



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2007: No. 7

**BETWEEN:**

**B**

**Petitioner**

**-And-**

**B**

**Respondent**

Date of Hearing: 10 August 2010

Date Circulated: 28 October 2010

Date of Judgment: 30 November 2010

MacLellan and Associates for the Petitioner

Peniston and Associates for the Respondent

## JUDGMENT

1. For convenience, I shall refer to the parties as the wife (who is 38) and the husband (who is 50).
2. This is the wife's application for ancillary relief. The parties met when the wife was 18 years old. They were married on 17<sup>th</sup> October 1992 when she was 20 years. They separated in 2007. Decree Nisi was pronounced on the 27<sup>th</sup> July 2007; it has not been made absolute. The marriage therefore lasted 15 years.

3. The parties have three children, two girls and a boy. The oldest child, a girl (J. aged 17) was born in 1993. The second child, also a girl (K. aged 14), was born in 1996. The youngest child a boy (E. aged 8) was born in 2002. The three children are involved in pursuing their education. The two girls have secured scholarships at BHS. The young boy is in primary school.
4. On 10<sup>th</sup> August, this Court heard evidence and argument. The husband and the wife filed three and four affidavits respectively. Both parties gave oral evidence.
5. At the end of the day's hearing the Court indicated to the parties that the case cries out for a "Mesher Type" order. The parties were not opposed to this. But there was a clear difference between the parties approach as to a suitable outcome of this matter. Before finalizing the matter the Court ordered the Respondent to secure three estimates for the cost of repairs to the now vacant apartment which adjoins the former matrimonial home which the Court understands is not in a tenatable state. There is an existing Order restraining the husband from entering those premises. The Court granted the husband leave to enter the premises with the contractor for the purpose of obtaining the cost of putting the apartment into a tenatable condition. There was no objection to this course either by the wife personally or through her Counsel. The case was adjourned for the parties to return to deal with the issue of the cost of repairs to the apartment. The Court was not able to continue the hearing of the matter on the adjourned date as one Counsel would be unavailable for some six months. Counsel provided written submissions to the Court and requested that the Court give its decision based on the material before it.
6. Peniston and Associates letter dated 16<sup>th</sup> August 2010 details the husband's attempt to comply with the Court's Order and the wife's alleged obstruction in preventing him from gaining access to the apartment. In the Court's judgment obtaining the cost of repairs was important as it would have enabled the Court to properly assess the financial position and make an Order in respect of the maintenance of the children.

### **The Parties' earnings**

7. The husband earns \$5,030 net per month from his employment as a telecommunications technician. From time to time he has the opportunity to work overtime. The wife earns \$2,310 per month gross assisting in her mother's childcare business which operates from her parent's residence located in the former matrimonial home. The wife has no other income. Counsel submits if the home was to be sold, she would lose this income.
8. I find that it was mutually agreed by the parties that the wife would stay at home. She looked after the children and carried out the domestic tasks – cleaning, laundry and cooking. At some point during the marriage, the wife wanted to improve her earning prospects; after the third child was born she started working part time from 9.00am to 1.00pm. Before the breakdown of the marriage she began to take courses at the Bermuda College to try and secure an Associate's degree in early Childhood Development. She has had to take a break from her studies because of financial constraint.
9. The main thrust of each Counsel's submissions is the approach to be taken by the Court in deciding how to divide the former matrimonial home, the parties' only asset.
10. In 1998 the parties purchased the former matrimonial home for \$244,000. The house was conveyed into the husband's name as the wife at the time of purchase was not a Bermudian (a restricted person) and unable without a license to hold property in her name. They obtained a mortgage of \$200,000 with the wife's parents signing as guarantors of the mortgage. Further, the wife's parents, who were also restricted persons, provided them with amounts of money as follows:
  - \$24,000 for the purchase deposit
  - \$35,530.38 for the conveyancing and stamp duty costs.
  - \$70,000 in two instalments which enabled the husband and the wife to decrease the mortgage by making two lump sum principal reduction payments.
  - \$159,112 towards renovation of the house which was almost completed when the parties as well as the wife's parents moved in.

11. The wife says the funds provided by the parents were loaned to them while the husband said it was gifted to them. I reject the wife's evidence that the funds were loaned to them. It would appear that the wife's parents who were restricted persons at the time when the property was purchased wanted to assist the young couple, as would most parents. I do not believe that they contemplated that the marriage would not have endured. They have not filed any evidence in support of the wife's contention. In my view, these arrangements were matters that did not trouble the parents or either party at the time.
12. The house is divided into three apartments. The wife and the husband lived in one apartment with the children of the marriage. The wife's parents live in the three bedroom upstairs apartment since the parties first moved to that residence — over 12 years. The wife's mother runs a day care business from this upstairs unit.
13. The mortgage payment, which is now fully satisfied, was \$2,200 monthly. The husband paid \$1,100 per month towards the mortgage and the balance of \$1,000 monthly was paid out of the income which was received from the adjoining apartment until recently when the tenant vacated. The apartment is in a state of disrepair and must be renovated before it can be rented.
14. The wife's parents pay the following expenses:
  - House building insurance – \$1,702.70
  - Water – \$900.00 per annum
  - Landscaping – \$1,300
15. The house is valued between \$1.1M and \$1.2M. The mortgage is completely satisfied. The property needs repairs including the apartment which is in an un-tenantable state. The husband maintained that the wife and her parents live rent free in the property and have had exclusive possession over the last few years and ought to have maintained the property. Therefore, any deterioration in its condition should be considered against this background.

16. The husband has advanced in argument that despite the contribution of the wife's parents towards the purchase and renovation of the house they have enjoyed a benefit of over 12 years rent free existence in the three bedroom upstairs main apartment. The husband calculates this benefit as equal to \$288,000 using a rental figure of \$2,000 per month over a period of 12 years.
  
17. I am left in no doubt that the wife is assisted by her parents paying \$2,000 monthly rental for the apartment which they occupy. I reject the husband argument that the wife's parents did not pay this sum. It matters not whether the husband payments or the wife's parents' payment were applied directly towards the mortgage. That is simply a question of expediency as to how the funds were used in meeting the wife's inescapable expenses. The wife sets out her household expenses is in the region of \$4,500 monthly. She has very little if any prospects of improving her income position. The husband pays \$1,100 monthly towards the reduction of the mortgage and the balance was made up from the income of \$1,000 monthly received from the rental of the apartment. While the order was expressed in 'general terms' this would leave \$650 monthly towards the maintenance of the children. When the court looks at the wife's budget and the level of maintenance received from the husband she would not have been able to make ends meet without the \$2,000 monthly received from her parents.
  
18. As a result of the wife's parents assistance the husband has been able to enter the real estate market and has benefited substantially from the increased value of the real estate over the 15 years of the marriage. On the other hand as a result of the husband being able to hold the property there is a benefit of increase in value to the wife. Her parents had the benefit of living in the home and running her business from the home.
  
19. The husband now lives with a woman whom he has indicated that he intends to marry. Counsel for the husband invites the Court to disregard this relationship.

20. In June 2008 the wife rejected the husband offer to purchase her interest in the property and to provide reasonable maintenance for the children. The husband has urged that based on this offer which was renewed during a mediation hearing the wife's prayer for costs should be rejected.
21. Counsel for the husband further submits that the property be valued after the second child completes high school and either party be given 60 days to demonstrate the ability to purchase the other party's interest, failing which the property is to be immediately offered for sale in the open market. Further, if the court is minded to impose a "Mesher Order" that it be expressly ordered that the property is to be valued and sold upon the completion of the second child's high school education.
22. On the other hand, Counsel for the Petitioner submits that the wife is the primary care giver of the three children. The youngest is only eight (8) years. The wife needs a home with a minimum of three bedrooms. She seeks the transfer of the home to her on payment of \$250,000 to the husband. An order in these terms would be appropriate because of the following principal factors:-
- The children would be able to remain where they have been brought up most if not all of their lives.
  - The bank informed the wife that she could secure a small loan and with the assistance of her parents. Therefore she could pay the husband \$250,000 to enable him to secure an alternative property.

Having regard to the statutory provision, Section 29 of the Matrimonial Causes Act, in my judgment this would be inequitable.

23. Alternatively, Counsel submits, the husband could live in the upstairs three (3) bedroom apartment and the wife live in the downstairs apartment so that they can remain in their home until K finishes her education at BHS in 4 years time. The property can be sold once K finishes her education. Further if this is not workable the other, less preferable alternative, would be a "Mesher Order". This would remain in place until E, the

youngest child, completes his high school education. Thereafter, the wife will be given a choice of either selling the property or having the property valued and the wife would have the right to buy the husband's share. A clause to allow the wife to buy the husband's share before E turns 18 years old would be preferable so that she can give the husband his lump sum prior to that date.

24. In my judgment neither suggestion is fair, reasonable or practicable. Given the history between the parties it would be unwise to have the husband occupy the upstairs apartment while the wife lives downstairs. As recently as during this hearing, the wife has been contemptuous of a Court Order that gave the husband permission to enter the premises for the purpose of securing an estimate of the cost of repairs to the apartment.
25. Additionally, the parties seek the Court's determination of the issue of custody, care and control and the wife seeks a continuation of the current maintenance payments until J completes her tertiary education.
26. What are the reasonable requirements of the parties? The standard of living enjoyed by the parties before the breakdown of the marriage was modest. This was due primarily to the cash injected by the wife's parents so that the husband and the wife could purchase a home in which they resided shortly after the inception of the marriage.
27. The wife needs a home so that she can have the security required to meet the needs of the children for the next nine years. On the evidence before the court particularly since the breakdown of the marriage, the parties' involvement in the welfare of the children has been unequal. The wife has been a constant stable force in the children's lives and continues to look out for their welfare. The child, J, has one year to complete high school before she embarks on her university education. The second child, K, has four years before she completes high school. It is hoped that she will pursue tertiary education. The youngest child, E, is eight years old. He has been adversely affected by the animosity and lack of involvement of his father in his life. Shortly, he will be meeting with a child psychologist to help him deal with certain unresolved issues.

28. The husband needs a home; however, he lives with a woman that he intends to marry. He has not been forthcoming generally, or in sharing this information. The husband has not made full and frank disclosure in these proceedings. For example, the Court was left with the impression that he was living in a substandard way. Counsel on his behalf submits that he has been “resting his head wherever he could for the last three years.” It was during the hearing that it was revealed that he has been living with his partner for most of this period. Also it was during the hearing that it was disclosed that his expenses was in the region of \$1,800 monthly as he shares household expenses with this woman. He did not provide information the he was earning some \$5,000 per month instead he indicated that he was earning a significantly less sum.
29. Having regard to all the factors in this case, the first consideration in the matter is the welfare of the three children who are under the age of 18 years and how any Order will affect them. Each case turns on its own unique facts. This is a needs-driven case.
30. The wife continues to have the primary obligation of caring for the three children. She has not shirked from this responsibility. Her income is insufficient to meet the needs of the children and herself. She owes her grandfather \$20,000 which he loaned her to purchase a car to transport the children. She met in an accident with the family car and because unbeknown to her the family car had remained downgraded to third party insurance she was unable to fix the damage which would estimated at \$7,000. When the wife approached the husband about getting a car he told her that she did not need a car and she and the children should get around on the bus.
31. The wife needs the security of a home for the children for the next eight to ten years until the child E completes his secondary school education.
32. I conclude that the children must have a measure of stability until the younger child reaches the age of 18 years or completes his high school education whichever is earlier. Thereafter the property is to be valued and sold and the proceeds divided equally.



33. The wife is to have first option to buy out the husband's interest in the property. If she is not able to do so within three months of the youngest child attaining his 18<sup>th</sup> birthday or completes his high school education, the husband will have the option to buy out the wife's interest. If he is not able to do so, the property should be placed on the open market and once sold, the proceeds should be divided equally.
34. The wife is to maintain the property during this period and if it deteriorates, and such deterioration affects the value at the time of valuation for sale any diminution in the value of the property caused by any such deterioration must be deducted from the wife's 50%.
35. The wife shall have custody care and control of the children with reasonable access to the husband. The wife will receive the rents from the apartment once it is rented. In the circumstances, the husband should pay \$1,200 per month for the maintenance of the children being \$400 per month each. The court will review this sum on 29<sup>th</sup> day of September 2011 when the apartment should have been rented. The Court is now satisfied that the arrangements for the children are satisfactory. Therefore, Decree Nisi can be made absolute.
36. On the application of the S29 criteria and precedent and in light of the need and the sharing principle and the evidence I have concluded that the award that I am making represents a fair sharing of the available resource. In my judgment this is a needs – driven case and it might lead to adverse unacceptable disruption of the children's lives were the Court to make an award that would result in immediate sale of their home.

37. Each party to bear his own costs unless the parties wish to be heard otherwise.
38. Liberty to apply in putting into effect this order. Counsel should prepare the necessary order for my signature.

Dated this 30th day of November 2010

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**THE HON. JUSTICE NORMAWADE-MILLER**  
**PUISNE JUDGE**