Act confers on the Court a discretionary power to make certain specified financial orders following divorce proceedings.
16. When deciding what, if any, financial order to make, Section 29 (1) of the Act imposes a duty on the Court to "*have regard to all the circumstances of the case*", including the statutory factors set out at paragraphs (a) to (f) of the section.
17. The Act obliges the Court to exercise its powers to achieve the statutory objective. Section 29(1) of the Act provides the following:-

"Matters to which court is to have regard in deciding how to exercise its powers under ss.27 and 28

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—

...

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."

18. In *Green v Green* [2001] Bda LR 67, *Meerebux J* held that whilst the aforementioned 'tailpiece' in our Section 29 (1) no longer exists in the UK legislation, the objective is the same; that is to achieve a fair outcome.

What is a fair outcome?

19. Lord Nicholls of Birkenhead in *White v White*, [2001] AC 596, went on to qualify the term “fair outcome”. He said this at paragraph 24 of the judgment:

“There is one principle 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”.

20. Lord Nicholls went on to state:

“A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always 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 is good reason for doing”.

21. However, in *Miller, McFarlane* [2006] UKHL 24 Baroness Hale expounded on the principle of “fair outcome” by clarifying at paragraph 136 that:

*“... the House was careful to point out [in *White v White*] (see p 605f) that the yardstick of equality...did not inevitably mean equality of result. It was a standard against which the outcome of the section 25 exercise was to be checked. In any event, except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, equality of outcome is difficult both to define and to achieve”.*

22. Whatever the assets, the nature, their source and the parties' contributions to such assets are matters to be taken into account when determining the requirements of fairness.

What are the Assets arising from the marriage?

a) *The FMH:*

23. The FMH was purchased in the joint names of the Wife and Husband. The purchase price was \$750,000. The home is subject to a mortgage outstanding in the sum of approximately \$395,846.90. The monthly mortgage payment is \$2,963.00 and the maintenance fees are some \$350.00 per month.
24. The Wife and Husband by Consent Order dated 12 September 2017, agreed to jointly instruct a valuation of the FMH. The jointly instructed appraisal described the home as a two storey 2 bed, 2 ½ bath condominium. The unit has air conditioning throughout and presents in good condition. The appraisal valued the FMH at \$575,000 as at October 2017.
25. The Husband disputes this value and at the hearing produced an alternate property appraisal which valued the FMH at \$625,000.00 as at December 2017.

b) *The Wife's Motor Car:*

26. The Wife owns a motor car which was purchased for her by her parents in 2014 for the purpose of transporting the child of the family. While there was no evidence as to the purchase price of the vehicle, the vehicle's current approximate value is \$19,620.00.

c) *The Husband's Truck:*

27. During the relationship the Husband purchased a truck at a price of \$20,000.00 in his sole name from monies advanced by the Wife's parents. This vehicle was subsequently wrecked in a collision. The Husband received an insurance pay out of approximately \$25,000.00. Out of these proceeds the Husband used \$6,000.00 to purchase a recreational

boat for his business and family enjoyment. The balance was retained by the Husband and used to pay his personal debts and miscellaneous expenses of the family. No evidence was produced as to the value of this truck.

d) The Husband's Motorbike & Boat:

28. The Husband also owns a motor bike and a boat. No evidence was provided confirming the value of these vehicles.

e) The Husband's Business:

29. In or about 2006, the Husband, with the support of the Wife, established a business. The business is owned 50/50 with the Husband's brother. According to the Husband, his mother is responsible for preparing the financial records and paying the financial liabilities of the business including payroll, insurance and other government taxes. The business employs three to five full-time employees and has regular occasional workers for whom government taxes are not paid. The Husband did not disclose evidence as to the value of the business.

f) Savings/Colonial Investments:

30. The Wife and Husband each contend that they currently have minimal, if any, savings and or investments. They each acknowledge having cashed in various investments and used the sums received for personal debts and other expenditures.

The Parties' Positions

The Wife's Position:

31. It is the Wife's position that a fair outcome would permit her to retain the FMH, and its net equity. In furtherance thereof, she contends that her father provided in excess of \$375,000 toward the purchase price of the FMH so that the financial obligation of the Wife and Husband was one that they could jointly meet. The Wife contends that these moneys were a gift to her.

32. The Wife asserts that she and the one child of the family require a ‘roof over their head’, which is consistent with her father’s purpose in gifting the money toward the purchase price of the FMH.
33. The Wife makes no claim on the Husband’s business, truck, boat or motorbike. However, she contends that the Husband’s failure to provide sufficient evidence as to the financial position of his business, including taxes paid to the government, is a matter which the court ought not to disregard. The Wife contends that the Husband’s business thrived during the marriage and continues to thrive with well-established corporate clients.
34. The Wife asserts that the total net equity in the FMH is some \$139,700 and produced the following calculation in support of her position:

The current FMH value of:	-	\$575, 000.00
Less:		
(a) The costs of sale namely:-		
• 50% conveyance fee	-	\$ 3,050.00
• 50% stamp duty fee	-	\$ 8,500.00
• Realtor’s commission	-	\$ 28,750.00
		\$ 40,300.00
Less:-		
(b) The outstanding mortgage:-		\$395,000.00
Net Equity:		\$139,700.00

The Husband’s Position:

35. At the hearing, the Husband amended his position as he no longer wished to pursue his claim against the Wife’s motor car, nor did he wish a 50/50 split of the contents of the FMH. However, he remained steadfast asserting his primary position; whereby he

contends that the provision of stretch limousines upon arrival at US airports, unfettered access to powerful race boats and other marine pleasure crafts, annual all-expenses paid overseas vacations and monies provided by the Wife's father throughout the 14 year relationship, were all gifts for the benefit of the marital union. The Husband contends that he became accustomed to what he subjectively believed to be "the lavish lifestyle" of the Wife's father.

36. Moreover, the Husband contends that even if the \$375,000.00 was a gift intended solely to the Wife, he asserts that such a gift in any event converted to matrimonial property and that he is entitled to 'his share' upon the division of the matrimonial assets.
37. The Husband's position is that a fair outcome would be an Order that the FMH be sold and that he receive 50% of the net equity.

Issues arising for Determination

38. It is well established that the court should always attempt to distinguish between matrimonial and non-matrimonial property. However, in modest or 'small money cases' in which there are limited or no surplus resources (including income), the Court's primary function is to conduct a fair assessment of the minimal future needs of each party and those of any children of the family.
39. On the facts of this case, I am satisfied that the resources of these parties are modest. In the circumstances, the primary issue(s) for determination is the manner in which the Court should exercise its discretionary power to meet the needs of each party, including the one child of the family, in circumstances where the primary matrimonial asset namely the FMH, consists of or reflects substantial monies received from a source external to the marriage.
40. It is noteworthy to mention that the Matrimonial Causes Act 1973 does not empower the Court to order the sale of the FMH. Nor, does the Act make provisions in relation to the

sharing or splitting of pension funds. Consequently, this Court has no jurisdiction to grant this aspect of the Husband's application, and so is refused upon that basis.

The Section 29 (1) Factors in this Case

41. I shall only refer to some elements of the evidence during the course of this judgment, but I have taken all evidence admitted into account when determining how to exercise my powers.
42. As to the Wife's income, her evidence is that she has no other income apart from her current two year contract of employment. Effective 1 April 2018, the Wife's salary is \$72,000 per annum at the net rate of \$5,700 per month. This contract ends February 2019.
43. The Husband's affidavit evidence regarding his salary is that he earns \$32,000 annually paid via cheque at the rate of \$2,700 per month. The Husband denied that he had any other income.
44. When pressed during cross examination the Husband admitted 100% of his deductibles are paid by his business. Additionally, he admitted that his monthly liabilities including credit card, cellular phone, vehicle licences and insurance, vehicle fuel, and his daily lunch expenses were all paid on his behalf by his business. Further, the Husband stated "*yes, I take money from the business as and when I need it*". The Husband went on to admit that clients would often pay for his services directly into his sole account and or via cash in hand instead of depositing fees for services into his business account. The Husband said that this was not an unusual occurrence.
45. The Husband vehemently denied that he or his business was "rolling in dough", though admitted without explanation, that for the purposes of payroll tax remittance he only declared a notional salary.
46. The Wife's father stated in his affidavit evidence that:

“In or about March 2010, I gave my daughter a gift of \$300,00 [sic] to assist her with the purchase of a home.....The money was intended as a gift for my daughter...so that I could ensure that she and my future grandchildren would have a roof over their head thereby providing them with home security. The {Husband} has always known this as I made it clear at the time of my gift to my daughter. Moreover, I wrote a letter indicating that the \$300,000 was by way of a gift to my daughter only.

47. The letter to which the Wife’s father refers was exhibited to his affidavit. The letter had a facsimile date of 12 March 2010, which reads as follows:

“This letter is to confirm that I {‘Wife’s father’} am gifting my daughter {‘CIC’} \$300,000 to assist with the purchase of...”

48. During his oral evidence, the Wife’s father confirmed that he had on occasion advanced money to the Husband. He stated:

“Yes, I advanced {the Husband} \$20,000 for a truck...I asked him how he would pay me back. He said \$1,000 per month. He paid me \$900 one time. No, I did not chase him for the money. I was too embarrassed to ask him for my money. Yes, the truck was totalled. Yes, he got \$25,000 from the insurance. He never gave me any money. I said “this guy is greedy”. I spoke to my wife often about this”.

49. The Husband did not challenge this evidence. When questioned about the money provided toward the purchase price of the FMH, the Wife’s father unequivocally stated:-

“Yes, I wanted my daughter to be safe and comfortable. I’m pretty sure that {the Husband} knew my gift was to my daughter not to him”.

50. Under cross examination by the Husband, the Wife’s father said:-

“My daughter came to me asking for money.... No, I never came to you and {my daughter} after the engagement to say I would gift you a deposit for a marital home. The deposit was not a wedding gift for the two of {you}.....No, I did not gift {you} money. I gave

{you} trips, a scrambling truck overseas... I thought you were an honest man. You were always looking for money."

51. In the Wife's affidavit evidence regarding the purchase of the FMH, she stated that:-

"My parents gifted to me the sum of \$300,000 plus the closing costs relating to the purchase of the property. The Respondent and I took up a mortgage of \$450,000 for the balance of the purchase price. The Respondent did not provide any financing toward the purchase of the home".

52. The Wife's oral evidence was that the value of FMH depreciated some \$200,000.00 since its purchase in 2010.

53. The Husband's affidavit evidence is that the Wife is:-

"...attempting to low ball the value to discourage {his} quest for the net equity...The Petitioner is suggesting that I disregard the contribution I have made toward the matrimonial home during the last seven (7) years and simply walk away leaving her to benefit from the equitable value...The Petitioner fails to acknowledge the undue hardship both I and our son may face in our transition from the standard of living enjoyed in the marital home".

Veracity of the Evidence

54. Before making any findings of fact, it would be appropriate to make a few observations as to the veracity of the witnesses.

55. I consider the Husband and Wife both genuine insofar as their evidence concerning specific lifestyle comforts and financial supports provided, from time to time, by the Wife's father during their 14 year relationship. Moreover, each acknowledged that such comforts and supports were indeed the fruits of the Wife's father's labour during his glory days and in no way the product of their marital effort.

56. I have no doubt that the Wife's father overcame many socio-economic obstacles to enable him to generously provide for his wife and children. In my observation, the Wife's father was a principled man and held the sanctity of marriage close to his heart. I consider the Wife's father to be a reliable and honest witness.
57. The Wife was straightforward in her evidence and settled in demeanour. Although, her evidence regarding the parties living arrangements within the FMH was puzzling. Nevertheless, I consider the Wife a reliable witness.
58. The husband was less than straightforward in his evidence. His demeanour was to a certain extent, uneasy. This may well have been in part to the fact that he appeared without the organization and guidance of legal counsel.
59. Interestingly, the Husband's unsettled childhood was a consistent thread throughout his submissions to the Court. I believed the Husband's childhood recollection of having resided in every parish at the benevolence of the parish or governmental assistance. I empathise with the Husband's childhood experiences and the consequential impact on his acumen.
60. Under cross examination, the Husband appeared somewhat naïve in his approach to the financial operations of his business. At other times, he appeared outright evasive.
61. I am not certain whether the Husband intended to mislead the Court, or simply did not appreciate the need to comply with the Order of this Court, which compelled him to disclose the records of his business. All parties to proceedings have a duty to assist the Court to further its overriding objective to achieve a fair outcome. *The Rules of the Supreme Court 1985* do not distinguish between represented parties and litigants in person.

62. Even so, in its search for a fair outcome, this Court made many allowances for the Husband during the conduct of the hearing. I still find that the Husband is not a witness with whom much reliance can be placed.

Findings on the Evidence

63. I have had regard to all the circumstances of this case including the matters specified in paragraphs (a) to (g) of Section 29(1) of the Act, as well as the relevant case law. I am satisfied that justice can be achieved by taking a relatively broad approach.

64. The essential search in these matters is for fairness. On the facts of this case, it is important to bear in mind that notwithstanding having each enjoyed fulltime employment during the six years of living together prior to marriage, neither the Wife nor the Husband brought ‘one red cent’ into the marriage other than their earnings.

65. In my view, the parties enjoyed a moderately long relationship including eight short years of marriage within which a healthy child was born. The relationship and marriage were coloured with artificial ‘bling’ lifestyle choices coupled with a breath-taking sense of entitlement.

66. In relation to the provision of child care, the parties’ choices were surprisingly realistic and, in my view, adequately met the emotional and physical needs of the one child of the family. I am satisfied on the evidence that the Wife throughout the marriage has been the primary care-giver of the child.

67. Like most marriages in Bermuda, the FMH was the cornerstone of the parties’ marriage, and to some extent, reflected their marital standard of living. Putting the artificial ‘bling’ lifestyle choices aside, the parties, in my view, enjoyed a marital standard of living that was a ‘good start’ in Bermuda.

68. Likewise, I am certain that this ‘good start’ was solely afforded as a result of the generosity of the Wife’s father. I am equally sure that the financial contribution made by

the Wife's father toward the purchase price of the FMH, raised the standard of living experienced by the parties during the six years of pre-marital cohabitation in the Husband's rental accommodation.

69. However, I reject the Husband's contention that he is now somehow entitled to a standard of living equal to the lifestyle gifts provided by the Wife's father during the relationship. In my view, to use the Wife's father's gifts as a benchmark for the Court's consideration of the Husband's needs post-divorce, would be unfair on the facts of this case, and astonishing considering the Husband accepted the Wife's father's evidence, whereby a loan(s) were advanced to the Husband with the expectation of repayment, and the Husband having not made good his obligations to the Wife's father.
70. The sobering reality of these parties is that the fruits of the Wife's father's labour are not resources either of them have, or are likely to have, or are entitled to have in the foreseeable future.
71. I have no doubt that during the marriage the Wife and Husband equally contributed toward the household expenses, which incorporated the monthly utilities, groceries and mortgage obligation. I therefore treat the parties as having made equal financial contributions to the reduction of the mortgage obligation. I am satisfied that the mortgage has been reduced by approximately \$55,000.
72. I am satisfied on the parties' evidence that thereafter they each retained separate their respective remaining income to meet their own personal expenses.
73. I am further satisfied from the information disclosed pursuant to the Court order, that the Husband's business routinely paid his monthly credit card balances, health insurance, social insurance, pension, and other governmental taxes on behalf of himself and other employees. Notwithstanding this documentary evidence, the Husband maintained that the business did not keep "sophisticated records" of its monthly or yearly income and

expenditures, and that the business did not have the financial ability to obtain an assessment of its current value. I find this contention less than persuasive.

74. Furthermore, I am not persuaded by the Husband's evidence regarding his lack of competence in Quick Books software, as reason for his failure to make full disclosure of his business records in the proceedings. In my judgment, this leads me to believe that the Husband did not want the Court to form a full picture of his financial position.
75. Consequently, I reject the Husband's evidence that his available income is limited to \$2,700.00 per month. I am more than satisfied that this sum was the Husband's notional wage for the purposes of employment tax obligations. I have no doubt that the Husband has more available income and that such income is more than sufficient to meet his current rental accommodation needs and other related monthly living expenses.
76. Additionally, I am satisfied that the Husband stands to benefit from the continued future income and profits of his business. In contrast, the Wife's contract of employment soon expires. Her future income is therefore far from certain.
77. In respect to the current value of the FMH, I agree with Counsel for the Wife that where a party contends that the valuation provided by an expert appointed under an Order of the Court was vitiated by fraud, collusion, bias, mistake or professional negligence, it would be open to that party, at the risk of costs, to raise that issue before the Court. In the absence of a vitiating factor, the parties would be bound by the value as found by the expert appointed under the Court's Order per the Court of Appeal in *N v C (Property Adjustment Order: Surveyors Negligence [1998] 1FLR*. The Husband has not established any such vitiating factor.
78. Consequently, I find that the Husband and this Court are bound by the jointly instructed assessment obtained pursuant to the Order of the Court dated 12 September 2017. In my view, fairness requires parties to proceedings to stick with what was mutually agreed upon and so ordered.

79. I therefore find that the current value of the FMH is approximately \$575,000.00 as reported in the jointly instructed valuation assessment. Furthermore, I accept the Wife's evidence that the FMH has depreciated in value since its purchase in 2010 and that the net equity is currently some \$139,700.00.
80. I am satisfied on the evidence of this short eight year marriage that the approximate \$375,000.00 provided toward the purchase price of the FMH still possesses the characteristics of a gift from a source external to the marriage. In this regard, I accept the Wife's father's evidence that the money was a gift to his daughter only so that she and his future grandchildren will always have a roof over their heads.
81. I find that the overall percentage value of the gifted money to the Wife has not diminished much at all. Thus, in my judgment an equal division of the net equity in the FMH would not be fair. As a result, it would follow that the Husband's application insomuch as a request for an Order that the net equity in the FMH to be equally divided is hereby refused.
82. In my view, a fair outcome having considered all the circumstances and the statutory factors must reflect the greater financial contribution that the Wife has made to the FMH, and the fact that she and the child of the family are in need of a roof over their heads.
83. Applying the principle of need, I therefore order the transfer of the FMH to the Wife together with the net equity save that the Wife must pay to the Husband a lump sum representing 50% of the sum by which the mortgage has actually reduced as at the date of the Husband's last contribution to the mortgage obligation.
84. The parties shall equally share the conveyance costs.
85. Given the parties ages, each shall retain their respective pensions without adjustment to the other.

86. In respect of the child of the family, I reject the Husband's assertion that the Wife should repay him nursery fees already paid by him at the rate of \$600 per month as from April 2015. On the facts of this case, this Court finds such a position particularly abhorrent. Throughout the Husband's evidence, he was rather vague on matters concerning the financial position of his business, yet with nearly exacting precision was able to account for the financial contributions he has made toward the welfare of child of the family. Fairness does not permit the Husband to have it both ways.
87. On an optimistic note, I am satisfied that moving forward the Husband shall continue to pay in full the sum of \$1000 per month representing the nursery expense of the child of the family. Upon the child commencing public primary school this sum shall continue to be paid by the Husband to the Wife by way of contribution to the child's direct and indirect expenses until further Order of the Court.
88. In my judgment for the reasons previously stated, this award is in line with the legal principles binding on this Court and represents a fair outcome in all the circumstances whilst giving proper weight to the factors in section 29 (1) of the Act.
89. I shall hear the parties as to costs.

Dated this 23rd day of **July 2018**.

The Hon. Ms. Justice Nicole Stoneham
Puisne Judge

