



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011 No. 90

BETWEEN:

R

Petitioner

-AND-

R

Respondent

Date of Hearing: 11th and 12th June 2013

Date Petitioner's Written Submission received 18th July 2013

Date Judgement Circulated/Delivered on 24th October 2013

In Person - Petitioner

Marshall Diel & Myers Mr. Adam Richards – for the Respondent

1. The Petitioner (wife) and the Respondent (husband) are at times referred to as the wife and the husband (although they are now divorced).
2. This, is the final hearing of the husband's ancillary relief application, dated 3rd July 2012 in which he seeks an order that the wife pay him a lump sum compensation as may be just. However, at the commencement of the hearing, Counsel for the husband indicated that the husband had changed his position and now seeks an order that each party shall retain the assets which they have in their possession and that the wife vacate the matrimonial home within a reasonable period. Going forward the husband will meet the monthly mortgage payments. Counsel submits that the effect of this proposal is that the husband will take on a debt and will be in a negative asset position while the wife retains whatever proceeds she has remaining from the sale of the taxi.
3. On the other hand, the wife seeks a lump sum payment in recognition of her contribution towards the former matrimonial home and the family over the course of 17 years. In paragraph 7 of the wife's affidavit, dated the 15th October 2012, she stated that she should not vacate the former matrimonial home without a lump sum payment or that the husband should vacate and allow her to reside in the property (with their daughters until such time as they have completed their full time education).

Background Information

4. The parties were married on 14th August 1993. There are two children of the family "HR" who is now 19 years old and "PR" who is now 17 years old. The wife filed her petition for divorce on 4th July 2011. Decree Nisi was granted on 25th November 2011 and was made absolute on 16th January 2012. The wife was granted care and control of the children with generous access to the husband. The Court adjourned all questions of ancillary relief to chambers. The wife, the husband and children reside in the former matrimonial home and continue to do so.
5. At the hearing the husband was represented by Counsel (hereafter referred to as Counsel) while the wife was self-represented. Both parties filed affidavit evidence, gave oral evidence and were cross-examined.
6. The wife and the husband are each 47 years old.

The Wife's Earning

7. The wife is employed by the Bermuda Government and if no overtime is available she earns approximately \$5,000 per month. She lists her monthly expenses as \$ 5,729.00.

8. The husband's disputes the level of expenses claimed by the wife. Counsel submits that the bank statements produced by the wife for the fourteen month period, November 2011 through to December 2012, show the income received by the wife to be an average of \$6,271 monthly. The wife should have an excess of \$542.12 monthly of income over expenditure available to her should the court accept her claim that her total monthly expenses are \$5,729 - *See her first affidavit dated 15th day of October 2011 Exhibit ALR2.*

The Husband's Earning Capacity

9. The husband earns approximately \$5,000 monthly from his employment. This sum is supplemented by his overtime earnings and he receives an average of \$7,000 net monthly. The husband is responsible for and pays 50% of the mortgage payment. Additionally he pays cablevision, electricity, land tax and landscaping expenses for the entire condominium units.
10. The husband says that despite having similar income and expenses as the wife, he has been able to meet his 50% of their daughter's school fees without incurring any debt. He said that he has been able to do this by drawing on his pension; consequently his pension is now only \$6,438.37. He maintains that the wife has failed to provide any details of her pension which is likely to be a significant superannuation pension.

Assets

11. The former matrimonial home, which is in the sole name of the husband, was gifted to him by his mother. The parties had no pre-existing asset at the time of the marriage. In 1994 for estate planning purpose the husband's mother transferred property which she held in her sole name into the joint names of herself and the husband. This conveyance was subject to the outstanding mortgage held against the property. The husband was added to the mortgage but all payments were made by his mother.
12. The Court accepts the evidence, and finds as a fact, that in 2003 the husband's mother Successfully made an application for the property to be registered as 5 Condominium Units. The approval was granted in 2005. She sold 3 of the units and applied the proceeds of sale to the outstanding mortgage which was secured against the property; the balance of the funds was held by the mother for her sole benefit.
13. Two units remained in the joint names of the mother and the husband. In 2007 his mother transferred one of the two remaining units into the sole name of the husband.

The husband secured a mortgage of \$527,816 in his name with the wife as a guarantor against the unit to renovate it. The husband and wife agreed that each would be responsible for 50% of the repayment of the monthly mortgage. The Parties obtained a further charge of \$52,000 to purchase a taxi. The husband, and the wife and the two children continue to reside in this property.

14. In March 2013 the property was appraised at \$525,000. On the 19th October 2012 the outstanding principle on the mortgage was \$532,122.66. Presently, if one deducts the value of the mortgage (\$525,000) less cost of the sale of the unit, were it to be sold, it would leave a negative equity of \$44,816.16.
15. The wife accepts that she has fallen into arrears in relation to her ½ share of the monthly mortgage payments. The husband's account is automatically debited to make up the wife's shortfall. The total amount deducted from the husband's account is \$7,194 which he has asked to be taken into account in assessing whether an award should be made to the wife.
16. There is evidence before the court that the husband's name remains as a joint owner of the condominium unit retained by the mother. I accept the mother's evidence and entertain no doubt that inadvertently the mother's unit was not transferred into her sole name. The husband does not derive any benefit from this unit which is jointly held with his mother. Indeed it was during these proceedings that it came to light that despite the mother's instructions to her Counsel the property remained jointly held. The wife did not challenge this evidence. Therefore, the Court disregards this unit and its value does not form part of the matrimonial asset.
18. The wife retains the family motor vehicle which is valued at \$15,000.00.
19. While divorce was being contemplated, but prior to the wife filing the petition for divorce, the parties agreed to sell the jointly owned taxi. The taxi was sold and the entire proceeds of \$165,000 was deposited into the wife's, Bank of N. T. Butterfield, account.
20. The wife testified that she has been struggling to meet her expenses and the extraordinary expenses for their daughters on a monthly basis. She said that she has had to supplement her income with some of the proceeds from the taxi which has now all been drained.
21. At paragraph 10 of her affidavit, dated October 15, 2012, the wife lists a number of items which she says shows that she spent \$104,000.00, inter alia, on school fees for the girls, credit card debts and a small investment for the benefit of the husband and herself. The balance of \$56,000 was used to supplement her income and is now depleted. No documentation has been provided in support of these alleged expenditures.
22. The husband disputes the wife's evidence as to how he says she disposed of the jointly owned taxi proceeds. He argues that it remains entirely unclear how the wife spent the taxi funds. Despite repeated requests by the husband for an accounting as to how the proceeds were expended very little information has been provided by the wife. She has

failed to comply with multiple Court orders requiring her to produce documentation, and she has ignored a number of letters sent to her by Counsel requesting information.

23. Counsel has painstakingly, and with clarity, demonstrated that the wife has not given full disclosure.
24. To cite a few examples, Counsel has shown that the Bank statement produced by the wife shows that:

“In the eight month period between February 2010 and September 2010, the wife spent \$174,973.75 at the rate of \$21,871.72 per month.

In the next six months, that is from October 2010 until February 2011 the wife spent a further \$71,157.18. That money was expended at the average rate of \$11,859.93.

During this 14 month period not only did the wife spend all of the proceeds of sale from the taxi but she also expended all of her income from her employment. Accordingly, in the fourteen months immediately following the wife receiving the taxi funds, she spent \$246,130.93. That money was expended at the rate of \$17,580.78 per month.”

25. Regarding school fees, Counsel has shown that from 2009 to 2012 the wife paid \$50,477.29 towards school fees. She gave evidence that in 2010 she borrowed \$30,000 for school fees. She used \$44,000 from the taxi proceeds in 2010/2011 and borrowed a further \$8,000.00 from the BIU in 2012. This amounts to \$80,000 claimed expenses which leaves at least \$30,000 not accounted for.
26. As regards the personal loan in the amount of \$30,000. The wife testified that this was taken out by her to establish credit since she was “going to be of single status and not dependent on the husband.” She submits that the loan monies were used to pay \$10,000 to a family member for an outstanding debt and \$19,068.29 to Saltus for the 2008/2009 academic school years. She says that although the Taxi proceeds was received after the \$30,000 loan she was advised by a Bank Officer not to repay it.
27. Further the wife said that she paid radio cab debt of \$15,000. Counsel stressed that the wife was unable to produce any documentation showing the alleged debt nor any evidence that the debt has been paid.
28. Another example, the wife says she spent \$18,000 to assist her sister who had a medical emergency. This alleged expenditure was never discussed with the husband nor was any documentation provided in support of this alleged expense or payment.
29. The wife said that the husband told her to use the taxi funds for expenses relating to the children. The husband countered that he said that in relation to minor day to day expenses and, did not expect the wife to use all the taxi proceeds in just over one year.

The husband accepts a total of \$35,000 for expenditure from the taxi proceeds which would leave a balance of almost \$125,000 unaccounted for.

30. Counsel submits that “the wife accepted that when you are going through what we went through you tend to go spending and stay out. It is submitted that on the balance of probabilities, the wife went on a spending spree and has funds remaining in her undisclosed HSBC or capital G account. Either way, it is the husband’s case that post separation the wife had the full benefit of more than \$120,000 from the taxi proceeds”.
31. It is clear to the Court that the wife has failed to comply with numerous requests and court orders for production of documentary evidence in support of her alleged expenditures and how the taxi proceeds was spent. She has failed to produce any evidence in respect of her pension benefit. There is no full disclosure or reasonable explanation of how she disposed of these funds. The Court is entitled to draw adverse inference from the wife’s failure to provide the requested documentary proof.

The Law

32. When marriages end and the Court is dealing with applications for ancillary relief it must consider the statutory principles prescribed by Parliament in Section 29 of the Matrimonial Causes Act 1974 (MCA) and precedent.
33. Counsel correctly submits, that in all cases the objective is fairness. As expressed in *Miller v Miller; McFarlane v McFarlane* (2006) UKHL 24 the leading authority on the application of Section 29 principles the Court must have regard to the considerations of needs, compensation and sharing. Counsel submits that when considering the assets the Court should consider the negative equity of (\$44,816.16), the taxi proceeds of \$135,000.00, the husband’s pension of \$6,435.37, the car valued at \$15,000.00 and the wife’s undisclosed pension. Accordingly, the total available assets for distribution is \$111, 622.21. An equal share is \$55,811.10.
34. In so far as the issue of a negative equity is concerned the Court refers to the case of *Harvey* Supreme Court 2012/54 in which at paragraph 17 I made the observation that the Issue of a negative equity only matters if the property is being sold now. The true value of any property can only be ascertained when it is sold. The question of a negative equity arises if the property, having been sold has an outstanding balance due to the mortgagor. Otherwise, it is purely speculation.
35. In this case the most significant need of each party is the need for a home. The husbands needs for a home will be met. The former matrimonial home is in his sole name and he wishes to retain this asset. After the husband’s mother transferred the condominium unit to him the parties obtained a mortgage of \$544,017.01. The mortgage is in the name of

the husband while the wife is a guarantor. The reduction on this mortgage is \$4,020 monthly. The wife assisted toward 50% of the mortgage in the amount of \$2,047. 00 monthly. Based on the wife's income and liabilities she is left with an income surplus every month. The parties jointly owned a taxi which was sold prior to the dissolution of the marriage. The wife has had the benefit of most of the taxi proceeds. The Court does not accept the wife's evidence that most of the taxi proceeds "have been drained".

36. The non-matrimonial assets consist of \$45,476.76 inherited by the husband from his father.

37. In Miller v Miller Lord Nicholas said at page 1194 paragraph 24 :-

"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.

The matter stands differently regarding property ('non-matrimonial property') the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the White case [2001] 1 AC 596, 610:

'Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.'

Court

38. This is one of those cases where the tail piece of Section 29 of the 1974 MCA – "in so far as it is practicable" – poses a real challenge for the Court. In considering how to resolve this matter the Court takes into account the fact that these parties were married for 17 years and each did their best to preserve the matrimonial home and contribute to the household. Unhappy, unresolvable differences arose and emotionally the parties went their separate ways. Sometime before the wife petitioned for dissolution of the marriage the wife borrowed \$30,000.00. In her own words she said that "the \$30,000 which she borrowed in 2010 was to establish credit as she was going to be of a single status and not dependent on the husband". Subsequent to this loan she had control of the entire

\$165,000.00 taxi proceeds. She says that she could have repaid the loan but she was advised by a bank officer not to do so. The wife has failed to comply with Court orders for disclosure. The wife has refused to disclose for example statements from her bank accounts – HSBC and Capital G. She has refused to disclose her pension.

39. I would accept Counsel's submission that post separation the wife had the benefit of over \$120,000.00 taxi proceeds. The husband has no assets from which he could pay the wife a lump sum.
40. In so far as the wife's evidence is concerned the touch tone of truth can be gleamed from the fact that since 2009 she was alive to the issue that at some point she was going to be of "single status" so she started to make plans for her future. Consequently, for example she borrowed \$30,00.00 which she said she could have repaid but she was advised by a banker not to settle the debt. Counsel has demonstrated that the wife has disposed of over a quarter million dollars in just over one year. She has failed to make full disclosure which leads the Court to the reasonable inference that she has undisclosed funds.
41. Given all these factors the Court orders that :-
 - i) each party should retain the assets in their possession
 - ii) the wife has 6 months to vacate the former matrimonial home
 - iii) she ceases to make any contribution to the mortgage payment forthwith
 - iv) the husband has 5 months to have her name removed as a guarantor of the mortgage debt
 - v) the wife pays the electricity bill until she vacates the former matrimonial home
 - vi) the children of the family will continue to reside in the former matrimonial home until further order of the Court
 - vii) liberty to the parties to apply in putting into effect any of the terms paragraph 41.
42. The parties have joint custody of the children of the family HR who was born on 18th December 1993 and PR who was born on 15th January 1996. HR was accepted into a UK University but deferred her attendance while PR is in her last year of government school. There is no application before the Court in relation to the childrens on going education and care. This Court will deal with their maintenance as a separate issue. Because of the parties financial constraints they can and ought to agree what will happen to the children. If they aren't able to agree either party can take out a summons and the Court can deal with this application and the matters raised therein as a separate issue with each party representing themselves.

43. Counsel has requested the Court to deal separately with the issue of the cost of these proceedings. Therefore the Court adjourned the issue of cost.

JUSTICE WADE-MILLER, PJ