



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2015: No. 16

BETWEEN:

JS

Petitioner

-and-

CS

Respondent

Divorce – Financial Provision – Ancillary Relief – Child Maintenance

Non -Matrimonial Property – inheritance

Parties married about 15 years having two children – maintenance for children –

Inherited property after marital breakdown -- Pension sharing – judge made award to equalize pension on a needs basis.

Matrimonial Causes Act 1974 Section 29

Dates of hearing: 18, 19 and 25 January 2016

Date of judgment: 2 May 2016

Marshall Diel & Meyers – Mrs Georgia Marshall for the Petitioner (wife)

Respondent (husband) in person

JUDGMENT

Parties

1. The parties in this matter are the wife (Petitioner) and the husband (Respondent), so called even though they are divorced.
2. The parties lived together in Japan for a year, then married on 21 May 1999 in Halifax, Nova Scotia, Canada.
3. The wife is a Bermudian citizen and, at the time of their wedding, the husband was a Canadian citizen. The husband was granted Bermudian status in August 2010.
4. The parties are both 41 years old. They have two children: child G born in May 2006, and child C born in June 2009. At the time of the current proceedings child G was 9 years old, and child C was 6 years old.
5. The marriage lasted about 15 years. The parties separated in December 2014. The wife filed to dissolve the marriage on the grounds of the husband's unreasonable behaviour. On 27 March 2015, decree nisi was granted; it was made absolute on 11 May 2015.

Applications

6. There are two applications before the Court: each party filed an application for ancillary relief.
7. On 3 February 2015, the wife filed her application for ancillary relief seeking:
... an Order that the Respondent be ordered to pay maintenance pending suit for the Petitioner and interim periodical payments and periodical payments for the children ... secured provision, lump sum or sums provision as may be just and that the Respondent may be ordered to make such payments or otherwise by way of property adjustment as may be just or such further or other relief as may be just.
8. On 19 March 2015, the parties agreed *inter alia* on an interim order for the maintenance of the children – without prejudice to their positions at the final hearing – regarding their respective contributions to the reasonable needs of the children.

9. On 20 March 2015, the husband filed his application for ancillary relief seeking:

... an Order that the Petitioner pay to the Respondent such lump sum payment as may be just and/or for such further or other order including an adjustment of property order as the Court may decide.

... [and] that the Petitioner pay the costs of this application.

Evidence considered by the Court

10. Each party filed an affidavit and gave oral evidence. The wife's mother also filed an affidavit.

Matrimonial assets

11. The former matrimonial home consists of two units (one upper and one lower). The property was assessed by Horsefield Property Services Ltd. and valued at \$500,000: \$275,000 for the upper unit, and \$225,000 for the lower unit. The net value of the upper unit is \$255,554.

12. The matrimonial assets and their value are:

- i. Net equity in the former matrimonial home (\$255,554);
- ii. A family car (\$8,000–\$10,000); and
- iii. A motorcycle (\$2,500).

The husband has kept the car and the motorcycle.

Matrimonial home

13. The wife's application is supported by her mother's affidavit of 3 July 2015. In that affidavit, the wife's mother states that the former matrimonial home was purchased in November 2000 for \$470,000.

The wife's mother provided 46% of the purchase price for the property (approximately \$200,000). To cover the balance, the wife and her mother arranged a mortgage with Capital G (now Clarien Bank). The husband was the guarantor of that mortgage.

14. Two days before the matrimonial home was purchased, the husband, the wife and her mother entered into a deed of family arrangement (the Deed).

The Deed confirms that 46% of the funds to purchase the property came from the wife's mother, and 54% from a mortgage with Capital G. The mortgage was to be repaid by the husband and the wife.

The Deed stipulated that the wife's mother would occupy the lower unit at the property, and the husband and wife would occupy the upper unit.

The Deed also specified that in the event of a divorce, the wife was to pay the husband the value of his equitable interest in the property within one year of their divorce.

15. The parties enjoyed a preferential rate for the mortgage because the wife worked at HSBC Bank. This preferential rate resulted in a saving of more than \$73,000 over the course of the mortgage.

The parties contributed equally towards repaying the mortgage balance.

16. In 2005, the parties purchased a property in Canada using funds borrowed against the matrimonial home mortgage. When they sold this jointly held Canada property, they used the proceeds from that sale to reduce the mortgage on the matrimonial home in Bermuda.

17. By 2013, the mortgage for the matrimonial home was paid off: the property is now debt-free.

18. After the divorce, the wife moved out of the matrimonial home but the husband continued to live there.

Affidavit from the Petitioner's (wife's) mother

19. The wife's mother states that she is relying on the Deed: the parties are now divorced so the husband is to receive his share of the property and leave the matrimonial home. Her relationship with her ex son-in-law is not amicable. She insists that as the parties are now divorced the Deed does not allow him to remain in the property. She asserts that she is not prepared to negotiate arrangements that deviate from the terms of the Deed.

Petitioner's submission

20. The wife states that without her mother's financial assistance the parties would not have been able to purchase the matrimonial property.
21. The wife states that the husband refused to leave the former matrimonial home, so in December 2014 she left and rented accommodation for \$2,500 monthly.
22. The wife asserts that the husband owes land tax and maintenance for the matrimonial home: as of 4 January 2016, he owed \$1,314.

Respondent's submission

23. The husband argues that when the parties purchased the matrimonial home their situation was different. His lack of Bermudian citizenship meant he could not legally purchase

property in Bermuda. Also the parties had no children to consider when he signed the deed of family arrangement.

24. The husband maintains that the main reason he signed the Deed:

... was the fact that he did not have Bermudian status and did not take into fact the consideration of his future children that would need a place to live as they did not exist at the time it was signed.

25. To support his plea for ancillary relief, the husband asserts:

... the most important need in relation to separating the finances/property is the welfare of the children and that both parties have a property to live on for the children.

Inherited property

26. In December 2013, the wife's father died. The wife and her brother inherited their father's estate and began receiving rental income from the property. The inherited property was formally conveyed to them in October 2014. The wife and the husband separated in November 2014.

27. The inherited property consists of two apartments: one is rented for \$4,500 per month, and the other is occupied rent-free. There are about eight years left on the lease for the rent-free apartment.

28. For the rented apartment: \$1,100 of the \$4,500 per month in rent is kept in an escrow account to meet tax, insurance and on-going expenses of the property; the balance of \$3,400 is divided equally between the wife and her brother (so each receives \$1,700 per month).

29. The wife has two joint bank accounts with her brother: one at Clarien Bank and one at HSBC. The Clarien account has \$19,014.12: the remainder of the cash inheritance from her father's estate, and rental income received since her father's death. The Clarien funds are held to meet emergency expenses and on-going expenses related to the inherited property. The HSBC account has \$7,325 to cover replacement costs for appliances at the property.

30. The inherited property has been valued at \$1,250,000 (taking into account the effect of the lease on a sale). Considering the cost of sale (legal fees, stamp duty and real estate commission) the net value of the property is \$1,158,575.

31. The inherited property is not debt-free. The wife's consolidated loan of \$148,000 (borrowed in January 2015) is secured by mortgage against this property.

Petitioner's submission

32. Mrs Marshall, Counsel for the wife, submits that the wife was clear that the inheritance was hers and not meant to be shared with the husband.

The wife maintains that she treated her inheritance as separate and distinct. Aside from giving the husband \$15,000 to help him clear his credit card debt, and increasing her contribution to the household expenses, the wife was not prepared to share her inheritance with him.

33. Mrs Marshall argues that the property was inherited within one year of the marriage breaking down. The wife moved out of the matrimonial home in December 2014. For ten months before she moved out, the wife increased her contribution to the household expenses:

... the wife received rental income of \$1,700 per month which she retained in her own account but agreed to increase her monthly contribution to the joint expenses of the household whilst agreeing that the husband's contribution could be decreased.

34. Mrs Marshall maintains that the suggestion by the husband that that the inherited property is their property and that he should therefore be awarded 25% of its value finds no support in legal authorities.

She cites Ward LJ in *Robson v Robson* [2010] EWCA CIV 1171:

43. ...

7. ... *The fact that wealth is inherited and not earned justifies it being treated differently from wealth accruing as the so-called "marital acquest" from the joint efforts (often by one in the work place and the other at home). It is not only the source of the wealth which is relevant but the nature of the inheritance ...*

8. *The duration of the marriage and the duration of the time the wealth had been enjoyed by the parties will also be relevant. So too their standard of living and the extent to which it has been afforded by and enhanced by drawing down on the added wealth.* [emphasis added by Counsel] *The way the property was preserved, enhanced or depleted are factors to take into account. Where property is acquired before the marriage or when inherited property is acquired during the marriage, thus coming from a source external to the marriage, then it may be said that the spouse to whom it is given should in fairness be allowed to keep it. On the other hand, the more and the longer that wealth has been enjoyed, the less fair it is that it should be ringfenced and excluded from distribution in such a way as to render it unavailable to meet the claimant's financial needs generated by the relationship.*

35. Mrs Marshall submits that in the current case, the wife's inheritance was acquired within a year of the parties' separation. The wife never indicated that she was going to place the inheritance in their joint names.

36. Mrs Marshall argues that the parties standard of living was not substantially enhanced by the inheritance because it was not available for long enough to be enjoyed by the parties. She maintains that throughout the marriage – except for each party placing an agreed amount in a common chequing account to cover household expenses – there was no co-mingling of their funds. The parties had separate bank accounts and used those funds as they wished without accounting to each other.

Mrs Marshall adds:

A feature of this case is that what hastened the breakdown of the marriage was the divergence of position between the parties as to the inheritance itself. The wife was clear that she considered the inheritance to be hers ... The husband on the other hand expected to share equally with the wife in the estate left to her by her father. ... the inherited property over the brief period of time that it was owned by the wife [was not] integrated into the family finances and that the wife treated her inheritance as hers separate and distinct from the husband.

Respondent's submission

37. In his oral submission, the husband requested the matrimonial property (the upper unit) and 25% of the inherited property. To support this he cited *Butterfield v Butterfield* [2008] Divorce Jurisdiction No. 17. He submits that he would like to have a place to live with the children, and he would place the property in trust for the children.
38. The husband argues that – ‘if one of the properties involved in this marriage is not left in his name’ – he should share in the wife’s benefits from the inherited property.

He maintains that the rent from the inherited property was intermingled in the parties’ joint chequing account. He therefore requests a portion of the wife’s rental income from the inherited property, especially as the wife’s income from the property will increase substantially when the current occupant (who is living there rent-free) moves out.

His intention is to use these funds to help him provide a home for himself and their children, and maintain the same lifestyle he had during the marriage.

He submits that this is fair because:

The petitioner will have at least one property in her name, make substantially higher earnings, [have a] higher pension and be able to work at her high paying job for ... 10 years [longer than the respondent], which makes it easier for her to obtain a loan and another property.

Income, pensions and debts

Income

39. The wife works for HSBC. She earns \$8,546 per month, and is eligible for an annual discretionary bonus. Over the past three years she received bonuses as follows: \$5,000 (2012); \$9,000 (2013); and \$12,700 (2014).

The Court accepts that this is a discretionary bonus, but notes that on average over the three years the wife earned the equivalent of \$742 extra per month to give an average monthly income of \$9,288 for the past three years.

40. The husband works for the Bermuda Police Service. He earns about \$6,500 per month net. He also receives approximately \$6,000 per year in overtime pay.

The Court accepts that this overtime is not guaranteed or fixed, but notes that on average the husband earned the equivalent of \$500 extra per month to give an average monthly income of \$7,000.

41. The husband is 41 years old and according to the terms of his contract he must retire when he is 55 years old. However, the wife rejects the husband's contention that his working life is limited to the police service retirement age of 55. She argues that he is able-bodied and capable of working until he reaches the retirement age of 65.

Pensions

42. Each party has a pension.

The husband's pension is currently worth \$67,000. He also contributes to the Superannuation Fund. When he retires he will be able to convert up to 25% of his pension into a lump sum then receive the balance as monthly pension payments.

The wife's pension is currently worth \$213,000.

43. The husband argues that after eight years of working he cashed out his pension – worth \$22,000 at that time – to fund a one-year family trip to Nova Scotia, Canada, because the wife wanted to take a year off work to focus on caring for their first child.

The wife counters that she borrowed \$15,000 from her mother to assist them during this period, and that she has since repaid her mother. She states that they used the rental income from the former matrimonial home to help finance their time in Canada.

The Court is satisfied that it was a joint decision to relocate to Canada. Based on the evidence, the amounts contributed by each party are balanced out.

44. With regard to pension sharing, Mrs Marshall (Counsel for the wife) asserts:

Whilst the pensions of the parties have been earned during the marriage and can be viewed as being part of the marital acquest, it is an important feature of this case that the parties did not pool their surplus income but retained it in separate accounts for their own discretionary spending. The pensions are similar in character to these surplus earnings. On that basis the wife's position is that each of the parties should be able to retain their separate pension entitlements with the husband receiving his at age 55 and the wife being unable to receive any portion of hers until she reaches the age of 65, in some 24 years.

Mrs Marshall continues:

If the Court rejects this position and views the pensions as marital acquest, it is the wife's position that any benefit to be apportioned to the husband should take into account the benefit that he has already received by virtue of the wife's staff interest rate which decreased the parties' mortgage payments by \$73,000 during the life of the mortgage secured against the [matrimonial] property. The husband has received a benefit of \$36,500 as a result and this should be reflected in the final award.

The value of the pensions totals \$279,000. If the parties were to walk away from the marriage with an equal amount of pension each would have \$139,500 in their respective pensions. The husband already has \$66,000 and thus the "equalization transfer" of pension funds to bring him to parity with the wife would be the sum of \$73,500. It is the wife's position that from this sum should be deducted the benefit which the husband has already received from the wife's reduced interest rate of \$36,500 and the transfer of pension from the wife to the husband should be thus reduced to \$37,000. That would give the husband an additional \$37,000 by way of contribution to his pension fund whilst recognizing the benefit received by him from the wife in reduced interest payments.

Debts

45. The husband has the following debts: \$16,000 borrowed from his father; an outstanding amount to the children's school for non-payment of his share of their school fees; \$250 in land tax arrears; and three months' arrears at \$415 per month for maintenance of the matrimonial property.

During cross-examination by Counsel for the wife, the husband stated that he would pay what he owes.

46. The wife's current debt is \$148,000. This represents the balance of a loan taken out in January 2015. The loan was used to pay her legal fees prior to this hearing, to buy a car, and to pay credit card bills. Her monthly repayment for this loan is \$2,250. If she stops working at HSBC, the monthly repayment will increase to \$3,086.

The Court

47. The Court has taken all relevant matters into consideration, and the guiding principles pursuant to section 29 of the Matrimonial Causes Act 1974.

The Court has also taken into account the authorities cited, and the affidavits and oral evidence of the parties in arriving at this decision. Although the Court has not restated all the facts, it has highlighted the relevant facts needed to make this decision comprehensible.

48. The parties enjoyed a comfortably modest lifestyle.

The wife has a higher earning capacity than the husband. Also, her pension arrangement will yield her a higher pension when she retires.

When the husband retires at the end of his contract, there is a level of uncertainty as to his future earnings. This uncertainty has to be factored in as he will have to seek further employment to maintain or increase his earnings.

49. Both parties need accommodation that will allow them to continue to exercise their joint custody, care and control of the children in a reasonably comfortable environment.

Child maintenance

50. The Court has given consideration to the welfare of the two minor children of the family. The parties share custody, care and control of the children.

51. In accordance with the 19 March 2015 interim order – accepted by both parties – the husband pays \$800 per month towards the children’s expenses. When the children are with one of the parents, that parent is responsible for bearing the children’s expenses.

52. Both parties agree that the children’s monthly expenses are \$1,532 for child G and \$762 for child C (\$2,294 in total).

The 19 March 2015 interim consent order indicated that the parties should share the children’s (educational) expenses proportionally at 60% from the wife and 40% from the husband.

Accordingly, the Court finds it reasonable that the husband’s contribution towards the children’s full monthly expenses remains at 40%. His contribution towards the children’s expenses should increase to \$900 per month.

Matrimonial home

53. The division of the former matrimonial home is stipulated in the Deed entered into by the wife, the husband, and the wife’s mother. If the husband and wife divorced, their equitable interest in the property should be divided equally between them.

54. The Court finds that the husband and wife shared an equitable interest in the upper unit of the property (net value \$255,554). The Court upholds the terms of the Deed. Accordingly, the wife is to pay the husband \$127,780 which represents approximately half of the net value of the upper unit. The husband is to move out of the property.
55. The Court notes that the husband has been living in the former matrimonial home for over 13 months. He has been paying maintenance fees of \$415 monthly – although at the time of the hearing he is in arrears – while the wife has been paying rent at \$2,500 monthly. The husband has failed to keep current with land tax and maintenance.

Inherited property

56. With regard to the husband's claims on the inherited property, it is clear to the Court that the husband has a fundamental misunderstanding of the law and the courts' approach to inherited property.

The husband relies on *Butterfield* supra, but the Court agrees with Counsel for the wife: the factual scenario in *Butterfield* supra is different from the facts of the current case.

57. On the issue of inherited money and property versus matrimonial property, Nicholls LJ in *White v White* [2000] UKHL 54 said:

... property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand ...

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

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.

58. For inherited property, the Court needs to consider *inter alia* the length of time an asset was available to the family, how it was used to fund their lifestyle, and the financial needs of the parties.
59. The Court accepts that funds from the inherited property were only available to the wife for the last ten months of the marriage, and that these funds did not have a significant effect on the parties' lifestyle. However, the Court notes that the wife recognised there was a need to use funds from the inherited property to assist with household expenses and to help the husband with his debts at the time.
60. In the interests of a clean break, the Court denies the husband's request for a share of the future rental income from the inherited property. However, the parties share custody, care and control of their two minor children. Therefore – as the husband has to vacate the family home and find alternative accommodation – the Court finds it reasonable to award him a percentage of the value of the inherited property.
61. In *CS v JS* 2010 No. 16, the wife claimed a share in the husband's inherited property. The husband inherited the property two and a half years (30 months) before he separated from the wife. Given the circumstances of that case, the Court awarded the wife 16.5% of the net value of the inherited property.

The Court accepts that in the current case the parties benefitted from the inherited property for ten months. Using *CS v JS* as a guide, the Court calculates that the husband in this case should be awarded around 5.5% of the wife's share of the net value of the inherited property. The wife's share at 50% of the net value of the inherited property is around \$580,000. So the husband's share is to be \$32,000.

Pensions

62. The wife has offered to pay the husband \$37,000 to equalise their pension funds. The husband could apply this towards a new home for himself and the children, therefore the Court makes this award on a needs basis.

Closing remarks

63. It is hereby ordered that:

- i. The Respondent is to pay the Petitioner \$900 per month in child maintenance, starting 45 days from the date of this order. When the children are with one of the parents, that parent is responsible for bearing the children's expenses.
 - ii. The Respondent is to pay the amount he owes to the children's school for non-payment of his share of their school fees. This is to be paid within 30 days of the date of this order.
 - iii. The Respondent is to move out of the former matrimonial home within 45 days of the date of this order.
 - iv. The Respondent is to pay land tax and property maintenance charges owed up to the date he moves out of the matrimonial home. All outstanding amounts are to be paid within 30 days of the date of this order.
 - v. The Petitioner is to pay the Respondent a lump sum for his share of the net value of the upper unit (the matrimonial home): \$127,780. If the Respondent fails to pay the land tax and property maintenance he owes within 30 days of this order, then the Petitioner can deduct any funds still owed from this lump sum. This lump sum is to be paid within 45 days of the date of this order.
 - vi. The Petitioner is to pay the Respondent a lump sum representing about 5.5% of her share of the net value of the inherited property: \$32,000. This lump sum is to be paid within 45 days of the date of this order.
 - vii. The Petitioner is to pay the Respondent a lump sum of \$37,000 to equalise their pensions. If the Respondent fails to pay the outstanding school fees within 30 days of this order, then the Petitioner can deduct any funds still owed from this lump sum. This lump sum is to be paid within 45 days of the date of this order.
 - viii. The Respondent shall keep the family car and motorcycle that are already in his possession.
64. The Court invites Counsel for the wife to prepare an order, which should be sent to the Respondent and then to the Court for signing on or before 9 May 2016.
65. The Court shall hear the parties on costs at short notice – and before 15 May 2016 – if they so wish.

Dated ___ day of May 2016

Justice Norma Wade-Miller
Puisne Judge