



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2008 No. 17

**BETWEEN:**

**CHARLES NATHANIEL ARTHUR BUTTERFIELD III**

**Petitioner**

**-and-**

**JEANE MARIE BUTTERFIELD**

**Respondent**

Dates of Hearing: 10-11 August 2009

Date of Judgment: 28 September 2009

Mrs. Georgia Marshall of Marshall Diel Myers, for the Petitioner;  
Mr. Paul Harshaw of Harshaw & Co. for the Respondent.

## **JUDGMENT**

1. In these proceedings both parties filed application for ancillary relief. The husband filed his application on 3 September 2008 seeking the Court's determination of his financial liabilities towards his wife.

2. On 17 September 2008, the wife filed her application for Ancillary Relief seeking periodical payments; secure periodical payments; lump sum payments, secured lump sum payment and transfer of property. She re-married on the 3 January 2009 and her application is, therefore, now limited to a lump sum provision as she is no longer entitled to periodical payments for herself.

## **Background**

3. The parties were married on the 27 November 1993 when the husband and the wife were, respectively, 30 and 26 years old. The wife is a United States citizen but now has Bermudian status by virtue of her marriage to the husband.

4. There are no children born within this union. The husband petitioned for divorce on 22 January 2008. The wife cross-petitioned for divorce on 27 February 2008. On 27 June 2008 the court pronounced Decree Nisi on the wife's cross-petition which was made Absolute on 12 August 2008.

5. It is clear that throughout the course of their marriage, except for one year when they rented an apartment in Fairylands, the parties have lived rent free in property owned by the husband's parents which has allowed them to enjoy a comfortable standard of living.

6. From 1993 to 2003 they lived at Edelweiss, a four thousand square foot house which was built in the early 20<sup>th</sup> century. In 2003, Edelweiss was damaged by hurricane Fabian and the parties moved to Westifa where they continued to live rent free until the divorce petition was presented relating to this matter. Edelweiss was renovated and rented for \$15,000 monthly in 2008 but now rents for \$8,000 per month. The properties were in the husband's father's family for a long time. The husband's father was gifted Edelweiss and Westifa by his father when he married the husband's mother. In cross-examination the husband said that he does not know how much his father spent on the renovation without which he could not get the level of rent he is receiving. The master bed-room did not have a bath room en-suite; the kitchen was old, and the electrics and plumbing were described as "dodgy".

7. The wife has asserted throughout that the husband is an only child and is likely to inherit three substantive properties sometime in the future.

8. The husband is an insurance agent and is employed by the family business- CNA Butterfield & Son Limited- of which he is a 10% shareholder. He earns \$62,790 net annually. Additionally, he receives occasional bonus and dividends of about \$1,200 per annum. He applies a small portion of his income towards a gift club savings which has about \$1,734 in it. He is a 50% shareholder in a company, Clip Limited, which owns 80% of the Bermuda Book Store. The husband's ownership of the bookstore is therefore 40%. Currently, this bookstore is barely managing to stay afloat. It pays \$450 per month to Clip Ltd, which is applied towards re-payment of a \$45,000, trade debt of the now defunct Washington mall magazine shop which was owned by Clip Ltd. The debt of \$45,000 is in the sole name of the husband. In cross-examination the husband said that he could walk-away from a debt owed by a limited liability company but he has chosen not to do so, saying that, "lot of people would not trust me again."

9. Because of his capital investments in Clip Ltd the husband used to receive an annual payment of about \$3,600 from Clip Ltd. Because of the poor performance of the bookstore and the Washington mall shop's debt, he no longer receives a dividend. The company CNA Butterfield pays for one annual business trip for the husband while Clip Limited pays for another annual business trip.

The husband receives a small dividend from his share portfolio which is always re-invested.

10. The wife has a Masters Degree in Architecture but has never qualified as an architect. She is a facilities Manager and works for the Ministry of Education. She earns \$9,250 per month or \$111,000 annually. The wife now has Bermuda status and can compete for employment in the open market.

11. The husband's financial position is comprised of marital acquest and inherited or gifted assets.

12. The marital acquest is made up of US shares \$38,764.26 (US shares through FBS of \$37,667.30 plus bank account \$1,096.96). The husband gifted/inherited property totals \$220,011.41 made up as follows:

**Inherited/Gifted Property**

US Mutual Funds (not FBS)	\$43,279.34
Butterfield Asset Management	\$40,387.17
Life Policies (CSV)	\$52,319.90
Bermuda Shares	<u>\$84,025.00</u>
	\$220,011.41

13. The husband was able to save approximately \$5,000 to \$6,000 per annum and he used these funds to purchase the US shares.

14. The wife's assets are made up of her superannuation and her interest in a motor boat. During the marriage the wife has not been required to contribute to the household expenses nor account for her earnings.

It is clear on the evidence that she not only used her income to pay off a substantial debt that she owed for her education expenses but, according to her own analysis, she "frittered" her excess cash.

The husband and wife did not discuss finance, which they kept separately, nor did they make any real effort to raise money to purchase their own home. At various times during the marriage they did look at 2 to 3 houses.

15. It is the wife's case that during the marriage she was led to believe that she would be provided for by the husband's family and in reliance upon this belief she used her money in other ways. She stated that she met the husband in University in the United States. Once they decided to marry the husband told her not to worry about living accommodation in Bermuda as they had options because his family had plenty of houses. Later on in evidence the wife said that she approached the Petitioner many times about buying a house

but he always told her that he would have the houses at Blucks Island (Maties' cottage) and in Pembroke (Edelweiss and Westifa) and did not want another albatross around his neck. The wife said that, had she not relied on this, they would have purchased a home and she would have had a 50% interest in it. However, during her cross-examination she accepted that during the marriage they looked at 2 or 3 properties but neither she nor the husband had any savings to pay a deposit on the proposed purchase nor surplus income that could pay a mortgage.

The wife has also said that it was clear to her his parents had control of the premises. They had keys. She said that she had no idea of the ownership.

I reject the wife's evidence that the husband led her to believe he owned homes wholly or in part, directly or indirectly.

16. The husband admitted that he did "anticipate inheriting property at some point in the future" and expressed this. While the husband's parents allowed them to live rent free in the property the parents always exercised control over the property. The husband's mother died and after her death they were given some latitude to renovate the premises but this was never undertaken.

17. I believe the husband when he said that the properties belong to his father and that he may or may not be inheriting them. Referring to a letter dated 4 July 2008 the husband's father's barrister made it abundantly clear that the father does not wish to share his testamentary arrangements with anyone. His father has remarried and lives in a congenial relationship with his new wife (who is 10 years his junior) who has children and grandchildren.

18. Counsel for the wife has submitted that the wife should receive a lump sum of \$400,000 which will ensure that she has the resources to secure a home of her own subject to a mortgage and will represent an equitable division of assets. He has urged that this is an amount that the husband can afford.

19. On the other hand, Counsel for the husband maintains that the marital acquest of \$38,764.26 is to be regarded in a different light than inherited assets. Counsel maintained that marital assets are confined to those assets created by the husband during the marriage. Given the duration of the marriage 14 ½ years it has not reached the pinnacle when a 50/50 division is presumed. Counsel stressed having regard to the duration of the marriage and the contribution made by the husband to the acquisition of the marital assets the wife's share should be no more than 40% or \$15,505.60.

20. She maintained the husband's other assets valued at \$220,011.41 are inherited or were gifted to the husband during marriage or property which he owned prior to the marriage. Given the wife's complete non-involvement in any of these assets, the fact that throughout the marriage they lived separate as to their financial resources and neither party looked to their assets as providing for them during their marriage "the yardstick of equality falls less vigorously on them." Given the evidence in the case the wife's share of these assets should be at most 20% \$44,000 if at all.

21. Against this background, the Court takes into account the statutory provision and precedent. The wife has asserted that the husband who is the only child of his 74 year old father is likely to inherit the property in which he lives, along with 2 other homes which could produce income for him. During the marriage the husband's parents – his mother died in 1998 – allowed them to live rent free in one or other of their family homes. Nevertheless, on the evidence the parents at all times exercised overall control of the property.

22. Counsel for the wife submitted that "whilst the traditional notion in relation to non-matrimonial property may be respected in many cases, here the majority of the husband's wealth will fall to be classified as non-matrimonial property by reason of the way he (and his family) has organized his affairs. Ignoring the so-called non-matrimonial property will leave the wife with income and very little more. Her hope of ever living in a 4,000 square foot Victorian/Edwardian home in Bermuda again is forever gone. With no savings, she will not even be able to purchase a condominium."

23. When the court is considering an application for ancillary relief, Section 29 of the Matrimonial Causes Act enjoins the court to have regard to a number of factors. I agree with Mrs. Marshall's reference to the case of *L v L* 2008 EWHC (FAM) where the issue of future inheritance prospects was considered. In *L v L* in declining to take the wife's future inheritance into account at paragraph 50 the Court said:

"In my judgment, the court does not normally take future inheritance prospects into account unless the inheritance is fairly imminent or a party is a beneficiary under a trust where the future interest can be ascertained with certainty. Given the ages of the wife's parents and their apparent good health, the wife may not inherit from them for many years to come, if at all. I have no evidence as to the value of the parents' respective estate. In my judgment, the parents are at liberty to change their testamentary intentions and their estates may be expended in future care and nursing costs or in other ways."

At this stage the husband has no immediate prospects of inheritance. It is partly a matter of speculation as to when, or if, he will inherit.

24. In *Morgan v Morgan* (1976) SCR 476 the Court refused to issue a subpoena sought by the husband to force the wife's father to divulge his financial resources and his testamentary intentions. In refusing the Court agreed that to do so "would be oppressive" and did not see "why a stranger to [the] suit should be forced to divulge evidence of this kind against his will". In this case, the husband's father has flatly refused to share his testamentary intent which he has the right to do.

Counsel for the wife has submitted that the wife should receive a lump sum of \$400,000 which will ensure she has the resources to secure a home of her own.

The husband has been allowed to live rent free in one or other of his father's houses which has augmented the parties' living standard.

Guidance is derived also from the case of *TL v ML* (2006) 1 FLR 1285 which dealt with the difference between resources in the nature of a "bounty" and resources in the nature of a beneficial interest in trust property. (see *TL-v-ML* para 86 cited below.)

What is clear is that in ordering ancillary relief awards courts should not make an order where payments can be reasonably or unreasonably withheld.

Having considered the facts in this case, the court can only make an award out of assets that belong to the husband as of right. The husband has no means to raise further capital or additional income, to meet an award of \$400,000 that has been suggested by Counsel for the wife.

25. In *TL v ML and others* (ancillary relief: claim against assets of Extended Family) [2005] EWHC 2860 (FAM) para 86 the Court said:—

“[86] I think that a clear distinction is to be drawn between, on the one hand, the position where the person being encouraged is a member of the payer’s family and, on the other hand, where he is a trustee in a fiduciary relationship with the payer. In the former case, the payee has no more than a mere spec of bounty which may, at the election of the provider, reasonably or unreasonably, be withheld. In the latter case, the provider has a legal obligation to consider the beneficiary’s interests. The very reason for the existence of the trust is to provide benefit for the beneficiary.”

26. In this case, the husband's father has flatly refused to share his testamentary intent which he has the right to do. At this stage the husband has no immediate prospects of inheritance. It is partly, therefore, a matter of speculation as to when or if he will inherit.

What is clear is that in ordering ancillary relief awards courts should not make orders in reliance of a bounty where the bounty can be reasonably or unreasonably withheld by the donor.

27. Having considered the facts in this case, the court can only make an award out of assets that belong to the husband as of right. In my judgment the husband has no means to raise further capital or additional income, to meet an award of \$400,000 that has been suggested by Counsel for the wife.



28. Accordingly, I order that the husband pay to the wife \$70,000.00 in full and final settlement of all claims which constitute a portion of his matrimonial acquest and approximately 25% of his gifted/inherited property.

29. I am satisfied that the husband can meet this sum out of funds directly under his control. Additionally, it is more likely than not that he will continue to enjoy rent free accommodation.

30. The wife has remarried and her new husband will be able to provide her with financial support in the future. This new marriage has not been taken into account in order to reduce the wife's entitlement to a lump sum provision.

31. I shall hear the parties on costs if they so wish.

Dated the 28<sup>th</sup> day of September 2009.

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**The Hon. Mrs. Norma Wade-Miller**  
**Puisne Judge**