

DIVORCE JURISDICTION

2011 No. 1

BETWEEN:

GAVIN LEROY WAINWRIGHT

Petitioner

-and-

MARIA VALORIO ALMONTE WAINWRIGHT

Respondent

E.P. Bailey - Edward P. Bailey & Associates for the Petitioner

Dawn Johnson – J2 Chambers for the Respondent

Date of hearing 9th November 2011

JUDGMENT

1. Before the court is the Respondent's application for financial relief pursuant to the Matrimonial Causes Act 1974 (hereinafter referred to as "the Act") filed on the 11th October 2011. In it she claims periodical payments, lump sum provision and such other relief as the court thinks just.

HISTORY

2. The parties were married in the Dominican Republic on the 9th June 2006. The Petitioner is a Bermudian domiciled in Bermuda. The Respondent is a national of the Dominican Republic and has resided in Bermuda since one month after the parties' marriage. There are no children of the marriage or at all between the parties.
3. The Petitioner filed for divorce by petition dated the 5th January 2011. The decree nisi of divorce was granted on the 25th February 2011. Both parties have worked throughout the marriage. The Petitioner worked as a salesman for a local beverage company and the Respondent worked as a cashier/merchandiser for a local supermarket.
4. The Petitioner and the Respondent have resided in a property located at 12 Ingham Vale in Pembroke Parish. This property was inherited in 1996 by, and is held in the names of

the Petitioner and his mother as tenants in common. The property once consisted of one 2 bedroom unit which prior to the marriage was occupied by the Petitioner and his mother.

5. The parties commenced living as man and wife in 2006 in the Ingham Vale property. In 2007 the property was renovated to accommodate occupation in 2 separate units. The parties thereafter occupied a separate unit from the Petitioner's mother. There is no evidence to suggest that that a legal sub-division of the premises took place as between the Petitioner and his mother. The property was valued at \$795,000.00 (in round figures) in July 2011.
6. During the marriage the Respondent acquired a lot of land situated in Urbanizacion El Doral, Peurto Plata in the Dominican Republic. The property was valued in the Dominican Republic by an Engineering firm that specializes in valuations at RD\$939,400. Roughly converted that amounts to \$25,000.00 in Bermuda currency. The parties jointly own a time share in a holiday resort purchased in 2008. A car was purchased by the Petitioner during the marriage for the use of the parties.

The Respondent's Case

7. It is the Respondent's position that she should receive such award as will allow her to move on with her life with financial independence. It is the Respondent's contention that the Ingham Vale property is matrimonial property. She argues that she should receive one quarter of the value of the Ingham Vale property, which she estimates to be in the sum of \$198,750.00 Bermuda dollars.
8. She further contends that she should receive the full benefit of the lot of land in the Dominican Republic. The lot of land in the Dominican Republic is held on her behalf in her sister's name. She also alleges that although the Petitioner initially paid for the Peurto Plata lot of land, she subsequently repaid him that money. The Respondent further seeks periodical payments until she settles back in her country of origin.
9. The Respondent bases her claims on the contributions in kind that she has made in terms of looking after the Petitioner and taking care of the home. She also asserts that she has made financial contributions in particular to the renovation of the Ingham Vale property. Her position is that she has contributed by providing the Petitioner with at least half the loan payments, although she did not specify an amount or period of time over which she made such payments.

The Petitioner's Case

10. Counsel for the Petitioner argues that as this is a marriage without children, a clean break is called for. He further argues that the parties' marriage was a short one and the Ingham Vale property having been the Petitioner's before the marriage is not matrimonial property but inherited property. He tendered in support of this a copy of the voluntary conveyance title deed and the mortgage which indicates that he and his mother were gifted the property in October 1995.
11. He refutes the Respondent's assertion that she made half of the mortgage payments and disputes that the Respondent contributed to financing the renovations to the matrimonial home. The Petitioner asserts that the Respondent did not repay him for the purchase of the Peurto Plata lot of land; he tendered proof of borrowing to finance the purchase. He denies that she contributed to household expenses. His position is that she did what she wanted with her income.
12. Counsel for the Petitioner also relies on the fact that the Respondent withheld knowledge that she was incapable of having children from the Petitioner well knowing that the Petitioner wished to have children. This counsel argues she did in circumstances designed to mislead the Petitioner into the marriage. It is the Petitioner's case that the discovery of the truth undermined the Petitioner's faith in the Respondent and amounts to gross and obvious conduct such as caused or contributed to the breakdown in the marriage.

THE LAW

13. The court's powers on making financial provision upon divorce are set out in section 27 of the Act. In determining how to exercise its powers the court is bound to take into account the matters specifically set out in section 29 of the Act.

Section 29 Considerations

The following are findings of fact:

14. Both parties worked during the marriage. The Respondent had worked in a health food store at first and then in a supermarket as a merchandiser and a cashier for the Market Place Ltd. By their records she worked for the later company part time for 6 months in 2007; the total earning were not stated. In 2009 she earned a total of \$38,490 gross over 12 months. In 2010 her gross annual pay was \$43,742. In 2011 she earned a gross income of \$8,289 between January and February.

15. By her evidence in her home country she was a manager in a restaurant; what this means in terms of earning capacity is indeterminate as no comparable salaries were given in evidence. At the time of the hearing the Respondent was no longer working in Bermuda as she was prevented from doing so by the Immigration Department.
16. Counsel for the Respondent criticizes the Petitioner for reporting the breakdown of the marriage to the Immigration Department because it resulted in her losing her employment. Whether or not he did so is irrelevant to the issues. In any event the Petitioner was under a duty to inform the authorities that the marriage was at an end.
17. The Petitioner is employed and has been through the marriage. His long time employment pay details indicate that since 2011 he has netted approximately \$3,500 per month in income. As mentioned he has an undivided share in the Ingham Vale property with his mother. He has a motor car registered in his name that on purchase second hand a few years ago was valued at \$11,000.
18. There are no known foreseeable financial obligations on the Respondent apart from such monies that she may have borrowed from friends while remaining in Bermuda pending the completion of the instant application that may require repaying. She will of course have to house herself. No evidence was given which suggests that she lost the benefit of a residence in which she had an interest by coming to Bermuda. She may well wish to develop the lot in Puerto Plat as a home for herself.
19. The Petitioner has as his primary responsibility the mortgage payment (combined with the car payment) on the Ingham Vale property. The mortgage payments are \$1,102 per month. The mortgage is not due to be paid off until August of 2022, 10 years from now when the Petitioner will be 57 years of age. The outstanding principle balance on the mortgage is approximately \$95,000.00 resulting in equity in the property of some \$700,000.00.
20. The parties' standard of living can be described as modest. They shared ownership of a vacation timeshare however there was no evidence of either luxury spending or annual trips abroad on vacation.
21. The marriage was of relatively short duration, four years and six months.
22. The Petitioner is 47 years of age. He is likely to consider remarriage as having children is a stated desire of his. His prospects for increasing his earning capacity in the current financial climate in the foreseeable future in Bermuda is not such as could be considered relevant.

23. The Respondent is 28 years of age. She has not stated so but is certainly young enough to consider remarriage. She has greater prospects for further education, training or retraining for purposes of increasing her earning capacity by virtue of her relative youth as compared with the Petitioner. She has not indicated that she has the intention or means (for immigration purposes) to remain in Bermuda, therefore it would not be unreasonable to assume that she will return to the Dominican Republic.

The Authorities

24. Both counsel rely on the leading English cases of **White-v-White** [2000} AC 596 and **Miller-v-Miller and McFarlane** [2006] 3 All ER 1. The issue for the English House of Lords in those appeals was as is usually the case in divorce, how best to achieve fairness in the division of property following divorce.

25. The principles supporting the reasoning of the court gleaned from the above cases, consonant with the aim of fairness within the context of the statutory guidelines, are need (generously interpreted), compensation and sharing. A strict application of the guidance is not to be expected as it is a well known principle in matrimonial law that each case must be determined on its own facts.

26. The above cited cases were also what were determined by the court to be “big money cases” involving matrimonial assets and inherited assets. The case at bar, on its facts certainly does not fall into that category of case. Need and compensation will usually play a greater part of the determination in cases where, for example, there has been a long marriage and one party may have sacrificed a career to raise children. Need and compensation will be less applicable to situations calling for a clean break. On the facts of this case, a clean break is the appropriate aim.

27. Consideration must also be given to sharing as one of the basic aims of the court in the instant case. The real issue in this case is whether the property at Ingham Vale should be considered to be matrimonial property. Mr. Bailey argues that since the Ingham Vale property was inherited a decade or more before the marriage it is not matrimonial property. He also relies on the fact that this was a short marriage.

28. In **Miller-v-Miller and McFarlane** Lord Nicholls said this in answer to both:

- a. “The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, 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.”

- b. Lord Nicholl went on to say:
 - c. “In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and a wife share the activities of earning money [and] running their home...”
29. These dicta require the court to ensure non discrimination as an aim along with the aims of fairness, and equality. The court went on however to indicate that once the statutory exercise is carried out, having looked at the circumstances a judge can depart from equality only if there is good reason for doing. Conduct on the part one party would not ordinarily be considered to be a reason for departing from the yardstick of equality.

CONCLUSION

30. Having looked at the statutory considerations I would consider myself bound by persuasive authority to regard the property at Ingham Vale as matrimonial property; actual contributions made by each party and the length of the marriage notwithstanding. However this is subject to the fact that the Petitioner does not solely own the property. The Petitioner only has an undivided half share of the property. In the circumstances it cannot be regarded as the matrimonial home in the strict sense indicated in the authorities.
31. Counsel for the Respondent’s submission that fairness would call for payment by the Petitioner of a lump sum equivalent to a one quarter share of the value of the matrimonial home might have been a reasonable expectation were it not for the joint ownership. I do not hesitate in holding that the Respondent should be granted a lump sum payment as she has made contributions to the development of the property and to the family.
32. I must however disagree with counsel for the Respondent’s submission that the Defendant alone should be given the benefit of the value of the Puerto Plata property. That property was acquired through a joint effort and should be taken into consideration in determining what an equitable division of assets should be.
33. An award of a lump sum equal to one quarter the net value of the Ingham Vale property, less the value of Puerto Plata property would amount to a sum of \$150,000.00. However when considering the issue of equality, there are some concerning features that the court should weigh up before ordering the Petitioner to pay to the Respondent a lump sum of \$150,000.00. The first is that much will depend on the ability of the Petitioner to raise that amount against the Ingham Vale property.

34. The court can take judicial notice of the fact that the economic realities of Bermuda may not presently support such a borrowing. Further, if it were possible to borrow, there will be costs associated with the Petitioner financing the borrowing. His earning power is therefore a relevant consideration.
35. The court must factor in the impact of further borrowing on the Petitioner at his earning capacity and his age. There was no evidence to suggest that he has the ability to improve his earning capacity or to increase his monthly earnings. The practical reality is that with additional borrowing he will have less disposable income to support himself and maintain the property.
36. The Respondent on the other hand will have a substantial lump sum free of any resulting costs. She will have property in her home which she will be able to develop as a home for herself. Therefore the issue of proportionality which encompasses the impact of further borrowing on the Petitioner in my view justifies a departure from the yardstick of equality.
37. The court is somewhat hampered in making an accurate assessment of the degree to which the departure should be from the yardstick of equality. Counsel for the Petitioner did not address the issues, as he merely hinged his case on the meaning of inherited property, without considering the issue of a lump sum payment. I reject his assertion that conduct should be taken into account in assessing a lump sum payment.
38. Counsel for the Respondent's submissions were focused simply on asserting that the Ingham Vale property was the matrimonial home and therefore justified an equal division of the value of the renovated unit. In my view it would be fair to consider the value of the investment to renovate the property to accommodate the separate units as a fair guide to a lump sum payment.
39. It would be reasonable to assume that the cost of borrowing a similar sum to that borrowed to effect the renovations of the property, or higher will amount to not less than a further \$1000 per month to the mortgage payment, depending on the interest rate available. This would leave the Petitioner with disposable income of approximately \$1,400 or less per month as the case may be. Any greater borrowing and he is less likely to be able to maintain the property.
40. If the Petitioner owned the property outright different considerations might apply. There is no escaping the fact of his mother's presence and interest in the property, and the degree to which that is likely to restrict the Petitioner's borrowing ability. An award to high may also result in cumbersome enforcement procedures if resort had to be had to

severing the joint interest of the mother and the Petitioner for the purpose of forcing a sale of the Petitioner's interest in the property to meet an onerous lump sum award.

41. The court is often called upon to do the best that it can in difficult circumstances in the interest of justice. This is no less the case in matrimonial matters where there is authority for the proposition that cases must be considered on their own facts and adherence to mathematical formulas is to be discouraged.
42. In all of the circumstances, including the provisions made below, I believe the sum of \$80,000.00 to be a fair and equitable lump sum payment to be made to the Respondent. It nearly equates of the sum the Petitioner invested in the renovations to create the separated unit. The total award takes into consideration the Respondent's financial and her non financial contributions to the family and the property.
43. In addition to the lump sum the Respondent is to have the full benefit of the value of the Puerto Plata property. Together they would meet her need for housing and compensate her for her financial contribution to the property.
44. Judging by its value the lump sum should be sufficient to fund construction of a home should the Respondent so desire (no indication was given of the associated costs). On the other hand if she were to remain in Bermuda \$80,000.00 would be a sufficient sum to provide the Respondent with adequate accommodation for the foreseeable future.
45. Additionally from the date hereof the Respondent is to have the exclusive benefit of the holiday time share either by outright transfer to her of the Petitioner's interest, or by her exclusive use thereof whichever is the most practicable method of disposing of the Petitioner's interest at her election. The Petitioner is to keep the family car. I reject Mrs. Johnston's submission for periodical payments pending the outcome of this decision.
46. I am of the preliminary view that each party should bear his or her own costs; however should counsel wish to be heard on the issue of cost they have leave to request of the Registrar a date for the hearing. The applicant shall file and serve written submissions four clear days before the fixed date, and the respondent thereto shall file and serve written submissions in reply within two day of the date fixed for the hearing.

Dated this 1st day of June 2012

Charles-Etta Simmons
Puisne Judge