# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 15 of 2011**

Between:

**TAWAUNA MANICK ASTWOOD**

*Appellant*

**-v-**

**JEROME CHRISTOPHER ASTWOOD**

*Respondent*

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**Before:** **Zacca, President**
**Ward, J.A.**
**Auld, J.A.**

**Appearances:** Ms Keren Lomas for the Appellants
Ms Karen Williams-Smith the Respondents

**Date of Hearing:** **19 June 2012**
**Date of Judgment:** **8 November 2012**
**Reasons for Decision:**

**Reasons for Judgment**

**WARD, JA:**

1. On 19 June 2012 we made an Order that the appeal be allowed in part, that the Petitioner be awarded a lump sum of $330,000, that the Petitioner be at liberty to apply to the Supreme Court for periodical payments for the child of

the family for whom the Respondent pays at present the sum of $450 per month and to whom the Respondent has liberal access every other weekend.

2. We awarded one-half of the costs of the appeal to the Petitioner and made no change in the Order for costs in the Supreme Court.

3. We now give the reasons for our decision.

4. This is an appeal against the Judgment of Simmons J dated 14 October 2011 in which she awarded the Petitioner a lump of $250,000 payable within 90 days with no order as to costs.

5. By an Amended Petition dated 21 May 2010 the Petitioner prayed that she may be granted for the benefit of herself and the one child of the family periodical payment orders, lump sum provision and a transfer to the Petitioner of the Respondent's interest in the property situate at 8 Sunset Strip in Pembroke Parish or such other property adjustment order as the Court should deem just and reasonable.

6. The learned judge treated the application for the transfer of the above real estate as a bold and ambitious attempt by the petitioner to lay claim to property to which she was not entitled. Simmons J found as a fact that the lot of land on which the matrimonial home was later built was a gift to the Respondent alone from his father and grandfather prior to the marriage. Any belief which the Petitioner might have had that the lot of land might have been gifted to her and the Respondent jointly was not supported by the evidence.

7. The parties were married on 3 August 2002 when the Petitioner was 23 years old and the Respondent was 26 years old. There is one child of the family who was born on 28 June 2006. Decree Nisi was pronounced on 25 May 2007 and Decree Absolute on 17 July 2007. The marriage lasted for less than five years and the parties cohabited for a little less than four years.

8. A Consent Order of 12 April 2007 was made an Order of the Court on the making of the Decree Nisi when the parties were working in harmony and consulting the same attorney. Two years later after certain tensions had developed between the parties the Consent Order was set aside on 18 June 2009. The Respondent remarried on 20 July 2010. The parties are now represented by separate attorneys.

9. At the time of the making of the Consent Order the Petitioner seemed to be interested in a car to drive and the continued support of the child of the family. For his part the Respondent retained the boat and continued to reside in an apartment at the matrimonial home.

10. Now the matrimonial home has become the bone of contention. The Petitioner would like it to be sold and to be paid one-half of the proceeds of sale.

11. The two-apartment building, the upper part of which was the marital home was erected with financing from the bank, HSBC, where the Petitioner was employed and where she enjoyed certain benefits as a result of her employment. She was a guarantor of the loan and, as a result, the parties obtained a benefit in the sum of $67,939.37 by paying a lower interest rate until July 2008 when the rate of repayment increased from $3739 per month to $4,138.35 per month. Prior to May 2009 one apartment only was rented at the rate of $3,600 per month. After May 2009, if both apartments were tenanted, the rental yield would have been $7,400 per month less the commission payable to the rental agent.

12. There are two valuations of the property based on the estimated value in July 2006. The first is by DeCouto and Dunstan Realtors, dated 25 September 2009 in the sum of $1,200,000, which value is based on sales of comparable properties. The second is from a Chartered Valuation Surveyor from Bermuda Realty dated 23 March 2011, pursuant to an Order of the Registrar, which

gives a value of $1,425,000. No reference is made therein to sales of comparable properties.

13. As the learned judge wisely observed in paragraph 51 of her Judgment, one should not ignore current market conditions with which the Respondent would have to deal in attempting to meet the lump sum award. Evidence of such conditions would have been instructive.

14. The insured value of the property is $900,000. Unfortunately Simmons J did not say what value she accepted in calculating the respective shares of the parties.

15. The Petitioner applies for a lump sum of $493,220, described as being one-half of the assets available for distribution. It is a claim for fifty percent of the equity in the matrimonial home using its highest estimated value and the value of the boat. Or, alternatively, the Petitioner applies for a lump sum of $250,000, as ordered by the Judge and $1,500 per month periodical payments for her and $1,200 per month for the child of the family in place of the present Order of $450 per month.

16. The learned judge treated the application by the Petitioner as one for a lump sum. She did not address the question of periodical payments. We agree that it was a case suitable for the application of the principle of the clean break. The parties cohabited for three years and eleven months. The Decree Absolute was pronounced after four years and eleven months. Where, as in this case, the reasonable requirements of the Petitioner can be met through the payment of a lump sum by the Respondent, that course should be followed. For, as stated by Balcombe J. in *Tommey v Tommey* Times Law Report March 12, 1982, there must be an end to litigation and matrimonial courts should encourage the principle of the clean break.

17. Counsel for the Petitioner had argued that there had been a previous agreement that the Petitioner would enjoy the benefit of the rent from one

apartment and the Respondent the rent from the other. The learned judge never accepted that alleged agreement, and we think rightly so. In paragraphs 48 and 49 of her judgment she observed that the claim by the Petitioner for a half share of the net value of the whole property derives its root from a misapplication of the principles stated in White v White (2001) 1 A.C.596.

18. By letter of 12 October 2009 the Respondent made an offer of $150,000 to the Petitioner in full settlement of her claim. She demanded considerably more.

19. Simmons J. does not set out in detail how she arrived at the figure of $250,000 as the correct sum for the Petitioner in order to produce a fair result as a percentage of the whole. Had she done so, it would have made the task of this Court in reviewing it less onerous. We are unable to say from a perusal of the Judgment, which valuation the judge accepted or whether the lump sum arrived at was 30%, 35% or 40% of the assets available for distribution. We express the view that 40% is the maximum which the Petitioner could have obtained in the circumstances of this case. It is interesting to observe that the award of a lump sum on appeal would be $80,000 more than that awarded by the judge, which is the approximate difference likely to accrue to the Petitioner if the higher valuation from Bermuda Realty is the basis of the calculation. We venture to say that that valuation should have been tested by cross-examination. The Respondent is still indebted to the Bank in excess of $500,000 and it would not be fair to burden him by requiring him to pay a lump sum greater than that ordered on appeal, which figure was only arrived at after we felt constrained to accept the higher valuation of the real property in the circumstances of this case.

20. Simmons J. wrote that her aim was to place the Petitioner in a position where she could purchase a home for herself and the child of the family and concluded in paragraph 54 that $250,000 was sufficient for that purpose based

on the reasonable requirementsof the Petitioner and on the Respondent's ability to find the lump sum.

21. Simmons J. found as a fact, with which we agree, that the land on which the building was erected was contributed by the Respondent alone. As stated by Lord Nicholls of Birkenhead in *White v White* supra at page 610EF

> *"Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely the other spouse has a weaker claim to such +property than he or she may h.ave regarding matrimonial property."*

Bearing in mind the duration of the marriage it is not a proper case where equality is equity and a 50/50 division would not be appropriate.

22. Counsel for the appellant submitted that White v White supra transformed the Court's approach to cases concernedwith the financial aspects upon divorce and that the principle that the Court should follow is that marital property is to be treated with equality in mind and be shared equally between the parties.

23. We do not read *White v White* as having that effect. It is not an authority in support of the principle that all matrimonial property should be divided equally such an approach would be to nullify the effect of the considerations listed in section 29 of the Matrimonial Causes Act 1974. It teaches that one should strive for a fair outcome and that there is no place for discrimination as to respective roles. Further a departure from equality should only be made with good reason.

24. The Petitioner gave evidence of what she thought the parties had agreed with respect to the matrimonial home. She appears to have treated it as a purely business investment. She understood that they would both move out,

that both apartments would be rented, that she would receive the rent from one apartment while the Respondent received the rent from the other and ultimately the property would be given to the child of the family. The learned judge did not accept that there was any such agreement. Marriage is not an easy road and to reap its full benefits one must enter it for the long haul and endure.

*Signed*

Ward, JA

*Signed*

Zacca, P

*Signed*

Auld, JA