



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2007: No. 204

**BETWEEN:**

**TRACY DEAN WOOLRIDGE**

**Petitioner**

**-and-**

**SHARLENE ISOLIA STEVENS**

**Respondent**

Date/s of Hearing: 13<sup>th</sup> -14<sup>th</sup> April, 4<sup>th</sup> June 2010

Date of Judgment: 24<sup>th</sup> August 2010

R. Woolridge for the Petitioner  
A. Richards for the Respondent

## JUDGMENT

1. This is the Wife's application for ancillary relief made in her Cross-Petition. In her Notice of Application for Ancillary Relief dated the 23<sup>rd</sup> November the Wife seeks various orders including lump sum provision as well as a property adjustment order in respect to property situated at #4 Crisson Avenue, Pembroke Parish ("the Property").

### **HISTORY**

2. The parties were married on the 17<sup>th</sup> day of September 1994. There are no children of the family. The Husband filed his petition for divorce on the 16<sup>th</sup> November 2007 and the Wife's Cross-Petition was filed on the 19<sup>th</sup> November 2007. By consent order of the 25<sup>th</sup> January 2008 the divorce proceeded on the Wife's Cross-Petition. The decree nisi of divorce was granted on the Cross-

Petition on the 29th February 2008. The decree was made absolute on the 15<sup>th</sup> day of April 2008.

3. The undisputed facts are that the parties started out married life living together in rented accommodations. The last such rented unit belonged to the Wife's aunt and was situated in Hamilton Parish.
4. The Husband's mother had become dissatisfied with the assistance given to her by another of her children. The Husband stepped in to take of his mother's concerns. On a date unknown but in or about 2000 the Husband's mother transferred ownership in the property from herself to him subject to her life interest. The Property consists of the main unit in which she and the parties resided and a lower rental unit. In 2002 the parties moved into the Property. The Husband said that he had done so because of his concerns about his mother's well being and safety.
5. The parties resided in the Property with the Husband's mother and with one of the Husband's grandchildren for whom he had the responsibility of care and control. The Husband assumed responsibility for the care of the Property and assumed responsibility for his mother's care. To that end the mother executed a power of attorney and placed the Husband's name on her bank account.
6. The Husband's mother passed away in October of 2004. The parties continued to reside at the Property as husband and wife. There is conflicting evidence as to the actual date of the breakdown of the marriage and separation of the parties; however, the Wife vacated the premises in September of 2007.

#### **The Wife's Case**

7. The Wife's case is that the Property was the matrimonial home. She seeks a lump sum payment on the basis of an equal division of the parties' assets. She contends that she should be put into a position where she has a secure home and the ability to meet her retirement needs. Further it is her case that the court should infer that the Husband has hidden assets. She bases this on the Husband's conduct in failing to disclose his assets. The record reveals that the court had to intervene to assist the Wife's attorney to obtain outstanding financial information.
8. The Wife makes her claim for relief on the basis that while living with the Husband in the Property she made contributions in cash and kind to the running of the household. She contends that she cared for the Husband's ailing mother and helped raise the Husband's grandchild.
9. The Wife is employed by Surf Side Beach Club in accounts and reservations. She is 54 years of age. She states that her weekly salary is on average \$530 net. A review of information supplied by her employer indicates a marginally higher average weekly income. Included in her pay are gratuities.

10. The Wife has only \$585.20 in savings and states that she has no other source of income. She is enrolled in a company pension plan. Its cash value to date is approximately \$7,000. She did not however provide any information regarding her intention to retire at any particular age or date. Nor did she indicate whether her pension plan was transferable in the event of changing employment.
11. In her affidavit of the 5<sup>th</sup> March 2008 she states that her total monthly expenses amount to \$2,362. Included in her monthly expenses is rent for a studio apartment in the sum of \$1,000. She indicates that she is not currently paying electricity or water costs as they are included in the rent but she anticipates having to pay them in due course.
12. It would appear from her list of monthly expenses that she only just makes ends meet however upon closer analysis savings can clearly be made. Two of the big ticket items in her monthly expenses, hair care and church tithes, are lifestyle choices rather than necessities. The Wife claims the cost for both a telephone (presumably a land line) and a cell phone. She has not provided account details for the land line as requested by the Husbands attorney. In any event in her circumstances two telephone accounts is excessive. Additionally she claims a substantial amount for gifts amounting to \$792 per year.
13. The Wife is one of five beneficiaries of her late mother's estate. Her mother died intestate, leaving a one third interest in a property in Devonshire. The Wife's evidence is that prior to her mother's death in December 2007 her mother made an oral request to her to forgo all future interest in the property. Based on her mother's wishes the Wife agreed to give up her interest in her mother's share of the family property to a brother and a sister.
14. She contends that to her knowledge the property was in a rundown state and that her interest was of little value. She has supplied a copy of an email indicating that she instructed an attorney that she was not claiming her interest in the subject property and that it should go to the benefit a named sister and brother. The Wife has not provided an affidavit of value of her mother's estate or a vesting deed or a valuation of the property as requested by counsel for the Husband. There was no evidence that the Husband played any part in the Wife's decision to give up her benefit however meager it may have been.
15. There was a car that was used as the family car during the marriage. The Wife's evidence is that with just 9 days of warning she was instructed to get rid of the family car. She was unable to sell it she therefore transferred ownership to her daughter. That was when she learned that the Husband had purchased a more luxurious car. The wife did enjoy the benefit of the newly acquired previously owned car. However once the parties were living separately the family car was returned gratuitously to the Wife for her use by her daughter.

### **The Husband's Case**

16. The Husband denies that the Property was the matrimonial home. His case is that it is inherited property in which he acquired a vested interest only after his mother's death in 2004. His case is that during his mother's lifetime she paid for all utilities and expenses related to the Property from funds in her account.
17. His case is that his mother gave him a power of attorney and he became a joint account holder of her account. This was done for the purpose of meeting his mother's monthly payments for her. The mother's pension payment and the rental income from the second unit of the Property went into that account. This he said was done prior to the parties moving into the Property.
18. He refutes the Wife's assertion that she contributed to the running of the household by meeting monthly utilities and other expenses once they had moved into the Property. He stated that the Wife was unemployed for two years, one of which was during the time that they moved into the Property. He contends that he continued to make all household payments from the joint account after his mother's demise.
19. His position is that the marriage became strained shortly after he and the Wife moved into the Property. He argues that the marriage had broken down shortly after his mother's death when the Wife started sleeping in the grand-daughter's bedroom or on the living room couch.
20. The Husband is employed by the Health Department of the Bermuda Government in the Vector Control Department as an inspector. At the date of the hearing he was 46 years of age. He produced a letter from his employer explaining the basis of his salary calculation although he did not produce all pay slips for the defined period. The salary slips that he has produced show that his net salary is just over \$500 per week. In addition he has rental income of \$1,500 per month from a rental unit on the property.
21. The Husband has two bank accounts and one Credit Union account. The largest deduction from the Husband's salary is savings of \$250 per week which is deposited directly into his Bermuda Credit Union account. Activities on that account together with the Husband's evidence show that money was regularly withdrawn there from. The Husband's evidence is that he uses the funds in the Credit Union account for the benefit of his 7 grandchildren whenever any of them they needed his help. The balance in that account as at November 2009 was just over \$5,200.
22. The Husband's Butterfield Bank account was held jointly with his mother until her death.

23. The Husband admitted that as at the date of separation the balance in his Butterfield Bank account stood at \$33,536.30. His evidence was that he did not touch the money in that account until two years after his mother's death as he still considered it to be hers.
24. The Husband admitted that he withdrew \$25,000 from that account on the 8<sup>th</sup> November 2007. His evidence was initially that he invested it into a business that went sour. He then clarified that he gave that money to the mother of one of his children so that she could re-establish a defunct family business. His evidence was that he saw that as being for the benefit of his child. He admitted that when the business did not get re-established the money was returned to him. He then placed the money into a safety deposit box at the bank.
25. The Husband's Bank of Bermuda account had a balance of \$23,221.39 in September 2007 at about the time the Wife left the Property. Under cross-examination the Husband stated that he was paid \$12,000 from his mother's life insurance policy. He also admitted that his mother inherited \$20,000 from an aunt which she then gave to him to deposit in his account at the Bank of Bermuda. When asked in cross-examination why he had withdrawn \$15,000 from that account the husband stated that he gave the money to the mother of his child.
26. The Husband made it clear to the court that he considered the money in his accounts to be his. He was adamant that to the extent that he had withdrawn or used funds he did so because it was his money and he did not want the Wife to get the funds. He stated that it was no concern of the Wife where he put his money.
27. The Husband's position is that he should be able to assist his children financially if and when the need arises. He admitted that he purchased a couple of boats which he has now sold. He also took a few trips abroad and purchased a Rolex watch for himself, reiterating that the money was his to do with as he pleased. He also acknowledged in cross-examination that he spent the money so that the Wife could not get her hands on it.
28. As to the car, the Husband's position is that he helped his daughter to purchase a BMW motor car in July 2006. Banking records indicate and the Husband confirmed that this purchase was financed by way of loan of approximately \$35,000.00. However, the evidence indicates that he and the Wife enjoyed the use of that car before the separation.
29. The ownership of the vehicle was transferred to the Husband's daughter shortly prior to the commencement of the divorce proceedings. The daughter has had some use of the car; however her evidence supported the position that the car is primarily the Husband's car financed almost exclusively by him.
30. The Property is now vested solely in the Husband. The rental unit generates \$1,500 per month. The Husband has incurred debt from securing borrowing on

the house. He borrowed to carry out renovations on the property and to purchase the BMW motor car. The outstanding borrowing secured on the Property appears to be a moving target with the Husband's first affidavit showing an outstanding balance of \$75,000.

31. Banking records indicate that the mortgage balance is approximately \$57,000. Counsel for the Wife suggests that it should now be along the line of approximately \$45,000. Although counsel for the Husband never addressed the issue at all, the repayment in any event appears to be covered by the income from the rental unit.

### **THE LAW**

32. The power of the court to make an order pursuant to an ancillary relief application is statutory and is contained in section 27 of the Matrimonial Causes Act 1976:

27 (1) "On granting a decree of divorce ... the court may make any one or more of the following orders, that is to say—

- (a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
- (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
- (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;

33. The matters to which the court is to have regard in exercising its power is contained in section 29 of the Matrimonial Causes Act 1976.

29 (1) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) ... in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;

- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those 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”.

- 34. The principles that guide courts on the exercise of the above mentioned statutory provisions derive from the decisions of other courts in similar cases, although matrimonial cases tend to be facts sensitive. Both counsel for the Wife and for the Husband have relied on the principles enunciated in the case of **White-v-White** [2000] UKLR 54 as supporting their respective position. Counsel for the Wife has relied on the principles laid down in **Miller-v-Miller; MacFarlane-v-MacFarlane** [2006] UKHL 24.
- 35. Counsel for the wife argues that the guiding principle to be gleaned from **Miller** is the “equal sharing principle”, that each party to the marriage is entitled to an equal share of the assets of the partnership as fairness requires no less. He also relies on the principle enunciated in **Miller** that the matrimonial home should normally be treated as matrimonial property and that in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.
- 36. Counsel for the Husband contends that the court should adopt the approach set out in **White** that the party inheriting property ought to be able to keep it as inherited property stands on a different footing from what is loosely referred to as matrimonial property.
- 37. Had the Husband not been gifted the Property effective upon his mother’s death there would be nothing to decide between these parties. Their financial positions would have been to a great degree at parity. The question for the court is, given that the Husband acquired this property only three years before the break down of the marriage, should it be considered a matrimonial property? Further whether or not considered a matrimonial property, do the facts support an equal division of its value between the parties.
- 38. The general principle underlying the matrimonial property regime reflects the premise underlying property law in Bermuda (and the England). The legal ownership of property rests in the title holders. In so far as gifts of property are

concerned, the principle established in the White and Miller cases is that the source of the assets may be taken into account.

39. However, the above referred authorities show that where that property is not a family asset, and not generated by the joint efforts of the parties then the duration of the marriage may justify a departure from the yardstick of equality. The authorities point out that the nature and source of the assets and the manner in which the parties ran their lives may also be taken into account.
40. The yardstick of equality has been described as the standard against which the outcome of the above referred section 29 matters are to be checked. Starting with items in (b) it is the financial needs of the Respondent that her counsel urges the court to consider. The rationale adopted in Miller however asserts that it is needs (obligations and responsibilities) that have been generated as a consequence of the parties' relationship that are to be taken into account.
41. Examples would be the need for housing for the party with care and control of the children of the family, or the needs of a spouse who has given up a career to look after the family. The notion of compensation also falls under this area of consideration.

#### **FINDINGS OF FACTS**

42. The court finds that this was a marriage of some thirteen years. This period is too long to be considered short but on the other hand by the facts not a long one or one of an enduring nature. I find as fact that the Husband became vested of the legal owner of the Property by way of gift in 2004. I find that the property at that time was mortgage free. The Wife did not contribute to its capital worth at all.
43. I find that the Wife did however make contributions to the welfare of the family in the sense that she looked after the Husband's mother and grandchild. I find that she contributed to some monthly household bills after the death of the Husband's mother. The atmosphere in the home may have been strained and complaints may have been made of the standard of care but these I find are the ordinary type of complaints that can and often are made upon the breakdown of a marriage. They should not in my estimation fall into account.
44. As to (c) The parties appear on the facts to have enjoyed a modest standard of living throughout the marriage. They lived in rented accommodation for most of the marriage. They only progressed to the Property in the final years of the marriage. They shared that property with the Husband's mother and his granddaughter. No evidence was given of family holidays or meals out. The husband however seems to have enjoyed a higher standard than the Wife did toward the end of the marriage.



45. As to (d) I have already expressed the view that this is not a marriage of long duration. There is an age disparity of some eight years between the parties but the Wife being the elder has not yet reached a mandatory retirement period. She may safely be presumed to have ten more working years; almost as many years as the de facto length of the marriage itself.
46. As to (f) I have already observed that the Wife has made contributions to the family. The care of the home, the Husband's mother and the grandchild the court accepts she shared with the Husband. It was not established by the evidence that throughout the marriage the Wife or the Husband had an expectation of the Husband inheriting the Property.
47. The loss of benefit contemplated by (g) counsel for the Wife contends is the value of the Husband's pension. I am not persuaded that this is a case where the value of the Husband's pension should be taken into account. The Wife also has a pension plan into which she pays regularly through her employment.
48. No evidence was given that suggests that the Wife will lose the benefit of her pension. Further she did not establish by evidence that she lost value in her pension plan as result of the marriage or any decision taken in the marriage. The un-refuted evidence of the Husband was that she had voluntarily been unemployed for periods of time during the marriage. In any event pension funds should only be ordered split where the facts justify it. I am not convinced this is such a case.
49. I have left for last, consideration of the section 29 (a) matters to which the court is to have regard. As stated above the parties have a similar level of income, and on the facts I accept that their earning capacity is similar. The husband will have at least eight more years of earned income should the Wife retire at 65. There was no evidence on the point however the court accepts from the facts available that upon retirement she will have little if any earned income, no real property and little if any savings.
50. In the circumstances the Wife should be given the benefit of the doubt. The fact that she gave up an interest in a family property shall be given minimal weight.
51. In so far as 'property' is concerned, I have determined above that the facts do not call for an equal division of the Property owned by the Husband. He has however established that the funds in the bank left after his mother's demise were used for the benefit of the family in the sense that he sustained the household with them.

### **CONCLUSION**

52. In my estimation, fairness calls for some distribution to be made to the Wife. Consistent with my analysis of the law and findings of facts this is not a case for an equal division of the assets of the parties. This is not a case for a distribution

- made on the basis of the non compliant conduct of the Husband. Dicta in Miller makes that clear. The Husband was in any event penalized in costs for failing to comply with Rule 77(4) requests.
53. The other conduct complained of by counsel for the Wife arises from the Husband's apparent attitude that he could do as he wished with his money and his dissipation of funds from his bank accounts. That is the kind of conduct that a court can take into account in considering the distribution of assets.
  54. His conduct and attitude may be taken into account in this narrow sense only. I am constrained to bear in mind the requirement for fairness to the parties. The Husband has a property that he has liberally relied upon as a source of revenue. No doubt he may do so again in the future. His asset picture has depreciated dramatically in the last two years of cohabitation and since then, largely for his sole benefit.
  55. The Husband believed that this might defeat any claim that the Wife might make. He was largely defiant of any such claim. It would be unfair to the Wife to deny her an award merely because the Husband may have to further encumber the Property. He put himself in this position and has no grounds to complain about it.
  56. In my estimation the Wife should be put in the position where she can acquire a car. The previous family motor car is aged and the Husband saw the need to replace it. It is only fair that that standard should apply to the Wife although not necessarily a car of equal value.
  57. In the exercise of my statutory powers and in consideration of the above matters I find that the Husband should pay to the wife the sum of \$115,000 in full and final settlement of her claims for ancillary relief. This sum should go a long way to provide some security for the Wife if not a means to secure a permanent home. Said payment to be made within sixty days of the date hereof. In the meanwhile the \$115,000 shall stand as a charge on the Property.
  58. Should the Husband fail or refuse to make said payment then the Property is to be sold and the Wife is to receive her payment from the net proceeds of sale. Should the Husband fail or refuse to sell the property then the Registrar shall stand in his shoes and appoint a realtor to sell the Property. The Registrar shall be empowered to sign the sales agreement and the conveyance as necessary.

Dated this 24<sup>th</sup> day of August 2010

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Madam Justice Charles-Etta Simmons

Puisne Judge