



In The Supreme Court Of Bermuda

DIVORCE JURISDICTION

2019: No. 29

BETWEEN:

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Petitioner

-and-

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Respondent

Before: Hon. Alexandra Domingues, Assistant Justice

Appearances: Mrs Georgia Marshall of Marshall Diel & Myers, for the
Petitioner

Mr Cameron Hill of Spencer West, for the Respondent

Dates of Section 41 Hearing: 25, 26, 27 and 29 April 2022

Dates of Determinations: 29 April 2022

Date of Written Reasons: 9 November 2022

Ex-Tempore Ruling (Set Aside Application) 17 May 2022

REASONS FOR JUDGMENT

Duly Stamped Instrument; Section 9 of the Stamp Duties Act 1974; Adducing Copy of Instrument in Evidence; Section 41 of the Matrimonial Causes Act 1974; Reviewable Disposition; Defeating a Claim for Ancillary Relief; Dominant and Subsidiary Motive; Definition of Defeating Matrimonial Claim; Burden of Proof; Leave to Appeal; Setting Aside Section 41 Order

Assistant Justice, Alexandra Domingues

INTRODUCTORY

1. By her Petition dated 19 March 2019, the Petitioner (hereinafter referred to as **the Wife**) sought all forms of financial relief including, a lump sum, a property adjustment order in relation to the former matrimonial home as well as child maintenance. Upon the hearing of the Petition the Wife's ancillary relief claims were adjourned to Chambers.
2. By her Notice of Application for Ancillary Relief dated 28 September 2020 (**Substantive Application**) the Wife sought maintenance for the two children of the family; a variation of settlement known as the T Trust (**the Trust**); an order pursuant to Section 41 of the Matrimonial Causes Act 1974 (**MCA**) setting aside the purported transfer of the former matrimonial home located in Hamilton Parish (**FMH**) into the Trust (**the Section 41 Application**); a property adjustment order in relation to the FMH; and costs.
3. By letter dated 17 August 2020 the Respondent (hereinafter referred to as **the Husband**) advised the Wife's attorneys that the FMH has been conveyed into the Trust. This is the first time the Wife was made aware of this transfer. Thereafter, it was brought to light that the Husband had instructed attorneys to transfer the FMH into the Trust by way of a Reconveyance and Declaration of Trust dated 3 February 2020 (**Reconveyance and Declaration of Trust**).

4. The Wife filed two affidavits which she relied on, the first on the 25 September 2020 (**the Wife's First Affidavit**) and the second on 4 June 2021 (**the Wife's Second Affidavit**). In addition to these, the Wife also filed a third-party affidavit dated 4 June 2021 (**the Third-Party Affidavit**). The Husband relied on one affidavit sworn on 22 February 2021 (**the Husband's Affidavit**).
5. After hearing the evidence and Counsel's submissions over four days, I granted the Wife's application under Section 41. I accepted the Reconveyance and Declaration of Trust purporting to convey the FMH into the Trust was a disposition carried out by the Husband for the purpose of defeating the Wife's claims for ancillary relief. I also granted costs from the date of the filing of Section 41 Application to the Wife on an indemnity basis as well as any costs associated to affect the setting aside of the Reconveyance and Declaration of Trust are to be borne by the Husband. These are the reasons for my determination.
6. I have also included my Ex-Tempore Rulings in relation to the Husband's subsequent application seeking to set aside the order I made in the Section 41 Application. The purpose of this is to emphasize the numerous applications which protracted these proceedings and also highlights the litigation conduct of the Husband since the commencement of hearings of both the Section 41 Application and the Substantive Application.

PRELIMINARY ISSUE

7. Mrs Marshall of Marshal Diel & Myers Limited (**MDM**) for the Wife raised the preliminary point regarding the ability of the Court to receive into evidence the Reconveyance and Declaration of Trust as it was averred this instrument had not been duly stamped in accordance with the Stamp Duties Act 1976 (**Stamp Duties Act**). Section 9 of the Stamp Duties Act requires that no instrument shall be acted upon, filed or registered and requires the instrument to be produced to and impounded by the Court for forwarding onto the Tax Commissioner for adjudication. The consequence being the Reconveyance and Declaration of Trust could not be accepted into evidence as it would have to be sent for adjudication which may result in the determination that the instrument does attract *ad*

valorem stamp duty rather than being stamped under Head 20 of the Stamp Duties Act. This finding would require the Husband to pay tens of thousands of dollars in stamp duty as well as attract possible penalties under section 67 of the Stamp Duties Act. It would also significantly delay the Court's ability to determine the applications made by the Wife in these proceedings.

8. Mrs Marshall relied on the case of *Mason v Motor Traction Company Limited 1905, Chancery Division* in which Buckley J gave the following ruling in relation to an unstamped agreement:

“The company have passed a resolution approving a certain conditional agreement dated December 9, 1904, and authorizing the directors to carry into effect. I am precluded from looking at that document as an agreement, for it is not stamped. It has, I am told, been carried in for adjudication. It would be unfortunate if I were compelled to require it to be stamped for the purpose of an argument which, if successful, would preclude it from ever being carried into effect. I am not, I think, driven to that course. I can look at the copy of the document, not as an agreement, but as a document evidencing the terms upon which the company by the resolution which has been passed propose to sell, if they are not upon the present motuon restrained from selling...” [Emphasis added]

9. Whilst Mr Hill did not accept that the Reconveyance and Declaration of Trust was incorrectly stamped, he consented to the position that instead of requiring the original instrument to be produced which would result in its impoundment and requirement to be adjudicated by the Tax Commissioner, that a copy of the instrument would be produced into evidence in accordance with *Mason v Motor Traction Company Limited*.
10. Based on both Counsels' consent as well as accepting the prejudice to the parties to require the original instrument to be produced would be immense, I determined that for the purpose of proceeding with the Section 41 Application, the Court would accept a copy of the Reconveyance and Declaration of Trust to be adduced in evidence.

THE FACTS

Purchase and Financing of the FMH

11. The FMH was purchased in 1983 by the Husband and it was his evidence that he had intended the property to be an investment property that would pay its own way by renting out the additional unit and that it has always been intended to be a property for his children. Mr Hill for the Husband submitted the FMH does not constitute a matrimonial asset that will be considered by the Court under any sharing principle.
12. The parties were married in 2003 some six months following the settlement by the Husband of the claims of his first wife (**First Wife**) of a five-year marriage by whom the Husband had two children. The Husband and the First Wife resided in the FMH with their two children for approximately one year prior to their separation and divorce.
13. In December 2003, the parties moved into the lower apartment of the FMH and the main house was rented. At this time, the existing mortgage secured against the FMH was refinanced with HSBC which offered better terms. At that time the principal was increased from \$500,000 to \$610,000 with the Wife signing on as Guarantor of the new mortgage, but the Husband remained the sole owner. The parties thereafter used rental income to apply towards the mortgage, which for the first six months covered the mortgage payment but not thereafter. The Wife paid \$1,500 into the mortgage account even when the rent covered the monthly payments. Within six months, the Husband and Wife moved into the larger unit and rented the apartment. They contributed equally to the shortfall of the mortgage payments which were not covered by the rental income. Additionally, the Wife also assisted with discharging the arrears of the land tax which was between \$6,000 to \$10,000 at the time the parties moved into the FMH.
14. Over the course of time, the Wife and the Husband both contributed considerable funds (approximately \$250,000 each) towards renovations to the FMH. Whilst Mr Hill's submissions for the Husband purported the Wife provided no such evidence of her considerable contributions to the renovations of the FMH, this proposition was not

challenged by Mr Hill during his cross-examination of the Wife. It was accepted the Wife also met the children's expenses and school fees without contribution by the Husband as well as most if not all the household expenses for the family.

15. The Wife's evidence is that the increase to the mortgage of about \$110,000 (from \$500,000 to \$610,000) was used to meet the Husband's obligation to his First Wife of a lump sum payment of \$40,000 in accordance with a Consent Order dated 15 July 2002 (**Consent Order**) which is exhibited at page 111 of the Wife's Second Affidavit which resolved the Husband's and the First Wife's claims for ancillary relief. Paragraph 1 of the Consent Order provided the obligations for the Husband to pay a lump sum to the First Wife as follows:

- "1. The Respondent shall pay to the Petitioner a lump sum of \$40,000 in the following manner:-*
 - (i) Respondent shall pay to the Petitioner the sum of \$30,000.00 within 60 days of the date of this Order.*
 - (ii) The balance of \$10,000.00 to be paid by the Respondent to the Petitioner within one year of the date of this Order payments to be made in monthly installments of \$833.33."*

16. A further sum of approximately \$40,000 was used to extinguish a similar balance owed by the Wife on a loan which was used to purchase a parcel of land in St David's (**Wife's Lot of Land**). The Husband said the remaining \$20,000 was paid in early redemption penalty fees on the existing mortgage. Further, the Husband was insistent that the only purpose the parties explored refinancing of the mortgage was due to the significantly better interest rate offered by HSBC. The Husband in his *viva voce* evidence sought to convince the court that the lump sum to pay his First Wife was paid over a period of years commencing in 1998 and none of the \$110,000 raised in the refinancing was used for this purpose. Evidence was produced by the Wife in the Wife's Second Affidavit at paragraph 42 that the Husband had actually approached the First Wife in an attempt to convince her to provide an affidavit supporting this position as well as to support his assertion that it had always been his and the First Wife's intention for the FMH to go to their children. The Husband's Affidavit also confirm the First Wife's refusal to provide

affidavit evidence to support his position. I will address this in more detail in due course as this was a key argument made by the Husband for the Section 41 Application to fail.

Husband's Infidelities

17. Infidelities were carried out by the Husband during the marriage. Whilst this would not normally be relevant in ancillary relief proceedings, the timing of these infidelities, the timing of the conceptions of the Husband's outside children as a result of these infidelities as well as the timeframe when the Wife was made aware of the outside children, play a critical role in putting into context the events which were disputed between the parties. In particular, it relates to the obtaining of legal advice regarding estate matters prior to the irretrievable breakdown of the marriage and the actions taken by the Husband in the transferring of the FMH in the Trust after the Wife filed the petition for divorce and communication ceasing between the parties in August 2019.
18. In 2010 the Wife discovered that the Husband had been unfaithful to her with a woman who resides in Arizona and that the affair had led to the conception of a child who was born in 2011. Despite this, the parties reconciled the relationship and carried on with the marriage. In or about September or October 2017 a paternity test was undertaken which confirmed that the Husband was in fact the father of the said child. Although the parties do not agree on the circumstances of which the paternity test was required to be taken, they agree it was taken in September or October 2017.
19. Unbeknown to the Wife, the affair was not a one-off short-lived event. The Husband later admitted that his relationship continued and resulted in the birth of a second child born in 2016. The ongoing relationship and the existence of the second child were not known to the Wife until January 2019 when the Husband revealed this to the Wife. It was at this time that the Wife determined the marriage had broken down irretrievably and she filed her divorce petition in March 2019.

Events Subsequent to the Breakdown of the Marriage

20. The Wife was clear in her evidence as has been borne out in the documentary proof produced in the Wife's First Affidavit, the Wife's Second Affidavit and the Third-Party Affidavit, that at all times she wished to have a legal interest in the FMH by having her name put on title. The Wife's evidence is that the parties both obtained legal advice from Mr Harry Kessaram of Conyers in or around 2017, as joint clients to obtain guidance on estate planning and also for the purpose of having the Wife's name placed on title of the FMH. It is accepted that Mr Kessaram gave the parties advice in relation to various aspects of estate planning including setting up of a trust but this was by way of general outline and was not pursued. Mr Kessaram had a second conference with the parties on 2 January 2018 and the following day prepared draft documents for their review. They included Mutual, Enduring Powers of Attorney, Mutual Living Wills and Mutual Wills. This was evidenced by way of emails from Mr Kessaram's Secretary, an invoice as well as the drafts of all these referenced documents produced by the Wife at pages 86 to 110 of the Exhibit to the Wife's Second Affidavit. It is noted the contents of the Mutual Wills in particular, that they contemplated each party being the sole beneficiary of the estate of the other. The draft documents were circulated for review on the 5 February 2018 but were then not acted upon.

21. The Husband's evidence is that he educated himself on trusts by seeking legal advice from various attorneys including, notably Angelia Dill of AAA Law. Through those meetings he became convinced that what he wanted was a trust structure. He was particularly impressed with a certain trust structure of which the Wife was or had been a trustee as it had protected the trust property from the excessive claims brought by a bank. It was stated that at the time the parties discussed trusts the Husband's business was in financial peril and the trust structure was seen as beneficial to ward off any potential claims against the assets, the main one of which was the FMH as it was in the Husband's sole name. It would appear that the Husband's business weathered the storm and the

business debt was brought into manageable proportion. The Husband was insistent throughout his evidence that the Wife had always agreed with the FMH being conveyed into a trust. This was vehemently denied by the Wife.

22. In January 2019 upon discovering the ongoing relationship of the Husband with his girlfriend as well as discovering the existence of a second child who the Husband had with the girlfriend (who by this time was 3 years old as he was born in 2016), the Wife filed divorce proceedings. The Wife was at this time represented by Jackie MacLellan of MacLellan & Associates. The divorce Petition was served on the Husband in April 2019, wherein the Wife's prayers *inter alia*, sought financial relief from him which included a lump sum provision and property adjustment order. Despite the circumstances which arose in the Wife determining the marriage had broken down irretrievably, at that time it was agreed between the parties to have an opportunity to negotiation between themselves regarding their respective financial claims rather than proceeding with applications to the Courts. The aim was to reach a resolution which would then be vetted by the respective attorneys of the parties. After the vetting of final terms of the agreement between their attorneys, the intent was that the terms of the agreement would be encompassed in a Consent Order which would be presented to the Court upon the hearing of the Petition.
23. The negotiations between the parties are evidenced in emails which are exhibited to the Exhibit of the Wife's Second Affidavit at pages 43 to 80. These email communications commenced on 21 March 2019 with the last correspondence being sent by the Wife on 16 July 2019. The parties also engaged in communications verbally outside of their email communications. Both parties were taken through the communications during their respective cross-examinations where it emerged that each party had a very contrasting views of what a fair resolution would encompass.
24. The Wife's email of 2 May 2019 (see page 45 of the Exhibit to the Wife's Second Affidavit) which enclosed a "*first draft*" of her proposal titled "*Agreement Consideration for Joint Tenancy in common*" (**Joint Tenancy in Common Proposal**) where the body of the message stated:

“... Our respective divorce lawyers will review the agreement (no additional cost) and I have advised [that] my lawyer that I agree to an extension for your response.” [Emphasis added]

25. In this same email correspondence in which the draft terms of the Joint Tenancy In Common Proposal were included , she expressed her terms for settlement as follows: (a) she sought the creation of a Tenancy in Common by which she would be added to the deeds of the property; (b) the signing of mutual Wills which would ensure that each party’s fifty percent interest would be inherited by the four children of the family after the death of the last survivor of them; (c) and a prenuptial agreement barring any future claims against the property by future spouses should either party remarry. Additionally, the Wife proposed a detailed agreement as to the management of the FMH during the joint lives of the parties and how as well as to what extent the Wife would be able to raise money against the FMH in order to finance the construction of another house at her plot of land.
26. In the Husband’s first response to the Joint Tenancy In Common Proposal on 11 June 2019, he expressed that he sought the creation of a trust where the FMH would be conveyed with the beneficiaries to be mutually agreed by the parties (see pages 48 to 50 of the Exhibit to the Wife’s Second Affidavit). He was not prepared to agree to leverage the FMH in order for the Wife to raise monies to build her house and neither was he in agreement with having mutual Wills and prenuptial agreements for any future spouses.
27. The Wife’s response on this same date provided inter alia, the following key amendments/responses to the Husband’s proposals at pages 51 to 56 of the Exhibit to the Wife’s Second Affidavit:
 - “1) Agree to the establishment Joint Tenancy In Common with a view to establishing a “Trust” for the Property as soon as financially feasible.
 - 2) Upon establishment of a Trust items 3b and 3c shall no longer apply.
 - 3) Upon the establishment of Joint tenancy In Common both parties to agree to:

- a. Lifetime tenancy for joint tenants
- b. A mutual WILL for beneficiaries (four children), to be re-signed in the event either party is remarried
- c. A prenuptial agreement to be signed by any future spouses stating implicitly that they are not entitled to any ownership or input into the management of the property.

...

13) All future negotiations with regard to the property between the joint tenancies are to be agreed in writing.

14) The Joint tenants reserve the right to amend this agreement as long as mutually agreed in writing and notified by the courts.

...

Definitions:

Joint Tenants – [The Wife], [The Husband]” [Emphasis added]

28. Further, the Wife’s proposal at paragraph 4 provided that her access to the FMH would only end when she had extracted \$600,000 from the FMH and she no longer had a mortgage on her property (see page 52 of the Exhibit to the Wife’s Second Affidavit). At this time, she additionally raised the issue of child support and sought at least \$1,500 per month by way of maintenance for only the youngest child of the family (see pages 55 and 56 of the Exhibit to the Wife’s Second Affidavit).

29. The Wife followed up with a further proposal on 24 June 2019 after discussions with the Husband. In that proposal found at pages 57 to 62 of the Exhibit to the Wife’s Second Affidavit, she reiterated that she wanted the establishment of the Joint Tenancy in Common with a view to establishing a trust for the FMH as soon as financially feasible. This was defined in paragraph 2) c. of the Joint Tenancy In Common Proposal which states as follows:

“2) Upon the establishment of Joint tenancy In Common both parties agree to:

...

c. *A prenuptial agreement to be signed by any future spouses stating implicitly that they are not entitled to any ownership or input into the management of the [FMH].*

i. *When [The Wife] no longer has a mortgage at [her property]: it is agreed that a trust is to be established.*

ii. *The trust may be financed through an equity line and serviced by the proceeds from the [FMH].* [Emphasis added]

30. The Husband's reply dated 12 July 2019 found at pages 63 to 66 of the Exhibit to the Wife's Second Affidavit, he reverted to the creation of a trust into which both the FMH and the St David's lot would be conveyed. The content of the Husband's email says,

“[Wife],

I agree that moving forward into a trust is the best idea.

Here is my draft of what it looks like.

If we can get the document completed by the weekend, I'll sign all docs and return to you/your lawyer early next week.

-TS” [Emphasis added]

31. In the attached document of the 12 July 2019 email, for the first time, the Joint Tenancy In Common Proposal had been renamed by the Husband to “*Agreement for a Trust*” (**Husband's Trust Proposal**) which is found at pages 64 to 66 of the Exhibit to the Wife's Second Affidavit. He proposed that the Wife could leverage her property, being the lot of land, in order to raise money for building her house. He proposed that once the loan to be taken up for the Wife's house was paid off, the rental income from the FMH would be divided by the parties. He then said, “*The Trust will explain how these properties will be managed and to whom they will benefit after [the Wife] & [the Husband] are deceased.*” In that proposal and for the first time the division of rental income was modified so that the proposed split was sixty percent to the Husband and forty percent to the Wife.

32. The Wife responded to the Husband's Trust Proposal on 15 July 2019 at page 67 of the Exhibit to the Wife's Second Affidavit. In that response, there are five main distinctions from the Husband's proposal of 12 July 2019 as follows:

- a. First, it was the Wife's expectation, in addition to her earlier expectation that her attorney would review any proposed agreement between the parties that the court would be called upon to ratify any agreement reached;
- b. Second, any trust to be created would only be created upon the mortgage to be taken up by the Wife was extinguished
- c. Thirdly that the terms of the trust were to be negotiated when the trust was established;
- d. Fourthly, the sixty/forty division of the rental income of the FMH was not agreed; and
- e. Lastly, if a trust was to be set up it would be estate planning purposes and the parties would pay the cost of setting it up equally and the Husband would assist the Wife in paying off her mortgage.

33. The Husband's response came later that day (see page 73 of the Exhibit to the Wife's Second Affidavit) by which *inter alia*, he said the following:

"1. Ok, I understand and agree that any Trust that is put in place for estate planning purposes only. That means that you will purchase and own and new property you choose to, without my involvement You may choose in the future to collectively place them into a trust or not.

...

3. 60/40 division [of the FMH rental income] is fair based on the following...

...

5. I agree that investment in the "Trust" (if it is \$100k) is a lot for what we are trying to accomplish. It can be agreed to do so when feasible.

6. *If the Joint-tenancy agreement allows this to happen than it's the tool. I'll get my lawyer who arrives back on island on the weekend...*" [Emphasis added]

34. The Wife's final response was sent on 16 July 2019 (see page 77 of the Exhibit to the Wife's Second Affidavit) in which she still challenged the sixty/forty division of rental income but agreed that this could take effect once she completed paying for her mortgage and for A's University education.
35. During the parties' negotiations, the Husband convinced the Wife to meet with Ms Dill for the purpose of Ms Dill explaining to her the trust "scheme" to avoid paying approximately \$100,000 in stamp duties for conveying the FMH into a trust. The Wife agreed to meet with Ms Dill in July 2019. Amongst other reasons, but particularly due to the Wife's skepticism of the scheme Ms Dill was proposing, the Wife asked her colleague Ms Richardson, to attend the meeting with her so that she could have a third-party witness.
36. The Wife relies on Ms Richardson's Third-Party Affidavit to support her version of what occurred at the meeting. It has only been during the course of these proceedings that it was brought to the Wife's attention by the Husband's attorney, that Ms Dill had tape recorded the meeting. Both the Wife and Ms Richardson confirm that this recording was made by stealth as neither was a request made for consent to do so, nor was it disclosed by Ms Dill that she was doing so. It is the Husband's evidence that Ms Dill left the meeting believing the Wife had provided her consent to the FMH being conveyed into a trust.
37. It should be noted that during the hearing Mr Hill made an application on his feet to provide the alleged transcript of Ms Dill's recording as rebuttal evidence; however, I denied this on the basis that at no time during the case management hearings/Rule 77 (4) Investigations before me was any leave sought to not only adduce this evidence, but to even seek leave to file a responding affidavit to the Third-Party Affidavit.

38. After July 2019, unfortunately matters took a very acrimonious turn between the parties. The Husband entered the FMH on the 31 August 2019 and ransacked the Wife's bedroom, ripping her clothing. This resulted in a police report being filed by her (see page 81 of the Exhibit to the Wife's Second Affidavit) and an application being filed in the Magistrate's Court for a DVPO. This led to the parties ceasing all communications thereafter; therefore, halting any of their ongoing negotiations regarding the resolution of ancillary relief.

Husband's Actions After Negotiations Ceased

39. Following the breakdown of the negotiations between the parties, the Husband moved forward with setting up a trust for the FMH. The Husband accepted on cross-examination that he did so without the Wife's knowledge or consent; albeit, he attempted to spin this by averring that Ms Dill having met with the Wife in July 2019 confirmed to him that she had in fact consented for the trust structure to be created and the FMH conveyed to it.

40. The Husband confirmed he had instructed Angelita Dill who provided to him legal advice from in or about July/ August 2019. The Husband's evidence was that Ms Dill advised him that to move forward the trust scheme, he should settle the balance of the mortgage secured upon the FMH in order to have the HSBC as the mortgagee, reconvey legal title to him. By this means the Husband would receive the legal title, but as trustee for a class of beneficiaries in relation to whom he would then hold the property in accordance with the provisions set out in a Declaration of Trust of that same date. By this scheme he was advised that the transfer of beneficial title to the beneficiaries would not attract *ad valorem* stamp duty but would be stamped under Head 37(v) of the Stamp Duties Act as a Reconveyance bearing 1/20 per centum of stamp duty, which in this case would amount to \$305.

41. Subsequently, the Husband conveyed the FMH into a trust on the basis as advised by Ms Dill. The Husband admitted in his *viva voce* evidence the following crucial facts:

- a) that he never again discussed what he was about to do or what he had done with the Wife;
- b) that he never sought the Wife's input as to the Declaration of Trust nor as to the terms of the Declaration of Trust.
- c) that he never approached Mrs MacLellan (and later Mrs Marshall when she came on record for the Wife) and neither did his attorney, Ms Dill, to forward drafts for review and comment.
- d) that once the disposition was concluded he met with the children and advised them of the transaction and accepted that the Wife was not invited to that or any other meeting.
- e) He accepted that the Wife remained oblivious to the disposition as is evidenced from the letter before action from MDM dated 21 February 2020 at pages 21 to 25 of the Exhibit to the Wife's First Affidavit until he wrote to the Wife's attorneys in March 2020.

42. On 27 March 2020, the Husband wrote to MDM falsely claiming that the property had been placed in a trust prior to the divorce:

“(1) [FMH]

In accordance with the insistence of your client, and the meetings commencing in 2017, which were held with Legal Counsel Shawn Dill and Harry Kessaram along with your Client, the property that you refer to as the “former matrimonial home” was placed in Trust prior to divorce.

I can advise you that your client is a beneficiary of the Trust and there is independent Protector of the Trust. Your client is currently enjoying full an unhindered access to the property which can be completely detailed by the Trustees as she is a beneficiary.” [Emphasis added]

43. This letter from the Husband did not advise who the trustees were, who the beneficiaries were nor did it provide copies of the documents. Notably, it was subsequently disclosed that the Husband himself along with his oldest son from his first marriage are the trustees.

44. Furthermore, this correspondence was sent just a few weeks after the date of the Reconveyance and Declaration of Trust had been executed on 3 February 2020. The Husband was well aware that the Petition was filed by the Wife on 19 March 2019 which was subsequently served on him in April 2019. After the breakdown of the negotiations between the parties, Decree Nisi was pronounced on 27 September 2019 and the Decree Absolute was granted on 12 November 2019. Therefore, the FMH was conveyed into the Trust just under one year after the divorce proceedings had commenced and approximately three months after the Decree Absolute had been granted.
45. Requests for production of the Reconveyance and Declaration of Trust by which the FMH was settled upon trust were made by the Wife's attorneys in the first instance on 9 July 2020 as well as in their letter of 18 September 2020 were ignored.
46. Eventually on 17 August 2020 the Husband wrote again to MDM this time giving details of the name of the Trust (see page 29 of the Exhibit to the Wife's First Affidavit). By the date of that letter the disposition complained of had been completed and the house was "*captured*" in it. That is how the Husband described what was done in his *viva voce* evidence, "*captured*". He asserts in this letter the restrictions and limitations available to the Wife due to the FMH being held in trust:

"I do not agree that the [FMH] is Matrimonial property..."

...

Notwithstanding the fact that the lifestyle investments that she made have completely depreciated, I have included her in the Trust as a beneficial owner, to recognize (1) any investment she has made and (2) any arbitrary support that she has provided. As a result of this action, any equitable position she believes she has, has been addressed generously through this action.

Because [the Wife] is the mother of my 14-year-old daughter, [A], I have advocated to the Trustees that [the Wife] be allowed to live at the premises for a nominal fee of \$2,500 monthly which enables the Trustees to properly discharge their duties to ALL of the beneficiaries. Your client is only one of five beneficiaries." [Emphasis added]

47. In this same correspondence, the Husband went on to make a proposal of settlement described as being “*fair if not generous*”. The offer was as follows:

- “1. *Your client will reside in the FMH for the next 3 years until Jan 2024, at which time she will be able to relocate, or request the Trustees to extend this period;*
2. *She will be required to pay \$2,600 per month to the Trust for the maintenance of the house. She can solicit some of this payment from the adult beneficiary that resides with her at the home;*
3. *I will assist with \$600 per month for living expenses for the children. This is a generous offer considering my expenses which have been outlined above.*
4. *She can maintain ownership of the [Lot of Land] and I will relinquish my ownership.” [Emphasis added]*

48. To the extent that these communications reflect the position of the parties in the negotiations, where they ended up was that a joint tenancy in common would be set up immediately with mutual Wills and agreement to enter into prenups. At a future date, when feasible to do so a trust structure would be set up with the full input of the parties in which the beneficiaries would be mutually agreed and the terms of the Trust would be negotiated and agreed and the parties would share in the proceeds of the property although there had not been agreement reached as to the proportion of that sharing. Insofar as the trust was concerned they had agreed to enter into an agreement at a future date when the terms of the trust would be negotiated and agreed.

THE LAW

49. There was little contention between Counsel regarding the legal principles applicable to this application; particularly as there is little room for alternative interpretation based on the wording of Section 41 of the MCA. The similar provision to our Section 41 is Section

37 of the Matrimonial Causes Act 1973 of the UK (UK MCA 1973). Section 41 (2) of the MCA provides as follows:

“41 (2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—

(a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial relief in question. [Emphasis added]

50. By Section 41(2) of the MCA, if the court is satisfied that the opposing party has, with intention, made a reviewable disposition and that if the disposition were set aside, financial relief or different financial relief would be granted, it may make an order setting aside the disposition. “Disposition” is defined in Section 41(6) of the MCA and includes any conveyance, assurance or gift of property of any description, whether made by instrument or otherwise.

51. Both “financial relief” and “defeating a person’s claim for financial relief” referred to in Section 41(2), are defined in Section 41(1):

“41 (1) For the purposes of this section “financial relief” means relief under any of the provisions of sections 26, 27, 28, 31, 35 (except subsection (6)) and 39, and any reference in this section to defeating a person’s claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions. [Emphasis added]

52. “*Financial provision*” is defined to mean relief under Sections 26, 27, 28, 31, 35 and 36 of the MCA and “defeating a person’s claim for financial relief” refers to preventing financial relief from being granted, or reducing the amount of any financial relief which may be granted or frustrating or impeding enforcement of any order under those provisions.

53. Section 41 (5), provides that there is a presumption, unless the contrary intention is shown, that the person who made the disposition did so with the intention of defeating the other party’s claim for financial relief:

“(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

(a) in a case falling within subsection (2)(a) or (b), that the disposition or other dealing would (apart from this section) have the consequence; or

(b) in a case falling within subsection (2)(c), that the disposition has had the consequence,

of defeating the applicant’s claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant’s claim for financial relief.” [Emphasis added]

Therefore, the burden of proof is on the Respondent to the application to prove contrary intent, which in this case is the Husband.

54. Here, the disposition complained of took place less than three years before the date of the applications, and the court, if satisfied that the disposition has had the consequence of defeating the applicant’s claim for financial relief, it shall be presumed, unless the contrary intention is shown, that the person did so to defeat the other party’s claim. Therefore, the burden of proof is on the Husband in this case.

55. Court of Appeal case of *Kemmis v Kemmis [1988] 2 FLR 223* the motive does not have to be the dominant motive in the transaction; it is a subsidiary (but material) motive then

that will suffice. I refer to *Kemmis v Kemmis* page 1321 at E to 1322 at B as well as page 1330 at H to 1331 at C. Lord Justice Purchas:

“I now turn to the judge’s consideration of intention. After referring to the repayment of the first mortgage on no. 59 and the Husband’s subsequent way of life; to the fact that a residential status in Jersey had been established and that, therefore, there was no further reason for the continued existence of the company, the judge continued:

“He was earning a sufficient income which, together with a small injection of capital, would have been quite sufficient to meet his commitments to his family and for his own expenses. By November 1980 he, or [the company], was already indebted to [the bank] in the sum of approximately £22,000, which was unsecured. In respect of the earlier mortgage he had given them personal guarantees. He deliberately did not do so in respect of the November 1980 mortgage nor did he give a guarantee for [the company], which he had done for previous borrowings. He told me that his intention was that no. 59 should be a home for his family, but laid stress upon it being a home for his children, and that when they were grown up his wife would have to fend for herself and no. 59 might well have to be sold. No purpose was ever clearly established for the mortgage of November 1980 and I conclude it was merely to provide more cash for the husband. [The bank] was, of course, anxious to have security in respect of the borrowings which at that time were unsecured. Looking at the whole history of this family it was obvious to any reasonable person that once the children were grown up and the maintenance to his wife had been stopped, some form of matrimonial proceedings would be started in which no. 59 would figure as one of the capital assets. With that in mind, the steps taken by this husband, through [the company], lead to the inevitable consequence that the value in those proceedings of no. 59 would be substantially diminished and, as [the company] had no income and there was no guarantee from him, the likelihood was that [the bank] would seek an order for sale. The cost of any proceedings would be added to the sale. As it happened the documents show that [the husband] was encouraging [the bank] to foreclose...In the light of all the circumstances I am quite satisfied that in entering into the mortgage of 1980 through [the company] this husband had an intention failing within section 37 of the Act of 1973. It is as well to note that the presumption of section 37(5) does not apply.”

Although it is clear from the terms of the guarantee given by the husband in respect of the company’s indebtedness to the bank in connection with the first mortgage on no. 59 that this would have been effective to cover the second mortgage, this was not a matter to which the husband adverted at the time. The legal consequences of this document were not, therefore, relevant to the determination of the subjective intention formed by the husband at the time of the disposition. Bearing in mind the findings of the judge in relation to the husband’s conduct of his affairs and his lack of frankness with the court and the general circumstances

of the case, in my judgments the judge was clearly entitled to find on that evidence the existence of an intention within the provision of section 37.” [Emphasis added]

56. Lord Justice Nourse further expanded on the definition of “*intention*” at pages 1330, H through 1331, C. as follows:

“I deal only with Mr. Trace’s principal submission and I deal with them in what appears to me to be their logical order.

(1) The husband did not grant the mortgage with the intention of defeating the wife’s claim for financial relief.

I agree with Purchas and Lloyd L.JJ. that what the judge had to find was a subjective intention on the part of the husband. Moreover, I think it clear that it did not have to be this sole or even his dominant intention. It was enough if it played a substantial part in his intentions as a whole. If it were otherwise, section 37(2) would fail to catch the case where a husband makes a disposition with the dominant intention of gratifying his mistress and only the subsidiary intention of defeating his wife’s claim for financial relief. I feel sure that that was not the intention of Parliament. As for the facts, on the evidence of the husband’s dealings and finances from 1973 onwards Mr. Trace made out a formidable case of the view that the husband granted the mortgage with the sole intention of financing his past and future expenditure and not with any intention to defeat the wife’s claim, especially since the parties have been living apart for some seven years beforehand and the wife accepted that there was no mention of divorce until some two years afterwards. But the question whether the intention was there or not could only be satisfactorily decided by the judge, who saw and heard the husband give evidence as a whole. The finding is not one with which this court can interfere.

(2) Alternatively, to (1), the evidence was not strong enough for the judge to be “satisfied” of the husband’s intention.

The submission here was that the standard of proof was higher than the proof on the balance of probabilities. I do not accept the submission in that form, although I would agree that, since what had to be proved was not merely a dishonourable intention but a dishonest and fraudulent one, the evidence which was required to tip the balance had to be correspondingly more convincing. Having reformulated the submission in that way, I reject it. I decline to say that the judge was not entitled to be convinced of the husband’s intention by his evidence and his demeanour in giving it.” [Emphasis added]

WIFE’S POSITION

57. It is the Wife's case that not only did the Husband undertake the disposition with express intention of defeating the Wife's matrimonial claims, it is clear from a review of the terms of the Reconveyance and Declaration of Trust, that the powers reserved to himself and his oldest son as trustees are so broad and expansive that the Wife's matrimonial interest and entitlements can be trammelled without any regard and without any recourse by her other than through this Honorable Court in these matrimonial proceedings. Pages 8 to 43 of the Exhibit to the Wife's Second Affidavit sets out the Reconveyance and Declaration of Trust. The main terms of the Declaration of Trust which have the effect of prejudicing the Wife's position rather than protecting it are as follows:

“2. TRUST INCOME

Subject to the powers contained in clause 3 and the provisions of 10 below:

2.1 *The Trustees may pay, transfer, appropriate, or apply all or any part of the income of the Trust Assets to or for the advancement or benefit of all of any one or more exclusively of the other of Discretionary Class and if more than one in any shares an proportions and in any manner generally as the Trustees think fit.*

...

3. OVERRIDING POWERS

The Trustees may at any time or times not later than the Termination Date but subject to the provisions of clause 10:

3.1 *pay, transfer appropriate or apply all or any part the Trust Fund to or for the advancement or benefit of all or any one or more exclusively of the other of the Discretionary Class and if more than one in any shares and proportions and in any manner generally as the Trustees think fit.*

4. PROVISION APPLICABLE TO DISPOSITIVE POWERS

4.1 *Without prejudice to the generality of the foregoing, the Trustees may in exercise of those powers contained in clauses 2.1, 3.1 and 3.2 above:*

...

4.1.5 transfer all or any part of the Trust Fund and the income of the Trust Fund to the trustees of another trust (wherever those trustees are resident and whatever the governing law of that trust) to be held by those trustees as an addition to the trust property subject to that trust

and as one fund with that trust property for all purposes, notwithstanding that the trust may contain trusts; powers and provisions (discretionary or otherwise) in favour of or for the benefit of persons who are not in the Discretionary Class; and

...

6. POWER TO ALTER THE DISCRETIONARY CLASS

The Trustees may, from time to time and at any time before the Termination Date with the prior or contemporaneous written consent of the Protector but not otherwise, by any writing revocable or irrevocable and made in respect of all or any part of the Trust Assets and the income of the Trust Assets and taking effect either immediately or on the occurrence of some specified future date or event (not being a date or event falling after the Termination Date) and which may (but need not) be expressed to take effect permanently or for any period:

- 6.1 declare that any person or class of persons (except a person or class of persons who has or have been excluded permanently) shall be a member or members of the Discretionary Class;
- 6.2 declare that any person or class of person shall cease to be a member or members of the Discretionary Class, provided that the removal of any person or class of person shall not prejudice any payment, transfer, or application previously made or any otherwise indefeasible entitlement previously arisen.” [Emphasis added]

58. It is clear that once the disposition was finalized and the FMH had been captured in the trust, the Husband reneged on each and every aspect of the negotiations which had taken place the prior year. His aim was to ring fence in the trust the FMH and keep it away from the reach of the court in the same way as the bank’s claims had been thwarted against the asset of the trust of which the Wife had been a trustee. At paragraphs 31 to 34 of the Husband’s First Affidavit he says outright,

“31. *At pages 3 – 33 of TES-01 is a true copy of the Conveyance and Declaration of Trust by which I, along with my son [C], declared that the [FMH] would be held upon trust for the benefit of the children of the family as well as myself and the Petitioner. It was purchased in my name in 1983 prior to my marrying [First Wife]. After we were married*

we set up home there and I paid the mortgage that had been used to assist in the purchase of the home in the usual way.

32. *For this reason, I have excluded the [FMH] from the assets that are available to the matrimonial judge for distribution. The trust arrangement that presently holds the [FMH] was created during the marriage for the benefit of our children. There was no intention, indeed there was a contrary intention, that either the Petitioner or I benefit from that asset. It is not true that I did anything with the [FMH] that was not actively encouraged and agreed to by the Petitioner.*

33. *Importantly the following considerations are key to an examination of whether the [Trust] ought to be set aside in whole or in part. From the above it is clear that the motivation for the establishment of the [Trust] was not to evade obligations to the Petitioner. The Petitioner herself supported the creation of the [Trust] and has benefitted from the access to financing that it provides when her own mortgage was discharged by funds provided by the asset now held by the Trustees of the [Trust]. Those considerations are:*

- a. *The trust arrangement was one that had been discussed throughout the marriage. Indeed, it had been a part of the logic of my previous divorce settlement, and*
- b. *It was expressly agreed to following discussions with Ms Angelita Dill who explained the substance scope and effect of the [Trust] as well as the consequences upon the rights of the Parties over any asset held by virtue of that declaration of trust and the trust limitations that the declaration imposes.*
- c. *The actual trust arrangement was entered into by the Petitioner following her having obtained appropriate legal advice in my absence and from a lawyer that she trusted and had known for*

some time. Her only caveat being that the cost of the creation of the trust arrangements should not be disproportionate, and

d. The formal conveyance took place following the commencement of these proceedings and in the full knowledge of all of the circumstances that gave rise to the decision to Petition for divorce including the existence of my relationship with another woman living abroad.

34. In those circumstances any application to set aside the trust arrangement and to see the assets of the [Trust] be made available for distribution should be dismissed. The [FMH] in which the Petitioner and I resided is not a matrimonial asset and whilst held by a nuptial settlement that settlement is one with which the Petitioner concurred and which gave effect to her wishes as much as mine. It would be unfair to the third-party beneficiaries to have the settlement set aside or otherwise interfered with. [Emphasis added]

59. Mrs Marshall emphasized the import of this evidence alone as there can be absolutely no doubt of the Husband's intent being that the purpose of the disposition was to exclude the FMH from the assets available for distribution. That was the goal and the intention from the Husband's own sworn evidence which he confirmed as being true at the commencement of these proceedings.

60. Furthermore, on 10 November 2020, Mr Hill wrote to Mrs Marshall advising that he had been instructed by the Husband in the financial aspects of the divorce and confirmed he had been provided the Wife's Affidavit and a responding affidavit would be filed by 25 September 2020. Mr Hill further stated in this email correspondence:

"I have advised that the Declaration of Trust that he has made will not hold much water if any and that we will have to go back to first principals. That is identify all of the assets and determine to whom they belong, have those assets valued and then come up with a fair distribution." [Emphasis added]

61. Mrs Marshall submitted that should this court take a sympathetic view of the Husband's actions and accept that his motivation and intention was to protect the interests of the children of the family, it is noted that the intention to defeat or reduce the Wife's claims or to prevent certain forms of relief from being granted or to frustrate or impede enforcement of the court's order need not be the primary intention or even the dominant intention. The Wife says that both of those tests are met, but even if the court finds otherwise, it was clearly a substantial part of the Husband's intentions as a whole. One need only consider the Husband's letter of 17 August 2020 as well as paragraphs 32 through 34 of the Husband's Affidavit to come to this conclusion.
62. The nature of the Husband's intent is further highlighted by the conduct of Ms Dill. At all relevant times Angelita Dill, a personal "*friend*" of the parties prior to their marital breakdown would have known and been aware of the divorce proceedings and that the Wife was represented by counsel. The Wife avers that Ms Dill would have been aware given she is herself a practicing attorney, that she was wading into dangerous waters when she purported to deal with real property which was the matrimonial home of the parties, whilst they were in the midst of divorce proceedings without sending such documents to the Wife's attorney for review. Mrs Marshall reiterated that Ms Dill would have known that her duties were to ensure that any document that she drafted on instruction by the Husband would need to be circulated to the Wife for her review and consent, particularly if it was Ms Dill's true understanding that the Wife consented to moving forward with such a scheme. Mrs Marshall submitted it is inconceivable that an attorney so instructed would conclude such a momentous disposition without any input or knowledge by the Wife of what was being done.
63. Mrs Marshall described Ms Dill's conduct in this transaction as being a "cloak and dagger approach". She submitted this conduct was highlighted in Ms Dill's response to MDM's letter of 20 August 2020 which stated as follows:

"...

If you are instructed in relation to the latter, being the creation of a trust, we wish to advise that [the Husband] has written to us stating that a trust was created upon

his instructions and that the former matrimonial home known as [FMH] has been settled upon the trust known as the [Trust]. We are further advised by [the Husband] that our client is a beneficiary of the [Trust].

We are writing to you to first confirm the above and secondly, if the information provided by [the Husband] is correct, to request that you kindly provide to these offices a copy of the Trust Deed, a copy of the Deed of Conveyance by which the matrimonial home was conveyed into trust and an account for the trust. As you will be aware, our client, as a beneficiary, is entitled to this information and documentation. We wish to put you on notice of the provisions of Section 41 of the Matrimonial Causes Act which, if relevant to this transaction, will be pursued.”
[Emphasis added]

64. Ms Dill’s response of 28 August 2020 said the following:

“I acknowledge both your letter and your email of 20 August 2020 regarding the above matter. Please be advised that AAA Law Company Ltd., nor I are instructed by [the Husband] on said matter, to be clear we are not instructed to received correspondence from your offices in relation to the Ancillary Relief proceedings.

Further, I do not act as Trustee nor Trust Administrator for the named [Trust].”
[Emphasis added]

65. Mrs Marshall emphasized the evasiveness and misleading response provided by Ms Dill in relation to a request for copies of documents that she prepared ostensibly with the consent of the Wife. Mrs Marshall asked what this Court would be left to conclude and why Ms Dill was evasive and misleading if she was clear that she had consent to do what she did. Furthermore, Mrs Marshall submitted that Ms Dill’s behavior is contrary to the Code of Conduct by which attorneys are bound and invited the court that if this assessment was accepted to refer the matter to Bar Council. Mrs Marshall was adamant in expressing her view that Ms Dill’s behaviour at a time when the claims of the Wife were before the Court are nothing short of an effort to subvert the course of justice.

66. Mrs Marshall's concluding submissions were that it is clear that the Wife by virtue of the scheme undertaken by the Husband and his attorney for the purpose of capturing the FMH into the trust and removing it from the reach of the court, is deprived of the relief which she seeks which is a property adjustment order in her favour . The Husband has not discharged the burden of proof required of him and that this court should set aside the Reconveyance and Declaration of Trust. By obtaining a property adjustment order, the Wife will be able to have conduct of the sale of the FMH and a lump sum provision could be paid to the Husband after taking into considering maintenance for the children (after backdating to the date of the Petition) as well as costs. The scheme of the Husband has resulted in this court being unable to exercise its powers in a manner without satellite litigation and exorbitant expenses. Moreover, the Wife's ability to enforce any award will be impeded if not prevented altogether by the FMH now being conveyed into the Trust.

HUSBAND'S POSITION

67. Mr Hill submitted that it is the Court's obligation to examine all of the circumstances of the case and to make such order as leads to the fairest resolution of the matter. This means, that while the Section 41 Application is being determined as a preliminary matter, the steps that the Court will take are linked to the relief actually sought as well as the nature if the asset that is the subject matter of the application. In this case the asset in question is the FMH.

68. The Husband's case it that the FMH was purchased in 1983 by him and it was his evidence that he had intended the property to be an investment property that would pay its own way by renting out the additional unit(s). Given that the FMH was an asset pre-owned it had been placed in the sole name of the Respondent and therefore in order to give effect to what he understood to be their common intention he did not require any input from the Petitioner. He averred that it had been agreed by both his First Wife and the Wife that this is a property that would be for the Husband's children and as such

suggested that the FMH does not constitute a matrimonial asset that will be considered by the Court under any sharing principle.

69. The Husband suggested that the idea to place the FMH in the Trust was only for the purpose of it being made available to meet the needs of the beneficiaries. Mr Hill was steadfast in his submissions that the terms of the Declaration of Trust are not in any way unusual as to have limited the trustees powers in any meaningful sense there would be a risk that the trust would be treated as a fixed trust which could have serious implications should one of the children live abroad.
70. Given its non-marital origin and in keeping with the dicta of *White v White* assets brought into the marriage are to be, in general terms, excluded from the pot to be shared. However, any such asset can be treated as an asset available to meet matrimonial claims. Therefore, the status of the Radnor Road Property, by the fact of having been fixed with a trust, has not changed. It was a non-matrimonial asset that was available to meet matrimonial claims and the situation with the trust has not changed. It is an asset which may be considered and orders made that may compel the Respondent to seek assistance.
71. Mr Hill suggested that the creation of a trust structure has nothing to do with the marriage. Its aim was to establish for future generations an asset base that would be of use long into the future whether the parties remained together or not. The Husband did not accept the Wife did not agree to the trust structure during the marriage. The structure that has been created permits access to capital to permit the purchase of a home for Wife and the children which Mr Hill says is one of the most important elements in any divorce. Mr Hill noted the Wife has purchased a home and there is no reason why the trustees would not assist with the making of a further payment to assist in completing that purchase. The fact that the FMH is now in a trust makes borrowing simpler, not less.
72. Mr Hill further submitted that the FMH will remain an asset that the Court can look to when assessing the parties' needs, the parties' assets available to either one of them and particularly as it relates to their respective housing needs; albeit, trust property will not be considered a matrimonial asset.

73. Mr Hill submitted that the true position is that nothing has changed as to the ability of the Court to take account of the FMH when making its assessment of a fair order. The asset remains available to the Court's calculation in precisely the same way as it was previously. Accordingly, Mr Hill submitted the Wife does not get over the hurdle of proving that the asset has been placed beyond her reach to meet her claims and the Court can still have regard to those assets in precisely the same way as would have been done previously. Mr Hill further suggested, the Wife actually has no claim against the FMH, but rather her only claim would ever be against the Husband and the Husband can meet any award of a lump sum payment from any resources to which he has access.
74. The UK Court of Appeal case of *Purba v Purba* [2000] 1 FLR 652 was relied heavily upon by the Husband to support the position that the Court could in certain circumstances simply ignore the existence of the trust structure and make such orders as appear expedient. The circumstances of this case were that when the parties separated the husband "*commenced his campaign to ensure that his liabilities to the wife post-separation should be reduced if not extinguished*". He did this by transferring sums totalling £100,000 to various family members from his accounts. An application was made under Section 37 of the UK Matrimonial Causes Act 1973 (which is the equivalent to our Section 41) and appealed to the Court of Appeal. Lord Justice Thorpe made the following findings:

"The resulting notice of appeal had raised a considerable number of points not all of which seem to me to merit reference in this judgment. The argument that the judge was wrong to have made orders under section 37 setting aside dispositions when there had been no notice of application in Form 11, no affidavit in support and no service upon the transferees is technically well-founded but, as Mr Justice Wilson commenced in his judgment, is one that lacks underlying merit. Technically, it seems to me that it was quite necessary for the judge in the court of trial to have gone to that length in order to arrive at reality and to do justice. These were not dispositions of the character that required that level of attack. They were after all only transfers of cash from one bank account to another. The fact that the receiving bank account was not in the

name of the husband but in the name of one or other of this close relations does not in any way inhibit the court from looking to the real questions – whose money is it? It does not cease to be the husband's money simply because it is moved into a different account. The recipient and account holder is a bare trustee. The ownership of the money, the cash, remains constantly with the husband and it was, in my opinion, open to the judge to deal with that cash on the basis that it remained throughout the husband's, without going through the formality of setting aside orders under section 37." [Emphasis added]

75. Mr Hill submitted that the applying the Lord Justice Thorpe's findings in *Purba v Purba* the Court would undertake the exercise of distributing assets between the parties as it would in any other circumstances. It will consider the interests of the other beneficiaries, particularly the minor child, it will consider the Section 29 factors of the MCA in full and make an order that does justice between the parties. The Husband's position is that any lump sum order granted will be relatively small given the contrasting positions of the parties, but that whatever the quantum is it, it can be paid from the Husband who, like the Wife will have access to the Trust assets and the ability to secure a loan against the FMH.
76. Mr Hill further purported that it is open to the Husband to show that the disposition complained of does not have the effect suggested. The disposition does not have meaningful effect upon the orders actually sought by the Wife. It was Mr Hill's firm position that the placing of an asset in a trust structure, of which the Wife is a beneficiary, may make a property adjustment order difficult to enforce.
77. It was further averred by Mr Hill that if after a proper analysis of the financial position of the parties the Court is of the view that there should be a payment from the Husband to the Wife there would be nothing improper in making an order against the Husband whilst giving judicial encouragement to the trustees (one of whom is the Husband) to meet the obligation. Mr Hill went further to suggest that non-payment in such circumstances would be fanciful.

78. As it relates to Mrs Marshall's submission that the Wife would have no ability to enforce any relief granted to her against the FMH being held in the Trust, Mr Hill suggested that the usual Judgment Summons procedure would be no more difficult as this would assume that the Husband will decide to allow himself to be committed to prison rather than take steps to have the trustees make the payment. Mr Hill said this does not withstand any rational examination. Having said this, Mr Hill did accept that whilst it is theoretically possible that enforcement will be more difficult, the real position is that the trustees will make good any order made if only because it is in the interests of the Husband in his capacity as a beneficiary of the Trust.
79. Mr Hill also suggested it is also open to the Court to consider the conduct of the Trustees since the trust's inception. He implied that review of their conduct will demonstrate that the trustees have extended to the Wife access to the FMH without requiring her to pay rent as well as placing no time limit on her occupation of the FMH.
80. In an attempt to rebut the language and content of the Husband's letter dated 17 August 2020 in which he placed himself as a specie of overseer, Mr Hill said this was unfortunate as it was written without advice. No other explanation was provided about the very clear language and statements made by the Husband in this letter.
81. The terms of Section 41 place the burden of proof upon the Husband to show that in creating the trust structure there was no intention to defeat the Wife's claim. It is submitted that there is no evidence that there is such an intention and in fact the contrary is true. Mr Hill intimated it would be churlish for the Wife to attempt to maintain that in theory the placing of the FMH into the Trust could theoretically have an effect on her Substantive Application. However, he submitted, in reality there is no possibility of the orders of the Court being frustrated by the Husband who could see himself committed to prison whilst at the same time acting in the role of trustee who could arrange the making of any payment.
82. Mr Hill submitted that it can be seen that the Wife does not get over the first hurdle. The FMH remains available as it has not been put beyond the reach of the Court. Indeed, the

Wife benefits from the asset daily in living in the home with a child of the marriage. It is simply misguided to take the view that the asset is 'gone'. He said it is therefore not true that the asset has been transferred to defeat the Wife's claim. Nothing has changed about the Wife's claim. The issue remains, as it often does, as to how the parties are to be housed. The Husband has a 50% interest in his mother's home whilst the Wife has purchased, through a trust structure, a property that could be used as a home. Each will require financing and each will have identical access to the assets of the Trust.

83. Mr Hill further submitted that the Husband is anything other than an honourable and decent man. He has worked hard all of his life and he has created a structure that makes his former Wife a beneficiary. Mr Hill described the Husband as "allowing her to benefit" from the Trust and confirmed that he will continue to do so until such time as she has her alternative housing arranged. The Husband stated in his *viva voce* evidence that the trustees would consider offering the FMH as security as well as confirmed that the trustees would consider obtaining a loan in order to make an advance to the Wife. However, on cross-examination, the Husband also confirmed he had neither approached any financial institution to determine if the Trust would be in a position to obtain a loan, nor to what extent any financing the Trust would be able to obtain.

84. The Husband remained adamant that it is simply not true that the FMH has been transferred in order to defeat the Wife's claims. The best that can be said is that it is no longer in the Husband's name, but that is not the same thing. On occasions too numerous to list the Courts have considered the assets of trust structures and effectively made the assets available for the purposes of meeting matrimonial claims. This provision is aimed at the transfer of assets to trust structures where the party in question is not a beneficiary. The Bermuda Courts have a jurisdiction to in any trust where the powers of the trustees are being exercised in a manner that is abusive or capricious. A Letter of Wishes, with which the Bermuda Trust industry is more than familiar can set out the wishes of the Settlor. Such a document would provide terms. Mr Hill was unable to produce any authorities or case law to support these very strong propositions.

85. To require the Respondent to sell an asset that he has worked his whole life to develop in order to provide a cash payment would be deeply unfair. This proposition is worth considering to the extent that setting aside the trust would place the asset in the hands of the Respondent and it is suggested that he could sell it to provide a lump sum. However, this proposition would be equally achievable through the trust structure. In fact, it would be easier because the younger beneficiaries of the trust would permit a loan extended out on a longer term.
86. The final submissions of Mr Hill were the trust structure ought not to be set aside. He stated the orders actually sought by the Wife remain available to her and the assets that are available to satisfy any such award are likewise available. Nothing has changed. A non-matrimonial asset has been placed in a trust and the Wife may benefit from that Trust's assets and indeed does benefit from that asset. Mr Hill further averred that there is no evidence that this Husband will seek to prevent the Wife from accessing capital to meet any award made. He says this is supported by the FMH being made available to the Wife to ensure that she is properly housed along with their child. He has given assurances that she will have access to the assets and when examined her wishes can all be met through the Trust. The Petitioner's application under Section 41 should be dismissed.

FINDINGS

87. For the Wife's Section 41 Application to succeed and for the court to exercise its jurisdiction to set aside the Reconveyance and Declaration of Trust the following must be demonstrated:

- i) That it is a disposition (as defined by Section 41(6) of the MCA).

The Reconveyance and Declaration of Trust is clearly a disposition giving is it is conveyance and carried out via an instrument.

- ii) That the execution of the Reconveyance and Declaration of Trust had the consequence of defeating the Wife's claim. This means preventing relief being granted or different relief being granted, or reducing the amount of any such relief or frustrating or impeding the enforcement of any order awarding such relief.

There is absolutely no hesitation in my mind based on all of the evidence presented, particularly that of the Husband's himself, that the sole purpose of him providing Ms Dill instructions to carry out the Reconveyance and Declaration of Trust was to defeat the Wife's financial claim in these matrimonial proceedings. Be it by way of attempting to reduce the value of assets available for the Court to distribute, or by making it practically impossible for the Wife to enforce any claim awarded to her against the Husband, the Reconveyance and Declaration of Trust had that exact effect.

The conduct of the Husband, and notably Ms Dill who is a practicing attorney, were deplorable. The Husband knew exactly what he was doing when he instructed this transaction to be completed and the impact it would have on the Wife's claim in these matrimonial proceedings. The purpose of Section 41 of the MCA is to protect parties against this exact scenario occurring. I have very little doubt another case can be found which so precisely fits into the Section 41 principles.

Mr Hill's attempt to contort the principles set out in *Purba v Purba* to aver they are applicable to this case were amiss. *Purba v Purba* simple related to cash sums moved by the husband whereas this case the Husband outright conveyed a piece of real estate to a trust. The impact of this is not only diluting the Wife's beneficial interest in the FMH, but does not allow this Court to make any orders against the trustees who are not a party to these proceedings.

Mr Hill's further farfetched submissions that the FMH was not a matrimonial asset in any event, had no weight in the hearing of this application. References were made to another case, *P v P [2004] EWHC 1364 (Fam)*, where the consideration of generational assets of the husband were explored in relation to what extent those assets should be considered for distribution. Counsel attempted to correlate the scenario *P v P* with the FMH. This argument held no water and in any event, I indicated that this particular argument that Mr Hill could make in relation to the Substantive Application, but did not form a part of the findings and determination I am required to make in this Section 41 Application.

- iii) In accordance with the Court of Appeal case of *Kemmis v Kemmis [1988] 2 FLR 223* the motive of the disposition which was completed does not have to be the dominant motive in the transaction; it is a subsidiary (but material) motive then that will suffice.

Based on the evidence of the parties, particularly taking into consideration the following:

- a. It was evident in the Wife's email correspondence that she never expressed her agreement with placing the FMH in trust until certain conditions were met;
- b. The email correspondence between the parties also clearly demonstrated the intent of the parties for their respective attorneys to review any final agreement they reached. The Husband accepted in his viva voce evidence that he never passed the conveyance or the deed of trust documents to either the Wife or her attorneys;
- c. The Husband made no attempt whatsoever after 31 August 2019 to advise the Wife's attorneys regarding his intentions to move forward with the trust structure;

- d. The Husband without any contemplation or verification accepted Ms Dill's proposition to him that in the Wife's meeting with her the Wife consented to the Trust;
- e. Ms Dill at no time attempted to contact the Wife or the Wife's attorneys to review the draft documents she had prepared for the Trust;
- f. The Husband accepted that after he carried out the disposition, he at no time informed the Wife; however, confirmed he had advised the children of the parties after the disposition had been completed.
- g. Ms Dill was not forthright in her correspondence to Mrs Marshall of 28 August 2020 when she had full knowledge of the Trust and had in fact been the attorney who drafted the Reconveyance and Declaration of Trust.
- h. The Husband was clear in of his position that the FMH was not a matrimonial asset given the content of his correspondence of 17 August 2020 as well as his evidence set out in within paragraphs 31 to 34 of the Husband's First Affidavit.
- i. The clauses of the Trust are so broad and unusual that even if had not granted the Wife's Section 41 Application, that would provide little to no protection to the Wife as a beneficiaries (see clauses set out at paragraph 57 above).

I find the Husband's motives to defeat the Wife's matrimonial claims for the dominant, if not sole, motive for transferring the FMH by way of the Reconveyance and Declaration of Trust.

- iv) The Husband must demonstrate that the Reconveyance and Declaration of Trust was not undertaken with the intention of defeating the Wife's claim for financial relief. Such an intention is presumed against the Husband and he must show that he did not intend to do so when the disposition was carried out within three years of the Section 41 Application (Section 41(5) of the MCA).

Given my findings above, I am not satisfied the Husband has discharged his burden of proof to show he did not carry out the Reconveyance and Declaration of Trust with the intention of defeating the Wife's claim for financial relief.

Dated this 19th day of **December 2022**



ALEXANDRA DOMINGUES
ASSISTANT JUSTICE

EX-TEMPORE RULING OF 12 MAY 2022

Assistant Justice, Alexandra Domingues

Husband's Set Aside Application

1. I dismissed the Husband's application to set aside the order made in relation to the Section 41 Application (filed on 16 May 2022 with the Third Affidavit of the Husband and Exhibit TES-03 sworn on 16 May 2022 (the Husband's Third Affidavit)) seeking *inter alia*, that the Order of 11 May 2022 (Section 41 Order) be set aside on the "grounds that the said order was made in circumstances where the Petitioner had materially misstated the true facts regarding their then joint intention in the creation of the Trojan Trust and failed to disclose her consent to and endorsement of the trust structure as being the best suited to achieve her own objectives".
2. Furthermore, the Husband sought a declaration that "*the evidence of the Petitioner in her cross-examination concerning the substance and purport of the discussion between herself and Ms. Angelita Hill was false and misleading...*".
3. After hearing submissions from Counsel, I gave the following Ex-Tempore Ruling which was subsequently perfected by the Order dated 17 May 2022 (the Set Aside Order):

"This is an application to set aside an order under Section 41 of the Matrimonial Causes Act 1974. I do not accept this Court has the jurisdiction under the Livesey v Jenkins principles to set this order aside.

However, albeit I do not believe it truly necessary, but given the numerous complexities of the applications by the Respondent, I will make it clear of my position as it relates to the disclosure of the transcript.

Even if I had accepted that I had the jurisdiction to set aside the order, I do not accept that the transcript is a material non-disclosure that would have caused me to come to a different conclusion in considering the Section 41 application. Indeed, having read the transcript (and even without hearing the tone of the participants voices), I believe only supports the position that the Petitioner did not in fact give her consent through Ms Dill for the FMH to be put in trust. It appears to me now, that the deception of the Respondent in instructing Ms Dill to transfer the FMH into a trust without the knowledge of the Petitioner is even now more clear and unwavering. As such, I dismiss the Respondent's summons to set aside the order of the Section 41 application.

As it relates to costs, this court find itself yet again having to consider the litigation conduct of the Respondent. The evidence is that Mr Hill had the transcript as early as 22 December 2020 and at the very least had knowledge of the secret recording of the conversation. Mr Hill on at least three occasions referred to Mrs Marshall that there were transcripts and on two of those occasions prior to the Respondent filing his affidavit [filed on 23 February 2021]. No application was ever made to the court until the Section 41 application hearing had already commenced and Mr Hill attempted to have the recording adduced into evidence; an application which I denied. I therefore award costs to the Petitioner on an indemnity basis for this application.”

Dated this 17th day of May 2022



ALEXANDRA DOMINGUES
ASSISTANT JUSTICE