



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2009: No. 142

BETWEEN:

C.B.

Petitioner

-and-

D.B.

Respondent

Dates of Hearing: 1st - 3rd February 2010

Date of Judgment: 28th April 2010

Mrs. Georgia Marshall of Marshall Diel & Myers, for the Petitioner;

Ms. Jacqueline MacLellan of MacLellan and Associates, for the Respondent.

JUDGMENT

1. The parties whom I will call the wife and the husband, for convenience notwithstanding pronouncement of a decree absolute, filed for ancillary relief.

2. The wife filed her application on August 25, 2009 in which she seeks interim periodical payments for herself and the children of the family and/or lump sums provision as may be just and a property adjustment order in relation to the jointly owned property.

3. The husband filed his application on September 22, 2009 in which he seeks substantially the same relief as the wife, namely periodical payments (including interim relief) for himself, and the children of the family and a property adjustment order in relation to the jointly owned matrimonial property. The husband seeks transfer of the wife's interest in the jointly held property to himself.

4. Pursuant to these proceedings each party swore and filed affidavit evidence, each testified and I have heard evidence and argument over a period of three days.

5. They were married in 2002. They were separated between September 2005 and July 2008. They tried unsuccessfully to reconcile their differences from July 2008 to July 2009. Decree Nisi was pronounced on October 30, 2009 with Decree Absolute on January 7, 2010. The period of marital cohabitation between the parties was 4 years.

6. There are two children of the marriage now aged 7 and 4. The first child was born on September 4, 2002 and the second child was born on February 6, 2006. The parties have joint custody with care and control to the wife. The husband has reasonable access – two or three days weekly. Provision has been made for holiday and travel access.

Background

7. The wife is a Canadian citizen and the husband a Bermudian. The parties met in Bermuda in 2002 after the wife had been residing here for about 1 year. Shortly after they met the wife became pregnant and she and the husband moved to Canada where they were married on July 25, 2002 about 6 weeks before the birth of the first child.

8. The husband could not be legitimately gainfully employed as he was not a Canadian citizen and an application had to be made to regularise his immigration status. The wife's father provided them with rent and utility free accommodation as well as footing the bill of hiring an immigration lawyer to process the husband's application to remain and to work in Canada. In the meantime the wife's father employed her to do accounting work at \$1,600 per month net in hand. The wife's father assisted her with payment of her tax liability.

9. She continued to pursue her training to acquire certification in accounting. It took a "considerable time" for the husband to obtain permission to pursue legitimate gainful employment. The strain during the first few years took its toll on the marriage and the parties separated in August 2005. By then, the wife was pregnant with the second child who was born some 6 months after they separated. The husband did not even visit the hospital during the birth of this child.

10. That was not a good indication for his acceptance of his obligations to his children. This is illustrated by his later failure to pay maintenance and then only doing so when threatened with court action. Nor did he pay for his children from a previous relationship.

11. During the period of separation the wife withdrew her support for the husband's application to regularise his employment status. In evidence, the wife said that she did not wish to be responsible for the husband's maintenance for the 12 year period which would be the case in the event she continued with the application.

12. During the separation in Canada the wife allowed the husband to have access to the children when he visited her residence only. She curtailed any other access to the children on the basis that he had taken to drug (marijuana) use. She did not know where he resided as he failed to provide her with his address nor did she know the people with whom he was associating. In cross-examination the husband accepted that her concern

was reasonable. He has indicated that he had stopped using marijuana about four years ago.

13. I am satisfied that the wife carried the brunt of the responsibility to care for the children during separation and the husband began paying maintenance of \$433.40 for the children on February 1, 2007 following a custody agreement. Prior to that, the wife took care of the financial and other needs of the children. I reject the husband's evidence that during the separation on occasion he was giving the wife \$1,500 occasionally for the maintenance of the children. The husband had no real income and it was only in 2006 he returned to Bermuda where he could earn an income during the first period of separation. Indeed during the period he was in Canada he was being chased by the mother of his other two children for arrears of maintenance. This was not contested and clearly shows that his history in meeting his financial responsibility to his children is not good.

14. In 2008 the parties decided to try and reconcile their differences. The parties made arrangements to purchase the matrimonial home in Ontario Canada from the wife's father at a reduced value. However, a few days before they were to sign the documents, the wife decided not to go through with the arrangement. She said she felt he was going to divorce her.

15. The husband had $\frac{1}{4}$ interest in a house and property situated at South Avenue, Bermuda (the property). Since 1932, the property belonged to the husband's family. In 1995 the husband's father transferred the property to himself, the husband and his two siblings as tenants-in-common but there came a point when the father wanted to sell the property.

16. Upon the parties' reconciliation, they agreed to return to Bermuda for two years, purchase the interest of the other tenants-in-common in the property, renovate it, rent out the property and return to continue to reside in Canada. Once they returned to Bermuda they resided with the husband's parents.

17. The property was valued at \$1.4 million and was subject to a mortgage of \$141,000.

18. The husband's father decided to sell the property to the husband. This was a very generous offer by the husband's father who sold at a figure far below the market rate. In September 2008, the parties submitted a joint financial statement to the lender which set out their income, monthly expenses and other fixed assets. The wife said that she stood her ground and insisted that if she was going to be on the loan her name was going to be placed on the deeds of transfer. In February 2008, the wife secured a licence to acquire the property jointly with the husband. A voluntary conveyance was entered into whereby the property was conveyed to the husband and the wife in fee simple as joint tenants. I am satisfied that at the time this was done it was their agreement.

19. Of the \$540,000 which was borrowed, payments were made as follows:

- i) the husband's father was paid \$300,000;
- ii) the Bank of Butterfield's existing mortgage of \$141,000 was settled; and
- iii) the balance was used for closing costs and renovations works at the property.

20. Regrettably, four months after the transfer the parties separated and the marriage ended.

21. I have no doubt that the wife supported the financial arrangement and was very instrumental in securing the loan of \$540,000 from her employers. Additionally as a member of staff, she was eligible and obtained a staff discount.

22. The wife is still employed as an executive assistant. She does not anticipate relocating to Canada immediately after this matter is settled. She earns \$4,227.32 net monthly. This sum includes a monthly deduction of \$333.33 which is placed in a savings plans and used by her at the end of each year. She receives an annual bonus but there was no evidence of its value and, no issue was raised by the husband about its value, or that the wife should bring it into account.

23. For one year (July 2008 to July 2009) the husband was occupied renovating and upgrading the property. It consists of three units with a total rental income of \$6,300 monthly.

24. The husband receives \$6,300 per month rental income. He is a skilled mason who previously worked and played an 'important role' in the family business for years. He was paid \$1,500 weekly when he worked in the family business. He did not earn his regular wage during the period he was occupied upgrading the property. He can work when he wishes and with his skill he can realistically earn no less than \$1,500 weekly. In cross-examination he has accepted that once he receives a building permit he will be embarking upon a larger renovation project.

25. As far as the family assets are concerned, the parties have the joint legal interest in the property now valued at \$1.350 million. The outstanding mortgage is \$539,563. The parties are not ad idem that the net equity is \$710,834.50.

26. Counsel for the wife argues that this sum is available for distribution while Counsel for the husband submits that the amount available for distribution is \$396,834.50 as the Court should make a further deduction of \$200,000 owed to the father and a further \$114,000 owed for material and supplies.

27. The evidence does not support the assertion that this further sum of \$314,000 (200,000 + 114,000) is owed to the husband's father.

28. Mrs. Marshall submits that there is some oblique evidence to suggest a further payment of \$100,000 was expected although not secured against the property consequently in the absence of reliable evidence the net equity should not be reduced to take account of this sum. However, if the Court is not with the wife in this assessment the net equity available for distribution would be \$610,000.

29. On the evidence, I accept and find as a fact that a further sum of \$100,000 is owed to the father, one can see from the transactions that not every discussion was enshrined in writing. The wife said that she was never privy to any of the discussions between her father-in-law and the husband. The husband said it was more of a '*moral thing*' than a paper agreement. I accept this and give the husband the benefit of any doubt although generally speaking where there is a conflict between the husband and the wife I prefer the evidence of the wife.

30. How should the Court distribute the assets?

The Court is enjoined by Section 29 (1) of the Matrimonial Causes Act 1974 and by precedent. The objective is to achieve a fair outcome giving the first priority to the welfare of the two children of the marriage.

Section 29(1) (a) The parties are joint owners of the property valued at \$1.350 million with a net equity of \$610,835. The husband has a 1/5 interest valued at \$360,000 in the property where he resides with his parents. The wife does not seek an interest in this property.

31. The wife brought no assets to the marriage. Her income and earning capacity is \$68,120 gross per annum. Her monthly income is \$4,227 net of deductions of \$333 monthly savings.

32. The husband has worked for his father for many years as a skilled mason earning \$1,500 per week. As was indicated earlier, since July 2008 to July 2009 he has not worked regularly and did not receive a monthly wage as he was occupied renovating the property. In November, December 2009 and January 2010 the husband worked, renovating a friend's home and earned about \$5,000-\$6,000 from that venture.

33. I am satisfied on the evidence before the Court that the husband's earnings have a value of at least \$72,000 per annum or \$6,000 per month.

34. Counsel for the husband submits that the husband expects to resume working on the property by adding three bedrooms which was part of the parties' original plan. The husband receives \$6,300 per month rental income which he uses for paying for the mortgage, the ongoing renovations and his debts. Once the wife's name is off the property the mortgage payments will increase although he has the option to extend the terms of the mortgage which would keep the mortgage payments at roughly the current rate. Counsel submits that when the renovations are complete the husband will use the rental income to pay for the children's expenses. He hopes to return to Canada and expects the wife and the children will be returning to reside in Canada. She submits that both parties have received financial support from their respective parents, both during the marriage and since the separation. Counsel submits that the wife's parents will also provide her with financial assistance as and when needed.

35. In my judgment, the husband is making assumptions about the wife's parents that are not supported by evidence or any sufficient evidence. There is no reliable evidence before the Court that the wife's father will continue to assist her financially. The Court does not know the father's means and what he intends to do. He may well have other demands on his money.

36. Section 29(1) (b) The financial needs of the parties is to house, feed and clothe themselves. I am satisfied they are able to do that. The husband lives with his parents in a house in which he has a 1/5 interest which is valued at \$360,000. In so far as meeting the mortgage and the land tax and other obligations associated with the property, the property generates sufficient income to pay the mortgage, house insurance and land tax leaving a reasonable surplus (\$2,500 per month).

37. The wife owes debts totaling \$50,300 made up of \$1,077 on her US Visa credit card, \$16,024 on her Canadian credit card and approximately \$33,200 in legal fees.

38. As to the ‘obligations and responsibilities’ which each of the parties has or is likely to have for the foreseeable future. The wife has the care and control of the children and incurs total monthly expense of \$6,533. She receives \$2,000 plus monthly from the husband towards the children’s expenses. The husband accepts that he has a joint obligation to assist with the reasonable maintenance of the two children which includes their direct as well as their indirect expenses. He does not take issue with the figures put forward by the wife but says he cannot afford private nursery for the youngest child of the marriage. Although he agrees it would be very disruptive to move him during the next school year.

He has two children from a former relationship and has the responsibility to maintain them. Some anxiety has been shown by the wife as to whether the husband will continue to meet his obligations to the children once this matter is concluded.

39. Mrs. Marshall argues the husband’s statement that he has always taken responsibility for “all my children” is a complete and outright lie. She says that for a period of five years he failed to make any payments toward the maintenance of his two children from a former relationship. This resulted in arrears of maintenance of \$19,000 each and was paid under duress when he was forced to return to Bermuda to assist his father and was threatened with incarceration. Additionally, \$7,000 was used out of the mortgage funds to settle arrears of maintenance. He is still in arrears, and according to Mrs. Marshall he only pays maintenance for his children when he is threatened with legal action. Counsel for the wife submits that it would appear that the husband is reluctant to engage in regular and normal employment to meet his obligation, for his children. He has indicated that it is his intention to remain in Bermuda only for so long as it takes him to construct a further apartment to the property and then to leave Bermuda to reside in Canada.

40. The husband has given no indication nor has he provided any credible evidence as to how he intends to continue to meet his joint obligation towards the maintenance of the children other than a general statement that a rental income will be assigned to meet their needs. Based on the evidence of the husband’s past conduct in that regard I have no

confidence in the husband's assertion that he will pay continued maintenance for his children.

41. The marriage subsisted for 7 years with co- habitation lasting 4 years.

42. The standard of living of the parties with their parents' assistance was adequate.

43. The wife is 36 years and I accept that the husband is 39 years.

44. The wife has been diagnosed with rheumatoid arthritis. However, this does not affect her current or short term ability to work. The husband suffered a stroke 4 years ago. There is no evidence from the husband as to how the stroke may or may not have affected his financial position.

45. Since the birth of the children the wife has played a major role in their care. This was particularly so during the 3 years between 2005 and 2008 when the parties were separated. The wife contributed all her income to the welfare of the children. The husband's financial support was notably lacking.

46. The Court is required by Section 29(1) "So as to exercise (its) powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

47. Mrs. Marshall submits that throughout the marriage the wife has been employed and has contributed all her income to the welfare of the family generally. She has been and continues to be the primary caregiver of the children. Her contribution will be enduring well into the future as the children are only 7 and 4 years of age. The wife has contributed substantially in making it possible for them to purchase the joint interest in

the husband's family property with the inclusion of her employment earnings and she obtained considerable reduction in the monthly payment in relation to the borrowing.

48. Mrs. Marshall submits that the equities of this case calls for a 50/50 distribution of the net equity. That is a lump sum payment of \$355,000 to the wife. Such a distribution recognizes the intention of the parties to own the property as joint tenants with a right of survivorship, recognizes the contribution by each party towards the purchase of the property and it recognizes the enduring contribution which the wife will continue to make by virtue of her ongoing care of the children.

49. On the other hand Mrs. MacLellan for the husband urges that the asset of the property is the sort of asset defined as non-matrimonial property within the meaning of Baroness Hale and Lord Nicholls definitions of non-matrimonial property and the only reason they are in a position to own the property is because of the husband's father's generosity in gifting the property to the husband at a value substantially below full market value. It was never the matrimonial home and given all the factors, fairness dictates that the equity in this property should not be included as part of the division of assets. Non-matrimonial property may be considered in a case where needs dictates and there are not sufficient assets to go around but this is not the situation here.

Mrs. MacLellan submits that it is likely that both parties will return to live in Canada once the addition to the property has been completed. Thereafter the husband will earn significantly more rental income and will be in a position to contribute more to the children's expenses. The wife will not be able to purchase property in Bermuda and she can put a roof over her children's heads with her income and the contribution from her husband who is able to do so because he continues to live with his parents rent free. Mrs. MacLellan submits further that it is likely that when the wife returns to live in Canada she will be allowed to resume living in the former matrimonial home and that eventually she will inherit this property or her father will gift it to her.

50. It has been suggested by Counsel for the husband that the facts in the case are relevant in the following way. The property has been in the husband's family since 1932, since the husband and wife only acquired it four months before the wife left the husband and because the wife and her parents did not uphold their end of the bargain and transfer the Canadian property to the couple. Fairness demands that the wife transfer her interest in the property to the husband for no consideration. For this reason it becomes irrelevant whether the net equity in the property is what the wife says or the husband says.

51. In my view, that is to focus on the narrow aspect rather than focusing on the broader question: what is a fair outcome giving priority to the welfare of the two children of the marriage.

52. In my judgment, the history in this matter is not particularly relevant. It tells us how we arrive where we are. The wife's conduct in this case is not sufficient to justify taking it into account when it comes to apportioning the assets.

53. If I am wrong in taking this view, then even though the evidence of the conduct of the husband and the wife may be accurate, it is not a factor that I gave any weight in the equation for or against either party.

54. Mrs. MacLellan submits that if the wife's evidence is to be believed, the husband could not borrow the initial amount of the monies to raise the mortgage. It therefore follows that it is unlikely that the husband will be able to borrow any additional money to pay the wife a lump sum.

55. In my view, particularly taking account of the welfare of the children, it is desirable, if the property could be held on to but if it has to be sold to meet short or long term demands then it has to be sold.

56. Primary consideration must be given to the 7 and 4 year old children. They must be catered for within reason. It is clear on the evidence that the wife will be looking after the children for years to come, and which on the evidence she takes seriously. She must be placed in a position to do so.

57. Counsel for the husband has asked the Court to have regard to the Supreme Court Divorce Jurisdiction decisions of *Humphrey v Humphrey* 2006 No. 220 and *Campbell and Campbell* 2008 No. 135. These cases can be distinguished. Each case is decided on its own facts and is different in each respect.

58. Given all the factors in this case and the evidence which I have heard I order the husband to pay the wife a lump sum of \$305,000 within 90 days of this Order. The wife should keep her motor car.

59. As regards the maintenance of the two children, Counsel for the husband submits that the husband has his own expenses for the children as well as the two older children and, until the addition has been put on the property the husband will not be earning an income; consequently, any contribution that he makes to the children's expenses will have to be borrowed from his father.

60. As I have indicated, first priority must be given to the welfare of the two children of the marriage. The husband has acknowledged that he has a joint obligation to take care of the children's reasonable expenses and has accepted that the budget put forward by the wife for their maintenance is reasonable. In the circumstances, I hereby order the husband to pay \$815 per month for his daughter and \$1,116 per month for his son. The parties have liberty to apply for an adjustment when the boy completes nursery school.

61. In summary, the husband should pay the wife \$305,000 in full and final settlement of all her claims. The husband shall pay the costs of these proceedings. I invite the Counsel to endeavor to settle a suitable order for my sanction.

Dated the 28th of April 2010.

The Hon. Justice Norma Wade-Miller
Puisne Judge