



IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2008: No. 237

SIMMONS **Petitioner**

and

SIMMONS **Respondent**

JUDGMENT

Dates of Hearing: 15th to 17th February, 2010

Date of Judgment: 15th March, 2010

Mrs. Georgia Marshall, Marshall Diel & Myers for the Petitioner
Mr. Arthur Hodgson, Richmond Law Offices for the Respondent

1. THE UNDISPUTED FACTS

1.1 The Petitioner and Respondent were married in 1983. They obtained their Decree Nisi and Absolute in 2009. It was therefore a twenty-six (26) year marriage. At the time of the divorce they had attained the ages of seventy-three (73) and seventy-six (76) respectively. There are no children born to the union but from their previous marriages, the Petitioner has one adult son and the Respondent has three adult children.

The Petitioner made application for ancillary relief. Her claim is for one half of the entire estate. The Respondent has resisted her claim and advocates that she should be awarded nothing.

1.2 Harvey Road

In 1980, some three years or thereabouts prior to the marriage, the Respondent purchased a property at Harvey Road. He financed the purchase in part from his own savings, contributions from his father and by way of a fifteen (15) year Mortgage. Immediately following the marriage the couple lived together in that house up to and since their divorce. At all times they treated it as their matrimonial home. The house is now free of encumbrances since 1998 and is valued at \$1,225,000.

1.3 East Gate Lane

In 1981, the husband inherited a piece of property from his fathers' estate at East Gate Lane. After some dispute pertaining to the estate he also acquired, in 1986, one of his brothers shares for the sum of \$15,000. That property is now free of encumbrances and is valued at \$650,000.

1.4 The O.T. Simmons Trust

In 1998, the Respondent established the O.T. Simmons Trust. He was appointed as trustee. The Petitioner, the adult children and the Respondent were named as beneficiaries.

1.5 No. 5 Palmetto Road

In 1998, the Respondent, in his capacity as trustee of the O. T. Simmons Trust, purchased a property at 5 Palmetto Road for the sum of \$200,000. He financed the purchase by way of a Mortgage for \$70,000 and by way of proceeds obtained from his sale of a property at Ord Road. In addition he paid the mortgage from his personal income and from his rental income. The value of the Palmetto property is \$740,000.

1.6 Fenton Drive

In 2001, the Respondent in his capacity as trustee of the O.T. Simmons Trust, purchased a property at Fenton Drive for \$245,000. It was financed by way of a Mortgage for

\$145,000 and from savings. The mortgage is being paid from his income and from the properties rental income. His daughter with her family resides in that property or part thereof. It is valued between \$850,000 and \$875,000.

1.7 Respondent's other Assets

The Respondent's other assets consists of, savings and other financial investments valued at about \$270,000. It is accepted that except for the Harvey Road property which was acquired three years prior to the marriage with part payment arising from the Respondents own means up to the time of the marriage and the inherited part of the East Gate Lane property, the other real property assets were acquired at different times during the marriage and were paid for during the marriage - inclusive of the mortgage payments for Harvey Road until its satisfaction.

1.8 Income

The Respondent enjoys an income from social insurance, pension, rent, and as a parish coordinator, totalling \$8,837 per month.

1.9 The Petitioner's Assets

The United States of America house.

She bought a house in the United States of America about 2003 for \$35,000. It is assessed at a tax value of \$61,000.

1.10 The United States of America Condominium

She together with two other siblings bought a condominium in the USA about fifteen or twenty (15/20) years ago. Her contribution to the purchase price was \$7,000. She has a one third interest in the present value.

1.11 Income

The Petitioner enjoys an income of \$2,550 per month from social insurance, pension, teachers retirement fund, and US social security. In addition she earns approximately \$1,779 per month as a substitute teacher and \$450 per month from the US house rental.

1.12 Other Assets Unknown

1.13 Other Assets of the parties

The parties own a ten year old motor car valued at \$10,000. The furniture at Harvey Road is valued at \$17,000.

2. THE DISPUTED FACTS

2.1 Harvey Road

The Respondent asserts that after the mortgage was satisfied in 1998, he acted upon advice and established the O. T. Simmons Trust. That by way of re-conveyance dated 1998, the Bank upon his instructions conveyed the Harvey Road property to the trust.

He pointed to the recitals and the habendum in support of that. The Petitioner asserts that the conveyance to the trust is of suspect legality and effectiveness, since the stamp duty thereon does not demonstrate a sufficiency in quantum to support a conveyance from the original beneficiary Mr. Simmons, to the several beneficiaries named in the trust. Thus the ownership of the Harvey Road property remains in dispute. The Respondent further asserts that the Harvey Road property was in effect entirely financed from his income throughout the marriage since he established a joint account into which he placed his income and from which the Petitioner drew to take care of the household, while the Petitioner kept her income to do with as she pleased. The Petitioner asserts that she played the role of homemaker, inclusive of washing and cooking; she assisted in the renovation of the kitchen and repair of windows; she paid for the overseas vacations of the couple and on occasions if some bills like the land tax and insurance were large, she would contribute. The petitioner produced no documentary evidence to support her claims.

3. THE SUBMISSIONS AND LAW

3.1 Both parties relied upon section 29 of The Matrimonial Causes Act 1974.

Both parties relied upon the authorities of *White v White* [2000] 2 FLR 981, *Mc Farlane v Mc Farlane* [2006] 1 FLR 1186. In addition, the Petitioner relied upon *Charman v Charman* [2007]1 FLR 1246 and *Butterfield v Butterfield*, No. 17 of 2008.

There is no dispute about the law to be applied. It is accepted that in a marriage of this length the duty of the court in relation to the division of the properties is one of fairness. That equality is a proper starting point unless there is good evidence to the contrary. It is also accepted that the conduct of the parties towards the assets is a relevant consideration.

It is accepted that where any matrimonial property has become part of a trust and there appears to be good evidence that its purpose or one of its purposes was to deprive one of the parties of their matrimonial benefit, the court is empowered to sever that property from the trust.

It is also accepted that the desire of one party to provide for the children, though relevant, may not by itself override the matrimonial rights of the other.

The Petitioner submitted that a fair assessment in this case is one of equality. That the parties always acted as a team for their mutual benefit. The Respondent submitted that one of the duties of the court is to consider the manner in which both parties acted towards the properties. That in this case in respect of several properties, on both sides, the parties always acted towards them in a manner that was inconsistent with the principle of equality. That in respect of some properties and the parties incomes, the parties acted towards them as their own respectively. That in the circumstances the Petitioner has already achieved and or squandered her benefit and ought to be awarded nothing.

4. THE FINDINGS

4.1 Harvey Road

This court is satisfied that from the inception of the marriage in 1983 up to 1998 when the mortgage was satisfied, the parties always acted in a manner consistent with the conclusion that this property was their joint matrimonial property. Though the husband provided most of the funding, including the payment of the mortgage from their joint account in which he placed substantially or all of the funds whilst the wife substantially kept her own, the wife was required to take care of the household from those funds. There had been no complaint from him about her not contributing a financial share to the pot. He must be taken to have thought as she did, both by their behaviour towards the property and her service to the house hold as homemaker, cleaning, cooking, managing the accounts and financially assisting in some repairs during this long marriage, that she had acquired an equitable interest in the property. She certainly continued to act in the same way as she always did towards that property and household up to this day. The court accepts her evidence as set out in paragraphs twenty-five (25) and twenty-six (26) of her affidavit in so far as it relates to her conduct in respect of the Harvey Road property. Prior to 1998 he involved her fully in matters relating to that property and to a large extent still does. That was until he purportedly conveyed it to the trust without informing her or

without seeking her opinion or consent. It must be taken that at that time he must have known that he was acting in a manner adverse to her legal interest. Further when she queried about her future in respect of the house in the event he should predecease her and repeatedly requested only a life interest, he only offered her a lease instead. Even when properly informed by her counsel that a life interest was all she wanted so that she could live out the rest of her days at Harvey Road and that a failure to so provide would leave her with no choice but to pursue her interest through the divorce process upon which she would seek her full share not only in Harvey Road but in the other assets, the Respondent still incredibly held firm. Given the terms of the trust, in which he is the only named trustee, in which there is no named protector, in which he is entitled to change the beneficiaries as he desires, not to mention that other than him and the Petitioner, the other beneficiaries are his children with whom the Petitioner, according to both of them, did not always appear to have the most wholesome relationship, and given that you would expect in time of conflict the trustee would be expected to act in the best interest of the trust, there is much merit in the submissions put for the Petitioner. That he intended to deny her rights is further illustrated by the Respondent's position even at this late period in time, that she should get nothing at all. The position taken by the Respondent was and still is wholly unreasonable and unfair. One is propelled to the single conclusion, that at the time of his purported conveyance of the Harvey Road property to the Trust, one of his intentions was to deny or avoid the Petitioner her matrimonial interest. For these reasons the trust must be invaded. Further, though it can be accepted that at the time of the acquisition of the Harvey Road property, the Respondent must have intended it to be a household for he and his children, due to his concerns about them at the time, as he asserts in his first affidavit, it must on the converse be concluded that since he continued to acquire at least three other properties during the marriage for the asserted purpose of providing housing for those children, his original intent in relation to Harvey Road must have evolved during the marriage and must have come to the acceptance and realization that Harvey Road had become joint property between him and the Petitioner at least for life as he admits at paragraph ten (10) of his first affidavit. An intent he incredibly failed to keep despite numerous offers and opportunities to do so. His intended disposal to his children thereafter, as expressed in the same paragraph has now become irrelevant.

Whether the Harvey Road property is now properly conveyed to the Trust or remains vested in the Respondent, this court finds that an equal share of its value, less the relevant conveying expenses, must be declared for the Petitioner and the Respondent must take such steps as are necessary to give effect to this finding.

4.2 East Gate Lane

There is merit in the evidence and submissions for the Respondent. This court can find no evidence to support any assertion of the Petitioner that this property forms any part of the matrimonial pot. That is so despite the acceptance that part of it had been acquired during the marriage. Half of it had been inherited from the Respondent's father prior to the marriage. This court can find no evidence that there had been any intention at the time of the inheritance that any portion was to be for the benefit of the Petitioner. Then the other portion was acquired by the Respondent from his brother during the marriage at what does not appear to be a substantial price at all. The payment therefore did not appear to have been detrimental to the financial or other well being of either party. This court finds nothing in the conduct of the parties suggestive that either treated or intended to treat this property as any part of the matrimonial pot. The court accepts the evidence of the Respondent as set out at paragraph 4 of his first affidavit that though the property remained in his name and he collected the rents therefrom, which he put into the household pot, from which the Petitioner drew, he had always intended the property to be for his eldest son to whom he sends financial assistance overseas. The court accepts the assertion of the Respondent that the Petitioner showed no interest in it at all during the marriage, even when invited.

Paragraph 23.1 of the Petitioner's affidavit seems to support this assertion as the Petitioner failed to answer it, except to say she had always thought the property remained in the Respondent's name and she called on him to produce evidence of the revenue therefrom. Her interests seem therefore not to be in the property itself but in the Respondent's income. The income issue will therefore be better dealt with when the court comes to the assessment of income and savings. In the circumstances this court has found no interest in this property to be declared for the Petitioner.

4.3 Palmetto Drive

There is also merit in the Respondent's evidence and submission in respect to this property.

The court accepts the evidence of the Respondent at paragraph 12 of his first affidavit. That he had acquired this property for his second son and that at the time the Petitioner knew this; that the Petitioner did refuse to assist even when asked.

It had been occupied by the Respondent's son until his recent death, apparently without complaint by or benefit or detriment to the Petitioner. Even when she approached the defendant about her rights or concerns in respect of the Harvey Road property and right up to when she instructed her attorney to pursue her interest in the Harvey Road property, just as she did in respect of the East Gate property, she exhibited no indication of an interest in this property. That, I think it is reasonable to conclude, was because she was long aware of the purpose of that property. In fact the court finds support for the assertions of the Respondent in paragraph 32.1 of the Petitioner's affidavit. There she failed to answer the Respondent's assertions to the contrary except to say as she earlier did in respect of the Government Gate property, that she believed the property was in the Respondent's name and that he collected the income and she put him to proof thereof. Again her interest seems only relevant to the issue of income. This court is satisfied that the parties always treated this property outside of their matrimonial pot. For these reasons no interest to the wife will be declared in respect thereof.

4.4 Fenton Drive

There is merit in the evidence and submissions of the Respondent as set out in paragraph 13 of his first affidavit. There he asserts that he bought that property for his daughter and that the Petitioner knew that at the time. That she refused to show interest even when he requested. There is support for that at paragraph 33.1 of the Petitioner's affidavit, where just as she did in respect of the other two properties, she again asserted a belief that this property was in his name, that it was tenanted, one of whom was his daughter who irregularly paid her rent and that he received the rents therefrom. Again there seems never to have been any objection to this state of affairs nor was there shown to be any detriment to the Petitioner's life style as a result. In fact she seems to have encouraged it. In fact even after she had instructed her attorney to press for her life interest, she demonstrated

no interest in this property at all. In the circumstances I find no interest to declare for the wife in respect of this property.

4.5 In respect of the East Gate Lane, Palmetto Drive and Fenton Drive properties, I find merit in the evidence of the Respondent set out at paragraph 14 of his first affidavit. There he asserted that the Petitioner had always been aware of his plans and had always assured him that she had no desire to benefit from any property which he owned or controlled other than the right to live at 2 Harvey Road should he predecease her. That she was always in agreement that the property should be inherited by his heirs. I think strong support for this can be found at paragraphs 30, 34 and 37 of the Petitioner's affidavit where she states, in paragraph 10, "I accept that the Respondent wanted to make sure that his children were taken care of and I was happy for him to look at properties for them so long as it did not affect me or my station in life." "I did not have a problem with the Respondent's heirs inheriting his property. I simply wanted to live out my life in the former matrimonial home without having to be worried about being put out by the Respondent's children or grandchildren should he predecease me. I wanted the right to rent out the house if I wished to do so." "I do not wish to take away from the Respondent or his children. I simply want my fair matrimonial entitlement." And later at the end of her affidavit paragraph 61, she said, "I do not wish to deprive the Respondent's heirs of their inheritance. I only want my fair and reasonable matrimonial entitlement."

I think this clearly shows that there had always been a recognition by the Petitioner that the non Harvey Road properties were intended for the children and were never intended to be part of the matrimonial pot, even though the parties had been benefitting from the incomes during their lifetimes.

Again at paragraph twenty-eight (28) of her affidavit she accepted the assertions of the Respondent at paragraph 9 of his affidavit that when in 1995 he acquired a parcel of land at Ord Road and requested her to join in its development so that in addition to her assets in the US she along with he and the children would all be provided with dwellings, she refused. She said because, upon her suggestion that her name be put on the deeds he refused and she was not prepared to invest in a property that she may or may not have an interest in later. The Respondent said he was then forced to sell the property and invested some of the money in a less expensive one for one of his children. These acts, I think

demonstrate a clear understanding between the parties that the properties outside of the Harvey Road property were individual in nature.

4.6 The United States of America house

There is some dispute about which one of the parties financially contributed to the purchase of this property. It clearly appears that the Respondent never felt that he had any interest in this house. In fact in his testimony and in his submissions, he asserts that it is her house and in effect she should go about her business with her house and leave him with his. The evidence also showed that she had always acted towards this home as hers only. She paid for its upkeep out of her own funds and received its income with she disposed as she considered fit. The value of the house is also disputed. She said she bought it for \$35,000 many years ago, it is now valued for taxation purposes at \$61,000 but she believes because of the current recession its value is still about \$35,000. I think that is an incredible assertion and the Respondent asserts that that is a suspicious value and has averred that she should prove the value. He had not exercised his rule 77 rights to seek a valuation and the Petitioner relies upon that. I think his failure to assert his rule 77 rights should not escape the Petitioner her duty to make frank and true disclosures. In any event regardless of the true value of this property, the court finds that this house had always been intended to be and was always treated by the parties as the house of the Petitioner only. Up to this point the Respondent has not demonstrated any interest in it whatsoever. It ought not to be counted towards a reduction or adjustment of her claim.

4.7 The United States of America Condo

An interest was acquired in this condo by the Petitioner several years ago. It is in dispute, which of the parties contributed the investment sum. The present value of the Condo is also in dispute. The Petitioner asserts that because of the recession, the value has hardly increased since the purchase. That is an incredible assertion. The Respondent cannot be faulted for the assertion that this is another suspicious act of non disclosure of the full and frank kind.

Again he had not exercised his rule 77 rights but now asserts that the Petitioner should prove the value. I think it cannot be argued that the Petitioner ought not to by his failure escape her duty to fully and frankly disclose. In any event just as was the case with the other US property, the Court finds that the Petitioners interest in this house was always

treated by the parties as hers only. In fact her brother has been allowed to live in it for years without payments of any kind to the other interest holders, all without any complaint from the Respondent. Further it seems that since its acquisition, the Respondent on his own admission paid no interest to it whatsoever to such a degree that he had completely forgotten about it until he was recently alerted. And according to the Petitioner she had likewise forgotten about it until the same alert.

In the circumstances this court finds that this property ought not to be counted as part of the matrimonial pot and therefore ought not go towards a reduction or adjustment of her claim or award.

4.8 The Respondent's other Assets

These present a more difficult question. It is evident that the Respondent was a man who deeply cared about provision for himself, and his family, inclusive of his wife and children. I think the court must find that these investments were intended to be shared by all of them. On the other hand, there is no evidence of any direct contribution thereto by the Petitioner who substantially, it is found, kept her own income to herself and invested or used it substantially as she desired. There are in addition to the Respondent, three natural children of his, a stepchild, and the Petitioner. The court accepts a valuation of these assets at \$270,000. I think a fair division of these assets should result in a 1/6th share of that value to the Petitioner.

4.9. The Petitioner's other Assets

It is suspicious, that a Petitioner as astute as this Petitioner appears to be, who enjoyed a long teaching career, and who was provided with a home at Harvey Road in which she was not required to substantially financially invest, who was allowed to keep substantially all of her earnings to use as she pleased, and whose only major investments was a \$35,000 house and a \$7,000 Condo, can assert that she now only has \$3,000 in her seventy-fourth (74) year. I think there appears to be some merit in an argument which suggests a suspicious non disclosure.

In any event, it appears that the level of her savings, disclosed or non disclosed, may not be relevant in the circumstances, simply because both she and the Respondent have admitted that she was free to do with them as she pleased. It would seem therefore that the value of her assets both in terms of savings and investments were always to be treated

separately from the matrimonial pot and cannot now be counted towards a reduction of the amount the Respondent is to provide her, in respect of the Harvey Road and other assets awarded by this court.

5.0 The parties other assets

The motor car and furniture at Harvey Road are declared to be jointly owned and should be divided equally.

5.1 Income

The parties enjoy incomes as stated above. They are both deep into their seventies. The application is for a clean break award. The Respondent will most likely have to raise the funds to give effect to the Petitioners award. Her share of the Harvey Road assets together with her share of the savings, and the income she now receives, even if less the substitute teaching income, shall allow her to continue to enjoy a lifestyle as comparably comfortable as that she enjoyed before the parties were divorced. In the circumstances no order will be made for any other payments.

5. CONCLUSION

The Petitioner shall have one half of the Harvey Road property whether it be legally in the trust or not, one sixth of the Respondent's savings, whether they be in trust or not, one half of the car and one half of the Harvey Road furniture.

6. COSTS

The court will hear argument as to costs if desired.

Dated this **15th** day of **March 2010.**

Hon. Carlisle Greaves
Puisne Judge