



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2009: No. 84

BETWEEN:

DEBORAH JANE RILEY

Petitioner

-and-

EDWARD CECIL PITMAN

Respondent

Dates of Hearing: 7-9 June and 14 June 2010

Date of Judgment: 10 September 2010

Ms Rachael Barritt of Marshall Diel and Meyers for the Petitioner
Mr David Cooper of Cox Hallet Wilkinson for the Respondent

JUDGMENT

1. It will be convenient to refer to the parties as “the husband” and “the wife” even though they are no longer married.
2. This is a hearing of the wife’s application for a lump sum payment of \$350,000 on a clean break basis. The husband and the wife filed affidavits and gave evidence before the court and were cross-examined. I have had the benefit of written and

oral submissions from Ms. Rachel Barritt on behalf of the wife and Mr. David Cooper on behalf of the husband.

History

3. On the evidence before the court I am satisfied and find as a fact that the parties lived together akin to man and wife for a period of 14 years – 1985 to 1999 – prior to the marriage.
4. This period of pre marital cohabitation passed seamlessly into their marriage on 16th December, 1999. In the long run, unhappy differences arose and on the 24th July 2009 Decree Nisi was granted. Decree Absolute was pronounced on the 18th September 2009. The marriage therefore lasted 10 years.
5. The Court has been asked to have regard to the 14 year period of cohabitation. In *Co v Co (Ancillary Relief: Pre-marriage cohabitation)* [2004] EWHC 287 (Fam) [2004] 1FLR 1095, Family Division, the Court observed that committed, settled relationships which often endure for years in the context of cohabitation outside marriage must be regarded as valid as those where the parties have made the same degree of commitment but recorded it publicly by marriage.
6. Coleridge J said *“this has nothing to do with morality or religious belief and everything to do with striving to achieve financial fairness as between a couple at a particular stage in society’s development. In the end, where such an arrangement has existed (especially where it seamlessly and immediately precedes the marriage) in a given case it seems to me to be capable of being as important a non-financial factor/circumstances under s 25 as any other, akin to the duration of the marriage (subs (d)), or may be a species or part of contribution (subs (f)) or conduct (subs (g)) if it is necessary to find a specific s 25 pigeonhole. Section 25 is concerned with taking into account the reality of a couple’s circumstances and situation during the relationship. It is concerned with establishing fact not fiction in all areas including the financial. To ignore such a*

factor as cohabitation would lead the court to be considering the case on an untrue basis and almost inevitably lead to unfairness.”

I accept that the 14 year period of pre-marriage cohabitation is an obvious important circumstance which I ought to take into account, and do so, when considering this case.

7. The wife is a United Kingdom citizen and is now 50 years old. The husband is Bermudian and is 62 years old. There are no children of the family.
8. In January 2009, the wife returned to reside in the United Kingdom. She is living with a partner and they share the household expenses. There is no reliable evidence that she and her partner intend to make this a permanent relationship.
9. The husband and wife first met in 1984 shortly after the wife arrived in Bermuda. They both resided in rented accommodation and in early 1985, approximately 6 months after they met, they commenced living together. They kept totally separate financial accounts throughout pre-cohabitation and during their marriage.
10. Whatever savings the husband accumulated he brought into the relationship. On the evidence, I am satisfied that when the parties first met the husband had sufficient savings, about \$50,000, for down payment on a house. He says it was always his wish to have his own home.
11. In 1986 the husband purchased the condominium, pre-construction, which became the matrimonial home, for \$226,100. The husband paid the initial deposit of \$22,610 and a further \$61,157 at completion. In addition he arranged a mortgage of \$148,000. The husband borrowed a further \$30,000 for furniture and fittings which he paid off over a period of five years. He made monthly payments of \$1,330 and \$600 respectively against these two debts.
12. The husband was employed by the Bermuda Government from 1976 to early 2000. In early 2000, shortly after their marriage the husband retired from his civil

service job for medical reasons. The fact that the husband faced retirement was known by the wife at the time of their marriage. At this time about \$85,000 was owed on the mortgage. He was allowed to take a portion of his government pension in a lump sum and used the monies secured to pay off the outstanding balance on the condominium. Consequently the husband's pension is now reduced to approximately \$2,364 per month. In October 2009, this property was valued and if sold its net equity is \$673,772.50.

13. The husband's only other significant asset is a 1/3 interest in one of the Paget town houses. The husband's mother bought this property in 1988 and resided in it until she died in 2008. On 1st December 1998 she conveyed the property to her 3 children each with 1/3 interest. One of the siblings now resides in the premises. She pays rent monthly which is divided equally between the three siblings. He receives a net sum of \$1,000 monthly being his share of the rental. His 1/3 interest valued at \$216,861.00
14. The husband has had several medical and health issues. He has had toes amputated, suffered a silent heart attack, vision difficulties and continues to receive eye care. The husband's health is presently stable but he needs ongoing medical and physical treatment. He remains in the Government Employees Health Insurance (GEHI) scheme where part of his premium is subsidized by the government but only a portion of his care is covered by his health insurance. At age 65 the husband will be eligible for free bus and ferry travel.
15. He said were he to take on full term employment, he would lose his GEHI medical insurance and will have to secure alternate health insurance. Because of his pre-existing health issues he would be facing substantial monthly costs of approximately \$1,000.
16. The significant assets in the husband's name are:
 - i. the former matrimonial home with a net equity of \$650,000.

ii. 1/3 interest in a Paget town house with a net equity of \$218,861. He has debts totalling \$27,096 inclusive of legal fees of \$12,000.

17. There is a conflict in the evidence of the parties as to the level of the contribution made to the household expenses by the wife. The husband keeps meticulous records yet it was only during the trial he produced pages of documents to show their respective level of contribution. On this issue of contribution, I accept the wife's evidence that during the early stages of their relationship she was not earning "that much" but she still contributed \$200 - \$250 on a regular basis to the household expense as requested. The wife's contribution increased to \$400 per week once she secured her job at XL Capital. I believe her when she said that she would give the husband lump sum payments out of her bonus towards the cost of the repairs to the property.
18. The wife had a passion for cats. Throughout the relationship she had been actively involved with the charity Bermuda Feline Assistance Bureau (BFAB). It is clear on the evidence the wife spent a significant amount of time and money for the benefit of the feral cats. The husband supported the wife's involvement with the cats and welcomed some cats (the house cats) about 22 into their home. The cost of feeding the cats is estimated at \$8,000 per annum.
19. Throughout the marriage the wife was employed either as a personal assistant or executive secretary. She was employed by XL Capital from 2003 to September 2008 when she was made redundant. I accept the evidence that when the parties separated, the wife left the husband with the house cats. She left the husband with \$5,000 to care for five of the cats which she expects to take to the UK. It is anticipated that the husband will have the expense (of about \$60,000 for the maintenance of the cats) of caring for the remaining cats depending on their longevity. When she started at XL she was earning \$50,000 per annum. XL paid her medical health insurance and pension benefits. In her final year with XL she earned close to 100,000 inclusive of an annual discretionary bonus of between

- 10%-20%. When she left XL she received \$47,032 as severance pay. The wife says she was forced to cash her pension of \$35,039 from XL as she could not transfer it to the UK.
20. Thereafter, she secured a position at King Edward Memorial Hospital she said that she left that position in January 2009, during her probationary period after she realised the marriage had irreversibly broken down. The wife said that she transferred funds to her partner, Martin, because she did not have an account in the UK and Martin used the money to assist her in purchasing items in anticipation of her relocation. She used some funds to contribute towards a deposit on her new accommodation, living expenses, purchase a laptop and printer.
21. On the evidence I find that in January 2009 the wife had \$42,000 when she left Bermuda. She purchased a car for \$21,000; some funds were used for legal fees and some to pay her initial divorce retainer.
22. When the wife left Bermuda she did not secure employment in the UK until June 2009. Presently, she is employed as a Business Support Officer for the Centre of Professional Development with the Oldham Safeguarding Board. She earns £229.93 net per week or £987.68 per month. She has been unsuccessful in securing better paying employment. She believes her age presents a barrier. The wife said that ultimately she would like to purchase a home in and around the Manchester area. The cost of a home in this area would be about £150,000 (\$217,500). The wife accepts that with her partner she would require 50% (\$109,000) of the cost to purchase a house.
23. The wife purchased a new car in February 2009 for \$21,272. Due to depreciation, she accepts a current value of \$20,000. She has pension with a capital value of \$37,528 per annum which becomes available when she reaches 55 years. She is eligible for a Bermuda pension when she reaches age 65.

24. The asset in the wife's name is a motor car valued at \$20,000. She has debts totalling \$22,667.90 inclusive of \$20,000 legal fees.

Conclusion

25. In dealing with this type of application, the court in exercising its powers is required to have regard to Section 29 of the Matrimonial Causes Act (MCA), 1974 which sets out the guiding principles. Both parties require a home and sufficient funds to meet their needs during retirement. A period of cohabitation of 14 years passed seamlessly into marriage which lasted almost 10 years.

26. The parties had a relatively comfortable standard of living, all their needs were met. They have their respective pensions but they have not accumulated any retirement savings. The wife accepted that she had sufficient income during her marriage to accumulate some savings but she did not do so. She accepted in cross examination that she could have been a bit more frugal.

27. The former matrimonial home was purchased with monies from the husband's savings which he had set aside before the parties started cohabiting. The mortgage was fully satisfied with a lump sum payment taken from his government pension funds after the husband became ill and was forced to take early retirement. This decision has significantly reduced his monthly pension.

28. During the parties relationship the wife contributed to the household expenses. This sum increased as the wife earnings increased. At all times the parties' maintained separate financial accounts.

29. The husband is aged 62 years; he has three more years of working life. His long term health is uncertain. Short term he is able to augment his income working from his home. His long term ability to continue to work is precarious as he has irreversible chronic illnesses likely to flare up at any point. He has to co-pay a portion of the cost of his medical care which with a flare up could be costly.

30. The wife is now aged 50. She has 15 years more working life and a partner with whom she accepts will share mortgage and household expenses. Her health is good. She is eligible for a Bermuda pension when she reaches age 65.
31. The Court has been referred to a number of authorities including the case of *White v White* [2001] 1 A.C., 596; *Miller v Miller and McFarlane v McFarlane* [2005-2006] UKHL, 24 and *Charman v Charman (4)* [2007] EWCA CIV 503. These are all cases where substantial assets were available. This is not such a case. Each case is fact specific. In this case the parties' main need is to house themselves. There is insufficient money to cover the entire needs and to provide a cushion for their senior years. Any award that the Court makes must be one that the husband can afford.
32. I have given detailed consideration to the proposals by the parties. Counsel for the wife submits that fairness requires that the assets of the parties should be divided so as to make provision for the parties housing and financial needs. The wife accepts that there should be some departure from equality and given the fact that the husband received his inherited interest in the Paget townhouse during the marriage she should receive 33.3 % of the assets of \$948,000. The wife needs a home and an award that will assist her with meeting her needs during retirement. On the figures she is entitled to \$350,927 but would accept a lump sum of \$350,000. This would allow her to pay her current debts and leave her with a balance of approximately \$300,000.
33. Counsel for the husband indicated that if the husband was ordered to pay a lump sum to the wife he would be forced to sell the former matrimonial home. The wife submits that in addition to securing a loan from the bank or from his family the husband's 1/3 interest in unit 24 could be sold in order to raise a lump sum. This 1/3 interest could be offered to the other co-tenants, the sister and the brother. If they are unwilling to purchase from the husband on a voluntary basis, the husband

can apply to the court under the Partition Acts 1855 and 1940 for an order to sell the property in order to have his interest realised.

34. Counsel for the husband submits among other things that the wife has a new life before her with a partner and not only a substantial remaining working life but existing pension monies set aside ... the more substantial portion of the living expenses of the parties during marriage have been met by the husband notwithstanding his income was less than that of the wife. The husband is of uncertain health.... The wife has failed to save money during the marriage. The proper Order of the Court should be that the husband *“pay the sum say \$130,000 which sum will provide for her cost. In addition the husband has volunteered to transfer existing shares in United Utilities which are of no significant value to the petitioner and this can be done, or the shares sold with the proceeds transferred to her.”*
35. Both parties require a home and sufficient funds to meet their needs during retirement. The assets consist of the matrimonial home, which should always be considered matrimonial property irrespective of how the home was acquired, who owns it, or how long or short the marriage.
36. As regards inherited property, I dealt with the application of the law in S v S [2009 No. 88] Supreme Court of Bermuda Divorce jurisdiction. I adopt my analysis at paragraph 41.
37. It is clear that inherited property which has been kept separated does not fall into the family pot. Based on the evidence and all the circumstances of this case, the husband’s inherited property does not fall to be considered as matrimonial property.
38. I am satisfied that it is reasonable for the husband to have the former matrimonial home to meet his housing needs. I reject Counsel for the wife’s suggestion that

the husband should sell his inherited property to meet the lump sum payment to the wife.

39. In my judgement based on the evidence in all the circumstances of this case that approach would not be fair. First and foremost the asset was inherited and it is only one year before the parties started living apart, that the husband began to receive income (\$1,000 monthly) from the property. The wife's reasonable needs can be met without selling this property. In any event the husband would need the income from the Paget property in order to finance any borrowing.

40. I have had regard to all the factors including the parties' needs, resources, medical health, capacities and abilities and have had regard to the policy that on the breakdown of a marriage, there should be, if possible, a clean break financially. In order to achieve fairness, I hereby order that the husband pays to the wife a lump sum of \$250,000 which should meet the requirement of fairness.

Dated day of 2010

Justice Norma Wade-Miller
Puisne Judge