

In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2007: No. 216

BETWEEN:

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Petitioner

-and-

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Respondent

Dates of Hearing: 10 September 2008, 11 September 2008; 15 September 2009

Date of Judgment: 9 December 2009

Mr. Jai Pachai of Wakefield Quin, for the Petitioner;

Ms. Ann Frith Cartwright of Ann Frith Cartwright for the Respondent

JUDGMENT

1. The parties are husband and wife. The application before the court is the final hearing of the parties' application for ancillary relief. There is an agreed chronology which I adopt.
2. There is one child of the family now aged 14 years who was born in August 1995, during the parties' pre-marital relationship, which started about 1992. The parties were married in January 2000. They separated in August 2007 when the wife left the matrimonial home.
3. The wife filed her divorce petition on the 17th October, 2007. The husband agreed that the Petition for divorce could proceed undefended on the wife's undertaking that the particulars of his alleged unreasonable behaviour would not be relied upon unless they were proved de novo.
4. Decree Nisi was granted on the 29th February 2008 and made absolute on 2nd October 2008.

Background

5. The parties are both aged 46 years. They started a relationship in 1992. The child of the family was born in August 1995. The husband made voluntary payments towards the child's maintenance by paying her nursery fees. Her parents married in 2000 when she was 4 years old.
6. The wife has a child by a previous relationship who is not a child of the family. Although the wife received maintenance for this child until her custody was transferred to the child's father, the husband assisted with this child's maintenance on and off for a total period of about 8 months. None of the maintenance received by the wife for this child was applied to household expenses. For example, this child resided in the former matrimonial home lower apartment, when her Mother was home from school holidays in the summer of 2001 for 8 weeks, and from January 2002 until June 2002 when her Mother was pursuing her training overseas she stayed with the husband and the child of the family in the former matrimonial home with the husband maintaining her during these periods.
7. After their marriage the parties moved into the lower apartment of the property of the husband's Mother, (T's homestead), where he paid a "modest" rent of \$1,200 monthly to his Mother. At this time the husband was employed by TELCO. The wife was unemployed and a full-time student at the Bermuda College. She moved to the United States and continued full-time studies until the summer of 2002 when she returned to Bermuda. The wife worked for short periods during the summer of 2000 and 2001 but kept those earnings for herself and applied them towards her studies.
8. From the date of their marriage until the wife returned from completion of her studies in 2002, the husband maintained the family. The wife had a scholarship which paid her tuition and education expenses but the husband assisted with the wife's support while she was studying by paying \$700 monthly towards her rent during her study period in the United States. The husband also funded the last 6 months of her studies.

9. While she was away she used the joint credit card to pay for some of her expenses. The husband paid for all of the credit card bills. The wife agrees that since the separation she has made charges on the credit card and that she has not made any payments. She accepts that there came a time when the maximum credit available was used up.
10. In 2002, when the wife returned from her studies overseas, she obtained employment with an insurance company. The parties' kept separate bank accounts but pooled resources otherwise to meet the household expenses – with each paying a separate account. In July 2007, the wife lost her job due to a dispute with her then employers. In order to settle the dispute she received \$75,000 from her employer plus her Pension refund contributions of \$6,198.66 from Argus Insurance Company.
11. After the wife lost her job, the husband at his expense placed her and her elder daughter on his major medical health insurance plan until March 2008, just before Decree Nisi, so that they would enjoy the benefit of full health insurance coverage. This was in addition to paying for his health insurance expenses and that of the child of the family.
12. After her employment termination, except for two months, the wife worked in several temporary jobs during the period October 2007 until June 2009, when she secured full-time employment. She secured temporary employment from October 2007 to December 2007 and from November 2007 to February 2008. Thereafter she worked as a corporate administrator from March 2008 to August 2008. Her total income from this latter company was \$33,679.39. Between September 2008 and January 2009, she worked as an independent contractor earning approximately \$720 net per week. In January 2009, she secured employment with the Bermuda Government earning approximately \$1,000 per week.
13. On 19th August 2008, the Registrar ordered the husband to pay \$1,200 per month to the wife, as maintenance for the child of the family. This order ceased in June 2009. Since June 2009, the wife has been employed by Bermuda Government at a PS 24 level. She

earns \$4,695.77 net monthly. In two years, she would have moved to PS26 then to PS28 earning annual salaries of \$75,402 and \$81,071 respectively. Government employees' pensions do not vest until after 8 years of service. Since May 2009 the wife has had a "locked in" pension of \$11,789.80.

14. The wife has not given this Court an acceptable or plausible explanation of how she has disposed of the settlement of \$75,000 plus the pension refund of \$6,000 which she received in July 2007. She has been far from clear about how these monies were expended. Although she has testified that it was spent for living expenses the court is not satisfied with this explanation. She has had part-time employment for most of the period after she ceased full employment until she secured permanent employment. During the period of unemployment she received a court order for maintenance of \$1,200 per month for the child for approximately 11 months. The husband said he would have challenged this order but he had no funds with which to pay the legal fees to do so.

The Husband

15. Shortly after the wife's return from her studies overseas the husband was diagnosed with hydrocephalus (liquid on the brain) and had to seek overseas treatment. Therefore, he was unable to work for a short period of time – October to December 2002 (inclusive). The wife took care of all the family expenses during this period.
16. The husband is now employed as a pension analyst and earns between \$4,963.90 and \$5,054.33 net monthly. In addition, from February 2008 to October 2008, he worked part-time as a security guard earning on average \$131.50 per week. He receives \$1,800 rent per month from the apartment.

The Assets

17. There is no dispute about the value of the assets.
18. The husband had no pre-cohabitation assets and had no debts. In October 2003, the husband's widowed mother (hereafter referred to as Mother) who was in her early 70's,

by way of estate planning, voluntarily gifted and conveyed to the husband and the wife as joint remainder men the “T homestead”, subject to a life interest for herself. This property was built by the husband’s father and his Mother has lived there for 48 years. It consists of a 3 bedroom house, 1.5 bath main house, a 2 bedroom, 1 bath lower apartment and a 1 bedroom studio apartment with kitchen and bathroom (described as being in “very poor order”).

19. The husband has one sibling, a brother and at the time Mother decided to gift the homestead to the husband she wanted the husband’s sibling to be compensated for his loss of equal expectation on her death.
20. In accordance with a Deed of Family Arrangement (DFA), the husband’s sibling was paid \$250,000. Mother was paid \$100,000 for her living expenses. In order to make the payments the wife, the husband and Mother secured a mortgage loan of \$411,530. The property was conveyed into their names. Conveyance of the legal title into the name of the husband and wife carries with it, prima facie, the absolute beneficial interest in the property conveyed. In cross examination the wife accepted that if Mother thought in 2003 that the marriage would collapse in 2007 she would not have conveyed the property to her. After the separation, the wife was not allowed into the homestead by Mother.
21. I accept the husband’s evidence that the balance of approximately \$50,000 after payment of stamp duty and legal fees was used for renovations of the property.
22. When the husband commenced the mortgage payments he ceased paying the \$1,200 per month rent to Mother. He paid the full mortgage from his salary. In 2005, the parties moved upstairs with Mother and rented the lower apartment for \$2,300 monthly. The husband collected this rent which he applied towards the mortgage.
23. I agree with the submission made by Counsel for the husband that an additional gift was made when Mother decided to forego collection of the rent to which she was entitled as life tenant. She not only allowed the husband to cease paying rent of \$1,200 monthly

from 2003, but when he moved upstairs she allowed him to collect the rent of \$2,300 monthly and now \$1,800 monthly. The rental income is being used by the husband to help service the financing of the mortgage payment. Mother was not to be responsible for the mortgage payments under the DFA. Mother's contribution by foregoing the rent amounts to over \$110,000 at the time of hearing of this matter. Without the continued gift of the rent, the husband would not be able to afford the monthly mortgage payments.

24. In January 2005, the parties secured a \$60,000 home equity loan to buy a car for about \$33,000 for the family. The balance of \$27,000 was used to renovate the house. This increased the mortgage payment to \$3,273 monthly.

25. Since the separation in August 2007 the wife has not made any contribution to the mortgage, land tax, insurance, general maintenance of the property or the car loan which is incorporated into the mortgage. The monthly mortgage payments, exclusive of the rent collected, totalling \$44,000 have been paid solely by the husband. When the parties separated in 2007 the wife took the jointly owned family car and she continues to have its exclusive while the husband continues to make payments. He has no car and recently bought a second hand motor cycle.

26. In October 2008, the husband borrowed \$45,000 from the bank which he reduces by paying \$917 monthly. He paid \$20,000 of this sum in reduction of his legal fees and he said that he paid \$23,000 to family members as repayment of monies loaned to him. During the hearing Counsel for the wife pressed him and he was asked to produce proof of repayment. The following morning he informed the Court that he was surprised that they never cashed the cheques and they indicated that they will deal with the matter after the case is over. The Court finds that the husband was not completely open and forthcoming in this regard. The Court is left with the impression that had the Counsel for the wife not pressed the matter, the Court would have been left with the impression that he had repaid these sums. This was quite unacceptable. It is the duty of a party to give up to date information to his counsel.

27. The husband continues to live with his Mother in the “T homestead”. He has no further inheritance expectation.

The Wife

28. The wife is a beneficiary of her grandfather’s estate. In 1998 she was bequeathed a 25% interest in a house and a lot of land in Warwick (the Warwick homestead). The Executors have not yet vested the property to the beneficiaries. The wife has not been completely forthright and it was only after extensive and determined enquiries by the husband through his Counsel, resulting in increased legal cost to the husband that she produced her grandfather’s will with this information.

29. The wife now resides with her Mother in the Warwick homestead in a large 3 bedroom family apartment. Additionally, this house has a 2 bedroom apartment and another bedroom, living room (a big studio). The appraiser did not gain access to all of the units but placed the value of \$1.1 million on the home and \$75,000 on the lot of land. The husband’s case is that the wife could take legal action to have the matter settled and if she wished be paid out her interest. In any event, she is living rent-free in the property as she did prior to her marriage to the husband. In respect of this property in which the wife has a 25% interest valued at \$272,693.74, the wife submits that the facts and circumstances of this case do not entitle the husband to any benefits and he should not receive any benefit from her inheritance.

30. Miss Cartwright submitted that the wife continues to have an expectation of inheritance from both her Mother and father. Her Mother owns a little more than a 25% interest in the Cobbs Hill properties and her father owns a home in Atlanta Georgia and on the evidence possibly another home in Panama. This court is not persuaded that the wife has any real expectation to the extent that it should be taken into account as a probable event.

31. The wife seeks a lump sum award of \$335,556.41 which is 50% of the net equity of the jointly held former matrimonial home in satisfaction of all her claims and a clean break.

She contends that as the joint legal owner she is entitled to 50% of the net equity share in the matrimonial home. She accepts that she must compensate the husband for his half interest value of the car.

32. This is a relatively short marriage – 6 ½ years and, of this period, the wife was a fulltime student for 2 ½ years and even though she had a scholarship the husband was maintaining her and the household. The parties had a relationship, cohabited and had a child before their marriage but the evidence is unclear as to the length of the period they actually lived together prior to the marriage in a dedicated, settled home.

33. In Jackson's matrimonial Finance and Taxation, 7th Edition page 96-97 the authors pointed out that the period of cohabitation between the parties before marriage is not to be taken into account in assessing the marriage as it is the "ceremony" and "sanctity" of marriage which counts, "rights duties and obligations begin on the marriage and not before..."

"The two periods namely cohabitation and marriage are not the same. What weight will be given to matters that occurred during those periods will be for the learned judge to decide in the exercise of his discretion but one cannot say that those two periods are the same."

In the circumstances of this case the Court gives no weight to the period of the cohabitation before the marriage.

34. In deciding how to exercise its powers under section 29 of the Matrimonial Causes Act 1974 the Court, is enjoined to have regard to all the circumstances of the case. A key consideration is the one child of the family who is 14 years old. The parties jointly paid her private tuition until January 2008 when the husband became solely responsible for the private tuition. Because of her behaviour in August 2008 her parents were asked to remove her from the private institution and she is now attending a government school. In August 2008, the husband was ordered to pay the wife \$1,200 per month for the child's maintenance after she left the private institution. In May 2009 the parties agreed alternate

six months care and control arrangement commencing July 1, 2009, a Court order has been entered to that effect. Maintenance for the child is not being sought by either party.

35. The wife has to have adequate accommodation to house herself and to exercise care and control of the child of the family. When the parties married the husband had no significant assets. But capital was brought into the marriage by the husband when his mother by Deed of Family Arrangement gifted her property to the husband and the wife retaining a life interest for herself. Fairness requires recognition of the source of these assets as well as the reasonable needs of the parties. This is not a case where one spouse has been enabled by the support of the marriage to accumulate assets or has accumulated them during the marriage. The husband's mother has altered her position to her financial detriment. She has put herself at considerable risk; if the husband is unable to make the mortgage payment she could lose the roof over her head. In order for the husband to afford the mortgage payment Mother foregoes the rental income to which she is entitled. She must agree to any additional borrowing and further encumber her life interest by joining in any further charge.

36. I have given careful consideration to the needs of the parties and their budgets. This is not a case where the available assets are beyond the reasonable needs of the parties. Neither party generated any asset during the marriage. The mother's extra-matrimonial gift of property plus forgoing the rental income contributed significantly to the wellbeing of this family and enabled them to enjoy a relatively reasonable comfortable standard of living. The monthly mortgage payment is \$2,843.70. The husband has a loan of \$45,000 which is being reduced by him paying \$917.00 monthly. Both the husband and wife have pensions.

37. The parties have a joint equity in the former matrimonial home of \$671,112.83. The property is subject to a joint mortgage. Divided equally each is entitled to \$335,556.41. The wife wishes to have half of the net equity as the joint legal owner. The husband's evidence is that, based on his income and having his income set against his inescapable financial obligations, the bank is prepared to loan him \$155,000.00 only

which he could pay to the wife. The wife has a 25% interest valued at \$272,693.74 in property that was bequeathed to her in 1998 by her grandfather. The wife says the husband should receive no benefit from this bequest.

38. Mr. Pachai, Counsel for the wife, maintains that the husband deliberately minimised his future earning potential. He submits that the failed to disclose that he worked part time as a security guard which equates to \$608.15 monthly income and, although this employment has ceased there is no reason to presume that he cannot obtain part time employment if he so wishes.

39. Much is being made of the fact that the husband can increase his income by charging an additional \$500 per month for the apartment in which his nephew resides as they obtained that level of rent in the past; that with minimal work fixing up the studio he could rent it for between \$1200.00 to \$1800.00 per month and, as in the past he secured part time employment, he could do so again.

The Court acknowledges that the husband has in the past secured part time employment – February 2008 to October 2008 – as a security guard but it does not accept the suggestion that in today’s economic climate part time work as a security guard is readily available. The current financial climate makes it more difficult for people to find employment. In any event, the husband has had the care of his daughter for alternate 6 monthly periods and he ought to be home to supervise her care during those periods.

40. In assessing the husband’s ability to afford the sum of \$335,556.41 being sought it can be seen that the wife has had regard to a number of imponderables – for example increased rent from the apartment occupied by the nephew, as well as rental income from a studio apartment that has to be renovated. While the Court is not obliged to limit its order exclusively to resources, capital or income that is shown to actually exist, a court ought not to speculate and any inference must be based on circumstantial evidence and must be reasonable.

It must be borne in mind that the studio which can be made into an apartment is in “very poor order” and has been in existence since the property was transferred to the parties in

2003 and no steps were taken to renovate it during the subsistence of the marriage. Further borrowing would be necessary to put it into habitable conditions.

Additionally, affordability of the current mortgage, and any increase in that amount to settle the wife's lump sum award, presume the continuation of Mother's open-handedness in foregoing collection of the rental income. While the Court has no reason to believe that this bounty will cease, it is a factor that must be borne in mind. Given the factors in this case the Court is not prepared to infer the availability of unidentified resources or income.

41. Miss Cartwright submits that the wife should receive \$155,000.00 in order to achieve a fair result and the Court should not make a crippling order. The husband alone will have to continue with the burden of any increased mortgage payments consequential from any order the court makes. She argues that Mother's gift cannot be underestimated and it is on the basis of the value of her share of this gift that the wife's claim is launched. Since separation the husband alone has made the mortgage and other payments which have maintained and increased the wife's equity. Further the husband partially supported the wife for two years while she was in the United States in College and prior to that immediately after marriage for about 7 months when she was a full time student at the Bermuda College. The wife's interest in her inherited property by way of income or otherwise was never contributed to the family, whereas the parties lived for several years at a modest rent then rent-free in the Mother's property and thereafter lived with Mother paying no rent at all.

42. In paragraph 27 of the written submissions the wife said that "the husband came into the marriage with nothing by way of assets." While she "contributed in terms of the house which she inherited two years before the marriage." Mr. Pachai's submits that, as a joint remainder man, the wife should receive her full equal share and that the husband is not entitled to any share, interest or compensation in the wife's pre-marital inherited asset which should be excluded in its entirety from division. The Court disagrees. It is quite mean for the wife to say that this asset should be excluded in its entirety and on the other hand say that she should be granted 50% of the asset gifted to them by the husband's

Mother, which comprises the lion share of the matrimonial asset. This is particularly so in a case where the available assets are not over and above the reasonable needs of the parties. In any event precedence does not support the wife's position.

The Court has derived guidance from the authorities cited by Counsel. The decision in *White v White* [2009] 3W.L.R. 1571 at page 1583; *Miller v McFarlane* [2006] UKHL paragraphs 22-24; *LvL* [2008] 1FLR 142 paragraph 89 and *Charman v Charman (No 4)* [2007] EWCA CIV 503 [2007]1FLR1246 was most helpful. Having regard to the guidance of the authorities the Court must apply the sharing principle but the Court can depart from equality if there is good reason to do so.

The Court accepts that, on the sharing principle, there is good reason for departure from equality. It is clear on the evidence that the husband assisted the wife to obtain her education and training and improve her skill and earning capacity. In two years time her earnings will increase to \$81,071.00 at which time the wife will be earning more than the husband. Future income must always be appraised (see paragraph 67 and 71 *Charman v Charman supra*).

43. Mr. Pachai's submits that as a joint remainder man the wife should receive her full equal share and that all the wife's pre-marital assets valued at 272,693.74 should be excluded from division. Miss Cartwright argues that the wife's entire pre-marital assets should be taken into account and based on the sharing principles the wife should receive \$155,000.00.
44. The Court considers that fairness requires that 25% of the wife's pre-marital asset or \$68,173.43 should be taken into account. In so far as the former matrimonial home is concerned and having regard to all the circumstances the Court considers a departure from equality in broad terms, so that the wife receives 40% of the current net equity or 268,445.13, is a fair outcome on a clean break basis. Deducting the sum of \$68,173.43 from \$268,445.13 leaves \$200,271.70. A credit of \$9,900.00 must be given to the husband for the value of his 50% interest in the car. The wife would receive the sum of \$190,371.70. In the Court's judgment this reflects a fair outcome on a clean break basis.

If the wife so wishes she can use this sum together with her interest in her inherited property to invest in a modest home for herself and should have enough income to support a mortgage. Alternatively, she may continue to live in her inherited property and invest her lump sum award. The husband must endeavour by creative management to find the lump sum to pay the wife and continue to meet a relatively substantial mortgage payment.

The lump sum of \$190,371.70 must be paid within 4 months of the date of this judgment. The wife must transfer her remainder man interest in the equity of the "T homestead" to the husband upon receipt of lump sum payment. The conveyance should be drawn by the husband's attorney and the cost of so doing must be borne equally between the parties.

Each party should pay 50% of the credit card debt (\$5,500.00) at the time of separation or \$2,750.00 each. Any charges made subsequently must be paid by the party who incurred them.

The contents of the former matrimonial home should be divided by mutual agreement and in the absence of agreement the parties have liberty to apply to the Court for resolution.

Each party should bear his own cost.

I invite Counsel for the parties to draft the appropriate legal order.

This order should recite the agreement reached in terms of the child's ongoing care and control.

It is so ordered.

Dated the Day of December 2009.

Hon. Norma Wade-Miller
Puisne Judge