



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2010 No. 12

**BETWEEN**

**R. C. J.**

**Petitioner**

**-and-**

**S. F. J.**

**Respondent**

Date of Judgment: 2 July 2012

Petitioner in person

Respondent by written submission

### DECISION

1. This is the Petitioner husband's application for financial relief following divorce made pursuant to the Matrimonial Causes Act 1973. The Petitioner's application is for a property adjustment order in respect to a vacant lot of land in Bermuda situate in Smith's Parish and in respect to property situate in Memphis, Tennessee in the United States of America (herein after referred to as "America")

### **HISTORY**

2. The parties were married on the 4<sup>th</sup> day of September 1993 in the state of Tennessee in America. The decree nisi was issued in favour of the Respondent on the 23<sup>rd</sup> day of July 2010; it was made absolute on 14<sup>th</sup> March 2011.
3. The Petitioner is domiciled in Bermuda and the Respondent in America. There are three children of the family; an agreement concerning maintenance for the children was settled by the parties and does not fall to be considered herein.

4. The Petitioner appeared in chambers in person for the hearing herein; the Respondent filed legal submissions as she was unable to travel to the jurisdiction for the hearing. Both parties filed affidavits in this matter. While the parties have supplied details relevant to the uncontested facts, where they have omitted to do so, recourse has been made to other documents on the file including letters that passed between counsel when on the record for the parties.
5. The major assets between the parties consist of two properties. The first in time is a property situate in Lightbourne Lane in Smith's parish (hereinafter referred to as the Lightbourne Lane property). This was the former matrimonial home. It was purchased in 1999 in the Petitioner's sole name. The property was purchased with the assistance of a mortgage with the Petitioner as mortgagor and the Respondent as guarantor. During the marriage the Petitioner met the mortgage payments out of his salary and other earnings.
6. The building forming the matrimonial home situated on this property was demolished in 2009. It does not appear that the parties were in dispute over the poor condition of the structure, or the need for the demolition in order to build an adequate structure on the property. There appears to be some dispute between the parties over the timing of the demolition.
7. The second property purchased is located in October Rose Cove, Memphis Tennessee (herein after referred to as the Memphis property). This property consists of 5 bedrooms and three full baths. This property was purchased by the Respondent in February 2008 and is registered in her sole name. The Respondent and the children of the family reside in this property.
8. The agreed value of the properties is as follows: Lightbourne Lane property \$500,000.00; Memphis property \$240,000.00. The existing mortgage on the Lightbourne Lane property is \$240,000; the existing mortgage on the Memphis property is \$278,214. The Respondent is in arrears of payment of some \$10,000.00 and is facing the threat of foreclosure.

## **THE ISSUES**

The principle issue to be decided is the how best to distribute the assets of the parties.

## **THE RESPONDENT'S CASE**

9. The Respondent's case is that the Lightbourne Lane property is matrimonial property and should be shared equally between the parties. She argues that it was through the parties'

joint effort that the property was acquired and maintained. She further argues that she had been informed at the time of conveyance that she was equally entitled to the property. She asserts that the Petitioner stated this on oath.

10. It is the Respondent's position that she did not agree with the Petitioner about demolishing the house situate on the Lightbourne Lane property at the time that it occurred. Her position is that she preferred that it occur after all of the financing was in place.
11. By contrast, the Respondent's position is that the Memphis property was purchased solely by her and she should be allowed to keep that property without any consideration being taken of it for the purposes of this decision. She continues to reside in this property with the children of the family and her mother. The Respondent's monthly mortgage payment is \$1,650 per month.
12. The respondent states that she has requested the Petitioner to establish a trust for what would be her share in the former matrimonial property at Lightbourne Lane for the benefit of the three children of the family. Alternatively, she asked that the Petitioner sell the property and put her share in trust for the three children. The Respondent states that her reason for wanting her share vested in trust for the children is so that they would have a base for their eventual return to Bermuda.

### **THE PETITIONER'S CASE**

13. The Petitioner's case is primarily that the original plan was for the former matrimonial home to be demolished and a new home erected on the lot of property at Lightbourne Lane. Further, that the Respondent was fully in agreement with the demolition as shown be a string of emails in which she deferred to him on getting that plan moving forward.
14. His position is that the Respondent has undermined her own earning power. She purchased the Memphis property against his advice and kept him entirely in the dark as to the terms of purchase and all other details about the purchase. He states that the Respondent has been financially irresponsible through the marriage and that he has borne the financial brunt of the resulting fall out.
15. The Petitioner's mortgage monthly mortgage payment on the Lightbourne Lane property is \$1,900 per month. Additionally he is committed to child support payment in the sum of \$500 per month. The Petitioner wishes to retain the Lightbourne Lane property essentially to develop as a home for him and the children. He would also like to place the property in trust for the children of the family.

### **THE LAW**

The court's powers on making a property adjustment order upon divorce are set out in section 28

of the Matrimonial Causes Act 1974. That section provides as follows:

“On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders—

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement,

subject, however, in the case of an order under paragraph (a), to the restrictions imposed by section 33(1) and (3) on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.”

Section 33 subsection (1) provides as follows:

“ Subject to subsection (3), no financial provision order and no order for a transfer of property under section 28(1)(a) shall be made in favour of a child who has attained the age of eighteen.

Section 33 subsection (3) provides:

“Subsection (1), and subsection (2)(b), shall not apply in the case of a child, if it appears to the court that —

- (a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
- (b) there are special circumstances which justify the making of an order without complying with either or both of those provisions.”

16. It would appear therefore that the court has specific power to order a transfer of an interest in property to a child or children of the family.

## SECTION 29 CONSIDERATIONS

17. The court is required to take into consideration matters that will assist in determining how to exercise its powers under section 28. As to those considerations I make the following findings of fact. There are no assets of either or both of the parties apart from the two properties referred to above.
18. The Respondent has a greater earning capacity than is revealed by her affidavit of means. She was at the time of filing working as a front desk attendant. Her average weekly income over 3 pay periods in 2011 amounts to \$490.00. Prior to this employment she was employed as a financial analyst abroad, however no income figures have been made available. She is now earning considerably less than what she earned in Bermuda as a financial analyst prior to her departure in 2009 when her salary from the Bermuda Monetary Authority was stated to be \$105,000.00 per annum or \$8,750 gross per month.
19. The Respondent did not indicate that she had any prospects for improving her employment, however considering that her mortgage payments were in arrears, she must be taken to realize that she must make efforts to increase her income. If the Memphis property were to remain in her sole possession her primary obligation would be toward servicing the mortgage. She would also have to share in the financial needs of the children.
20. The Petitioner was employed as a facilities manager at the Bermuda College in 2006; however his post was subsequently made redundant. Up until that time his net monthly earnings were \$6,074. In his submissions to the court the Petitioner indicated that his most recent employment had also come to an end, however he was hopeful of commencing new employment. No further information was available at the time of the hearing.
21. The Petitioner is now renting an apartment as the former matrimonial home was demolished. His most immediate need therefore is for a secure home for himself and the children when they visit him or return to reside in Bermuda with him. During the marriage the parties did not live a lavish life style however they were home owners and can be taken to have intended to build equity in the property at Lightbourne Lane.
22. The Petitioner and the Respondent are 50 and 45 years of age respectively this year. They were married for approximately 17 years. There is nothing in their submissions that indicates that either suffers from physical or mental disability. They both worked through the marriage although the Respondent was unemployed for short periods between her changes of employment. Both parties have contributed to the family and the family finances in one way or other.

## THE AUTHORITIES

23. 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. The court relies on the principles enunciated in the case of *White-v-White* [2000] UKLR 54 as providing guidance in this case along with the principles enunciated in *Miller-v-Miller; MacFarlane-v-MacFarlane* [2006] UKHL 24.
24. 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. A further principle enunciated in *Miller* is that the matrimonial home should normally be treated as matrimonial property and that in principle the entitlement of each party to a share of matrimonial property is the same however long or short the marriage may have been.
25. In *Miller-v-Miller and McFarlane* Lord Nicholls said “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...” This dicta is authority for the proposition that no matter how the parties actually went about dividing up or carrying out their financial responsibilities, equality of outcome is the hall mark of sharing.

## CONCLUSION

26. I have considered all of the facts in this case. Further, having considered the law, I am of the view that fairness calls for an equal division of the equity in the matrimonial property situate at Lightbourne Lane. The value of the equity is to be calculated as stated above. There is no equity in the Memphis property; therefore it is not an asset that can be taken into consideration in this application. The Respondent has requested that the Memphis property not be taken into consideration; in the circumstances this is not an unreasonable request provided she has made full disclosure.
27. The Petitioner has complained of the Respondent’s financial conduct. The fact that the Petitioner may have had to pay off debts incurred solely or even dishonestly by the Respondent does not in my view amount to gross and obvious conduct such that would call for the court to diminish her interest in the family property.
28. I am satisfied that the parties’ desire is that their respective interest in the equity of the property should be held on trust for the children of the family. I must also bear in mind the interest that the mortgagee has in the property. The Petitioner will have to continue to pay the Bank of N.T. Butterfield & Son. Limited in order to preserve the children’s interest.

29. The current mortgage debt is equal to half of the value of the property. In the circumstances, it seems only fair that the Petitioner should have an opportunity to have a secured interest in the property as he reduces the mortgage. Therefore, the Petitioner is ordered to hold 50% of the property in trust for the children of the family. He shall retain 50% of the property for himself once the mortgage is satisfied.
30. Should the Petitioner sell the mortgaged property before the mortgage is satisfied, then the children of the family shall have an equal share in 50% of the net value of the property at the time of sale, or \$260,000.00 whichever is the greater. In all the circumstances the Petitioner is encouraged to promptly seek the advice of an attorney to fully appreciate his obligations under this judgment, and at any time that he wishes to sell the property in the future.
31. There shall be no order as to cost.

Dated this            day of July 2012.

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Charles-Etta Simmons  
Puisne Judge