



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2015 No: 108

GINA VERONICA MINKS

Petitioner

-and-

EARL KENNETH MINKS

Respondent

JUDGMENT

(In Chambers)

Ancillary relief – Matrimonial Causes Act 1974 ss 27, 28 and 29 – matrimonial property – whether wife should be awarded interest in matrimonial home acquired by husband prior to marriage – whether property adjustment order – whether periodical payments

Date of Hearing: 4th and 5th April 2016

Date of Judgment: 6th April 2016

Mr Adam Richards, Marshall Diel & Myers Limited, for the Petitioner

Mr Jai Pachai, Wakefield Quin Limited, for the Respondent

History

1. In this judgment I shall refer to the Petitioner/Wife as “W” and the Respondent/Husband as “H”. This is the substantive hearing of the prayer for ancillary relief contained in W’s Petition for Divorce dated 16th October 2015.
2. W and H were married on 22nd December 1995. A Decree of Judicial Separation was pronounced on 29th January 2016. The marriage lasted some twenty years. It is common ground that the marriage was a stormy one during which at times the parties were separated. W left the matrimonial home for good in July 2015.
3. On 10th November 2015 the Registrar ordered that H should pay W interim maintenance of \$500 per month for November and December 2015. On 15th December 2015 the Registrar ordered that from January 2016 interim maintenance should be increased to \$1,500 per month.
4. There are no children of the marriage, although both parties have adult children from previous marriages. W looks after her granddaughter who is aged five years, and of whom H is very fond.
5. W is aged 57 years. She has a serious medical condition as a result of which she has been unable to work since August 2011. I am satisfied that it is unlikely that she will ever be able to return to work. She receives \$3,507.95 per month in disability payment from her employer. This will cease when she reaches the age of 65. She will then be reliant on her government pension, plus a small private pension with a current vested amount of \$58,000. In retirement her income will thus be much reduced.
6. W assesses her monthly expenses at \$5,258. She has debts of some \$64,844. These comprise legal fees of an estimated \$46,000; credit card debt of \$8,070; and debts to her mother and brother of \$10,774.

7. H is aged 76 years. He used to earn his living as a fisherman. He continues to fish, but chiefly as a past-time. Although his evidence on this point was not entirely consistent, I find that he earns enough from fishing to cover the cost of fuel for his boat, and possibly a bit more in summer, but that such earnings are likely to be quite small.
8. H's receives sporadic rental income of \$2,500 per month from letting out rooms in the former matrimonial home in St George. The property has been divided into four apartments. H lives in one of the apartments and his son, daughter and grandson respectively live in the other three. The son and grandson pay rent, although they are two months behind with their payments, whereas the daughter pays the Land Tax for the three rental apartments. H is also in receipt of a monthly pension of \$451.08.
9. H estimates that his monthly expenses come to \$3,063. This is without taking into account the monthly periodical payments of \$1,500. He has been able to meet those payments and it was not suggested that they have caused him financial difficulty. On cross-examination, it appeared that the figure of \$3,063 may be an over-estimate.

The law

10. The relevant principles regarding ancillary relief are in most respects well established. The starting point is the Matrimonial Causes Act 1974 ("the 1974 Act"). The Court has power under section 27 to make financial provision in connection with divorce proceedings and power under section 28 to make property adjustment orders.
11. Section 29 provides that it shall be the duty of the Court in deciding whether to exercise its powers under sections 27 and 28, and, if so, in what manner, to have regard to all the circumstances of the case, including the various matters specified in the section. I need not set

- them out, but I have regard to them all. In the present case, the most important factor is the financial needs and obligations which the parties to the marriage have or are likely to have in the foreseeable future.
12. Section 29 contains a legislative steer requiring the Court to exercise these powers so as to place the parties, so far as it is practicable and just to do so, in the financial position in which they would have been if the marriage had not broken down and they had properly discharged their financial obligations and responsibilities towards each other. In this case, sadly, as in many others, both parties will be in a worse financial position as a result of the divorce that they would have been had they remained together.
 13. There is a substantial body of relevant case law on ancillary relief. The leading cases are the decisions of the House of Lords in White v White [2001] 1 AC 596 and Miller v Miller [2006] 2 AC 618.
 14. The court will aim to divide the property fairly. See White v White *per* Lord Nicholls at 599 G – H. Where one of the parties is the breadwinner and the other the homemaker, the court will not, save in exceptional circumstances, discriminate between them. See Miller v Miller *per* Lord Nicholls at para 1. As required by section 29 of the Act, it will take into account their financial needs.
 15. There is no presumption that the matrimonial assets will be divided equally. But equality of division nonetheless provides a useful tool for assessing the fairness of the division proposed. As a general rule, equality, sometimes known as “*equal sharing*”, should be departed from only if, and to the extent that, there is a good reason for doing so. See White v White *per* Lord Nicholls at 605 G.
 16. The courts distinguish between matrimonial property and non-matrimonial property. The latter includes (as a minimum) all property which the parties bring with them into the marriage or acquire by

inheritance or gift, plus perhaps its income or fruits. See Lord Mance in Miller v Miller at paras 167 – 168.

17. The courts will more readily adjust the parties' rights in relation to matrimonial property than non-matrimonial property. Mr Richards, who appeared for W, referred me to a well-known passage from Lord Nicholls' speech in White v White at 619 G:

“Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.”

18. To similar effect was a passage from Lord Nicholls' speech in Miller v Miller at para 27:

“... where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.”

19. The matrimonial home is usually treated as matrimonial property. As Lord Nicholls stated in Miller v Miller at para 22:

“The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.”

20. However, as Mr Pachai, who appeared for H, rightly submitted, that does not necessarily mean that it will be shared equally between the parties. Eg in Woolridge v Woolridge, Civil Appeal No 15 of 2010, the Court of Appeal made an order that the husband pay the wife a

lump sum of \$300,000. I am told by Mr Richards, who was counsel for the wife in that case, that this was substantially less than half the value of the matrimonial home. The decision underlines that each case turns on its particular facts.

Discussion

21. The dispute between the parties centred on the former matrimonial home. This was acquired by H prior to the marriage and as at the date of the marriage it was, and has remained, free and clear of mortgage. A professional valuer has assessed its market value as of late November 2015 at \$600,000. Taking into account deductions for commission and legal expenses, if the property was sold for this price the net proceeds of sale would probably be in the region of \$560,000.
22. In a subsequent email commenting upon the basis of the valuation, the valuer was prepared to assume that two of the three apartments not occupied by H could be let for around \$1,500 per month and that the remaining apartment could be let for around \$1,200 per month, giving a potential monthly income of \$4,200.
23. W submitted that the matrimonial home should be treated as a matrimonial asset, both because it was the matrimonial home and because she had contributed to the marriage as a homemaker. H accepted that W had cleaned and done laundry, and although he said that he had done most of his own cooking, he accepted that if W cooked something then he would eat it. He also accepted that she had provided living room furniture, although he said that she had taken it with her when she left.
24. H also accepted that W had nagged him (as he saw it) to get treatment for a potentially serious medical condition and recruited his sisters to do likewise. He had undergone the treatment, much against his better judgment. He accepted that it would have been costly, maybe running

- to hundreds of thousands of dollars (although there was no independent evidence as to the cost), and that it was funded through W's medical insurance policy.
25. In the alternative, W submitted that the Court should take into account the matrimonial home in any event as her financial needs cannot be met without recourse to the property. This is because when she reaches the age of 65 her only source of income will be her two pensions. It was therefore submitted that W will need a lump sum payment, which could only plausibly be funded by the sale of the property, in order to support her once she has reached that age.
 26. H submitted that as he had acquired the matrimonial home prior to the marriage, and without any assistance from W, it should not count as matrimonial property. Alternatively, he submitted that, to the extent that W was awarded an interest in the property, it should be substantially less than 50%. In his opinion W had contributed very little to the marriage.
 27. I accept W's submission that the matrimonial home is matrimonial property. I do not propose to make a lump sum order which will require H to sell the property at this stage, as he is reliant upon it for his income. However I shall make a property adjustment order whereby H will hold the matrimonial home on trust for himself and W as tenants in common, with W holding a 45% interest in the property and H a 55% interest. H is not to dispose of or deal with the legal interest in the property, and neither party is to dispose of or deal with their respective beneficial interests, without a written agreement between them or alternatively the leave of the Court.
 28. As W approaches her 65th birthday, the matter should be relisted so that the Court can consider in light of the then current circumstances how the matrimonial home can most fairly be dealt with so as to meet both parties' needs.

29. As to the remaining property, I order that within 14 days of judgment H is to pay to W a lump sum equal to half the balance as at the date of the hearing of H's HSBC savings account. As of 18th March 2016, the balance of the account stood at \$87,425.75.
30. In view of the interest which I am awarding W in the matrimonial home, and the financial provision which H has made and will continue to make for her (as to which, see below), I make no order in relation to the car and the boat held by H, which have an estimated value of \$5,000 each, or the modest balance in H's St George Mutual Fund. I would have made no order even had I not taken the financial provision into account.
31. H will continue to pay maintenance at a rate of \$1,500 per month.
32. I shall hear from the parties as to costs and as to the precise terms of the order consequent upon this judgment.
33. I should like to record my thanks to both counsel for their concise and helpful submissions.

Dated this 6th day of April, 2016

Hellman J