



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2021 No: 19

**BETWEEN:**

**KAREN MICHELLE RAYNOR**

**Petitioner**

**and**

**RICKY PATRICK ALLEN RAYNOR**

**Respondent**

## RULING

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**Before:** Hon. Alexandra Domingues, Registrar

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

Mr Raynor, In Person

**Dates of Hearing:** 21 and 22 March 2022

**Date Draft Circulated:** 3 June 2022

**Date of Ruling:** 7 June 2022

**Registrar, Alexandra Domingues**

**Introductory**

1. The parties were married on 6 June 1997. There is one child of the marriage who is over the age of eighteen years and who is gainfully employed. The Petition for divorce was filed on 9 February 2021 asserting the marriage had broken down irretrievably based on the Respondent's (hereinafter referred to as **the Husband**) unreasonable behavior. The Decree Nisi was pronounced on 9 April 2021 wherein the particulars of unreasonable behaviour on the part of the Respondent were accepted as facts. On 26 May 2021 the Decree Nisi was made absolute; therefore, the parties were married for approximately 24 years. The Petitioner (hereinafter referred to as **the Wife**) is approximately 55 years of age and the Husband is approximately 57 years of age.
2. The Wife filed an application for Ancillary Relief on 10 May 2021 (**the Application**) seeking the following relief: periodical payments, secured provision, lump sum(s) provision and property adjustment order in relation to the former matrimonial home located at 44 Riviera Crescent, Southampton Parish (**the FMH**), or variations of settlement as may be just.
3. During the course of these proceedings, the Husband appeared as a litigant in person. Despite a number orders being made by the Court by way of case management directions as well as to financial disclosure, the Husband failed to comply with any requirements. The Husband stated on the first day of the hearing that he had no knowledge of the previous hearings, although there were a number of affidavits of service filed evidencing the Husband had received all orders. The Husband accepted he did receive all Orders and I directed him to those orders wherein the court dates were clearly stated in the body of the orders. I also explained to the Husband that on all occasions where parties are required to appear in court and one party does not appear, I am required to be satisfied the absent

party has notice of the court appearance otherwise I would not be make orders in the absence of the other party.

4. After having been taken to the previous orders, the Husband accepted he had in fact received them, but it was rather him who did not “*pay attention to what they said*” as the true reason he did not appear. The consequence of the Husband failing to appear at the all previous hearings resulted in him being barred from raising new evidentiary matters during the course of the hearing. Notwithstanding, the Husband had sent correspondence to the Wife’s attorney, Mrs Georgia Marshall, on 11 January 2022 and a second undated document which was received by the Petitioner’s attorneys in March which after having taken the oath the Husband confirmed were both true to the best of his knowledge and belief. These documents stood as the Respondent’s evidence in this matter in addition to his *viva voce* evidence and was cross-examined by Mrs Marshall.
5. The Wife relies on her Affidavit sworn on 12 April 2021 (**Wife’s Affidavit**), as well as provided *viva voce* evidence updating her financial position since the filing of her Affidavit. The Husband also cross-examined the Wife.

## THE FACTS

### ASSETS

#### Businesses during the marriage

6. Between 1998 and 2007 the Husband operated his own businesses under the umbrella of Grapes Trucking and Bobcat Services (**the Businesses**). The Husband’s evidence is that he had been residing in Florida for a number of years and returned to Bermuda in 1997. During his residence in Florida he ran different businesses where he was a broker for boat sales and also flipped lots of land. His Florida businesses were largely cash based with some deposits being made to an account he held in the United States which he says is now closed. The Husband “*stashed*” his cash earnings at home as he “*never left money in the bank*”. As a result of his work in Florida over a twenty-year period, he returned to

Bermuda with approximately \$200,000. The Husband's mother had also been accumulating funds at her residence for the benefit of the Husband from the age of 18 years which represented his portion of the rental income from the family homestead. The Husband was unable to say how much cash was available to him from this source on his return to Bermuda in 1997. When asked what the Husband did with the \$200,000 on his return in 1997, his response was "*I stash my money*". His evidence was that at this time he had been contracted to build the new Berkeley Institute in or around 1998 and was earning \$35,000 a month for the four years he said he was working on this project.

7. The Businesses were disbanded in 2007 when the Husband sold the Concrete Truck (purchased for \$230,000), the Bobcat (purchased for \$45,000) as well as the JCB. Other than the Cement Truck which the Husband confirmed his father paid the down payment of \$80,000 and obtained a loan for the remainder, it is not known where the monies for the purchase of the other equipment came from. The monies acquired upon sale of these vehicles according to Husband were \$30,000, \$12,000 and \$50,000 respectively. The Dump Truck purchased for \$50,000 was allowed to waste and eventually was taken to the dump. The Husband has not been in full time gainful employment since that time. It is not known what the Husband did with the proceeds of sale of the said equipment.
  
8. In or around 2007, the Husband and Wife purchased Spicelands Riding Centre, Trail Riding (**Spicelands**). The Husband's evidence was they owned Spicelands for 3 years, whereas the Wife averred it was no more than 1 ½ years. The Wife was unable to recall the purchase and sale price; however, the Husband said the purchase price was between \$80,000 and \$100,000. The Husband confirmed that the sale price was approximately \$140,000. In relation to the source of monies to purchase Spicelands, the Husband said he was "*not positive, but probably came from one of my investments or businesses*". The Husband was also not able to recall how the sale proceeds were spent other than stating "*I could've done a lot of things with it. I spent it on a lot of things, like trips.*" The Husband also purported that during the time he owned this business, it was earning up to \$7,000 per day. The Wife was unable to verify this, but did not believe the profits were this high and that it could earn about \$2,000 "*on a good day*".

### Real property during the marriage

9. During the marriage, in March 1998 and without the Wife's knowledge, the Husband purchased a property located at Lot 17, Lighthouse Road, Southampton Parish (**Dolphin Ridge**) for \$275,000. The Husband said in *viva voce* evidence that the deposit of \$80,000 came from "*one of my stashes*" of money. The balance of the purchase price was raised by mortgage of \$195,000. This property was sold in 2009 for net sale proceeds of \$433,478.86, after deduction of the outstanding mortgage which then stood at \$277,266.01. Neither was the Husband able to clarify why the mortgage balance had increased by some \$82,000 over the period of time that the property was owned by him, nor was he able to account for same. It was suggested the Husband had not paid the monthly mortgage payments, but the Husband was adamant he made monthly payments of \$1,600 per month from when Dolphin Ridge was purchased until it was sold in 2009. When questioned as to what the payments of \$1,600 per month comprised of, the Husband was unable to answer and simply stated "*I was told to pay \$1,600 and that's what I paid*". At page 36 of the exhibit to the Wife's Affidavit, is a Mortgage Statement from Challenger Banks Ltd for the quarter ending 30 September 2001. The balance at this date was \$195,000 in principal and \$34,767.67 in interest. There are no line items showing where any payments were made by the Husband. This statement as well as the amount of the outstanding mortgage paid at the time of sale, supports the proposition that no payments were in fact made on the mortgage from the date Dolphin Ridge was purchased until it was sold eleven years later.

### The former matrimonial home

10. In 2006 the parties approached the Wife's mother, Mrs Adderley, to enquire whether she was prepared to sell the family homestead, the FMH, to the parties. The FMH comprises the main house (where the parties resided during the marriage) as well as four rental units. Mrs Adderley swore an Affidavit on 12 April 2021 which was relied upon by the Wife. At no time during the case management and financial disclosure hearings did the Husband express any intention to file an affidavit in reply to Mrs Adderley's evidence to challenge

the same. Mrs Adderley's evidence is that she discounted the insured value, which at that time was \$800,000 by 50% and agreed to transfer the property to the parties for \$400,000. The difference between the purchase price and the actual value of the property was described by her as being an *inter vivos* gift reflecting the Wife's eventual inheritance. The Husband accepts that the value of the property exceeded \$400,000 and accepts that the difference "*was a gift*" and that it was purchased at undervalue. However, the Husband believes that it was sold to them at undervalue as the state of the FMH was very poor and as such Mrs Adderley did not what the burden of having to repair and/or maintain it. He also strongly rejects the assertion the term "*inheritance*" was ever used by Mrs Adderley and that this is a construct of the Wife's attorney, but he did accept Mrs Adderley was clear when they purchased the FMH from her that should anything happen with the marriage that the Wife must retain it. The Husband agreed he gave this promise Mrs Adderley at that time.

11. Furthermore, Mrs Adderley noted that at the time the FMH was transferred to the parties, she did not appreciate the insured value of \$800,000 was only the replacement value of the buildings situation on the property and did not incorporate the value of the land. The evidence of the Wife and Mrs Adderley is that at that time the land would have been valued between \$150,000 and \$200,000. There was no expert evidence provided to support this value.
12. The parties raised a total of \$672,350 by way of mortgage to meet the purchase price, pay for the closing costs and \$220,000 for renovations. In 2007, having used the monies borrowed for the renovations at the time of purchase, the parties raised a further \$45,000 by way of further charge to complete the renovations. The monthly mortgage payments increased at that time and are still currently, approximately \$6,200.
13. Throughout the marriage the four rental units have been rented and the income derived from them has been used to pay the monthly mortgage payments. The Wife has been and is responsible for collecting the rental income and paying the mortgage. The main house has recently been rented (December 2021) for \$3,500 per month which is also being applied to the monthly mortgage payments as well as the current mortgage arrears.

14. The Husband asserted that he paid an additional \$250,000 (and then altered this to \$200,000 during the course of giving his *viva voce* evidence) over and above the \$220,000 and the subsequent \$45,000 obtained from the bank for renovations. The Husband was neither able to specify what his purported cash contributions of \$200,000 were used towards, nor the source of the funds. The Wife disputes this, particularly as the Husband did not produce any evidence to support this as well as the fact that they had to obtain funds for the mortgage and the further charge to cover the costs of the renovations. During the trial the Husband said he was unable to obtain a quantity surveyor report to evidence his contributions within the two weeks leading up to the trial. It was explained to the Husband, again, that he had several opportunities to appear before the Court to determine if he wished to rely on expert evidence and this report should have been obtained well before this final hearing. Although, I raised the point that even if the Husband had been able to produce such a report, the report would not be able to speak as to who paid for the renovations.

15. A jointly instructed valuation was completed by Bermuda Realty Company Limited on 31 January 2022 which assessed the open market value of the FMH as \$1,185,000. The Wife vacated the FMH in March 2020 and has since then been residing with her mother at her mother’s residence. The Husband vacated in October 2021. Whilst the valuation of the FMH was not disputed, the apportionment of the value to be taken into consideration for the determination of this application is rigorously disputed. The net value of the FMH is calculated as follows:

Gross Value		\$1,185,000
Less	½ legal fees	\$4,343
	½ Stamp Duty	\$22,500
	Realtor commission	<u>\$59,250</u>
	Subtotal:	\$1,098,857
Less	Mortgage	<u>\$262,950</u>
	<b>Total Net Value:</b>	<b><u>\$835,907</u></b>

## Vessels and vehicles

16. Approximately twelve years ago the Husband sold a cabin cruiser known as “Grapes” which he says he had prior to the marriage but which appears to have been inherited by him upon the death of his father, for \$60,000. When asked what happened to those sale proceeds he said he could not remember as it was so long ago, but then stated “*Karen helped spend that too*”.
  
17. In 2010 the Husband used proceeds from the sale of Dolphin Ridge to purchase a 46’ Trojan boat in Florida for the sum of \$125,000 (**Trojan**). The Husband purchased two new engines for \$120,000 in 2011. In or around 2018 or 2019, a further \$10,000 was used to purchase a generator. The Wife’s evidence is that since the boat was first purchased in 2010, from then to date, a further \$100,000 has been used to pay for such items as rewiring, painting, interior fitting out including cabinets, flooring, T.V, upholstering, remodeling the head, etc. The Husband has disputed that this work cost \$100,000 but accepts that the work was done. He has not produced any evidence to contradict this. He has said however, in addition to these works, that he has paid over \$150,000 over the last twelve years in boat storage costs. Furthermore, the parties obtained two loans to cover refurbishment expenses for the boat. These loans were obtained from Clarien Bank and Carib Cash for \$50,000 (**the Clarien Loan**) and \$25,000 (**the Carib Cash Loan**) respectively. Of these funds, \$35,000 of the Clarien Loan and the full sum of \$25,000 of the Carib Cash Loan were used for the costs of the boat refurbishments. A further generator had to be purchased in 2020 for \$10,000. To cover this cost the Husband unilaterally approached the tenants of the FMH, advising them that their rental payments for the next month should be paid to him directly rather than being directly deposited into the parties’ joint account as it always had. Consequently, a total of \$6,200 in rental income was paid to the Husband which put the mortgage in further arrears. It was noted the mortgage had already been in arrears due to concessions some of the tenants were being given due to loss of income from the Covid-19 pandemic. A professional valuation was unable to be obtained. As such, the Wife submitted in order to attach a value to the Trojan, the sums of money invested into the boat during the course of the marriage and to date should be taken into consideration which can be broken down as follows:



Purchase price	\$125,000
2 new engines	\$120,000
Two generators	\$20,000
Fitting out	\$100,000
Clarien Loan	\$35,000
Carib Cash Loan	<u>\$25,000</u>

**Total: \$425,000**

18. The Husband does not accept the value put forward by the Wife for the Trojan and suggested it is only worth approximately \$175,000, but provided nothing to evidence this. Additionally, it should be noted that since the Husband purchased the Trojan he has been spending four to six months each year in Florida. The Husband stated he was not working in Florida during these trips.
19. The Wife also owns a Mercedes which was purchased in or around 2008 secondhand (**the Mercedes**). It was accepted the Husband initially paid \$10,000 towards the purchase of the car; however, the Wife subsequently obtained financing for \$34,000. Her evidence is the Husband was repaid his \$10,000 from these loan proceeds; however, this was not accepted by the Husband. The Wife's evidence is she has been solely responsible for paying all expenses for the vehicle which includes the monthly loan payments, annual license and insurance, annual maintenance etc. The Husband contends that it was only because of him that the Wife was able to purchase the car due to his \$10,000 contribution and that he also contributed to the expenses such as the licensing on a "60/40" split in favour of the Wife. The Wife estimates the current value of the car to be between \$7,000 and \$11,000 which is not disputed by the Husband.

Property inherited during the marriage

20. The Husband is a beneficiary under the Last Will and Testament of his late father who passed away on 8 July 2020. By the provisions of that Will the Husband and his sister have a remainder interest (as tenants in common) along with his 84-year-old mother having a life interest in a property located at 10 Raynor Drive, Southampton Parish (**Raynor Drive**). Raynor Drive consists of four units as well as a wharf with sufficient room for berthing a number of boats. The other units are in variable states of renovation with funds from his mother's account being used from time to time towards the renovations. The

Husband moved out of the FMH in or around October 2021 and is now residing in one of the Raynor Drive units. Notably, the Husband has been benefitting from Raynor Drive since he was 18 years old, as he has been receiving the rental income from one of the units since then. The rental income has increased over time and has been \$1,000 per month for several years. Currently there have been two paying tenants for the wharf paying \$450 and \$500 per month, respectively. Bermuda Realty Company Limited valued this property on the joint instructions of the parties and assessed it as having an open market value of \$850,000 as at 9 February 2022 and was not disputed by either party. The net value of the Husband's interest Raynor Drive is as follows:

Gross Value		\$850,000
Less	½ legal fees	\$3,737
	½ Stamp Duty	\$14,000
	Realtor commission	<u>\$42,000</u>
	Subtotal	\$790,263
Less	Value of mother's life interest (16%)	<u>\$126,443</u>
	Subtotal	\$663,820
	<b>Husband's 50% interest</b>	<b>\$331,910</b>

21. The Husband is also a beneficiary under his mother's Will and will receive, upon her death a taxi and permit, currently being operated by the Husband's brother. The Husband has indicated that the value of the taxi is between \$120,000 and \$150,000. Therefore, at a value of \$135,000, the Husband's remainder interest is \$133,400 (84% as his mother's life interest is 16%) All current revenue generated from the operation of the taxi is received by his mother.

Pensions

22. The Wife has a pension which has a current value of \$362,000. The Husband does not have any private pension plan.

*INCOME AND EXPENSES*

23. The Wife is employed as the Clinical Director of Medical and Surgical Services at KEMH, having previously held another post at KEMH as the Clinical Manager of Curtis Ward. The Wife’s current level of income is \$8,492 per month net of health insurance for the adult child of the family which she pays out of her salary. Until December 2020, the Wife also paid for health insurance for the Husband.
24. Prior to the Wife’s positions of Clinical Manager and Clinical Director, she was employed at KEMH as a Registered Nurse between 1995 and 2000. She has been in continuous, uninterrupted employment throughout the marriage. The Wife’s income as well as her employment during the course of the marriage was not disputed by the Husband, notwithstanding, the Husband challenged the Wife’s ability to have paid the household expenses she purports to during the marriage. It is the Wife’s position that during the marriage she paid the following expenses: utilities for the FMH; groceries; car loan; private school fees; and land tax. This was rigorously rejected by the Husband as he says “*it is scientifically impossible for her to pay all of those expenses on her salaries*”. The Husband contends that he was responsible for the “*big bills*” and the Wife was responsible for the “*small bills*”. The Husband clarified that “*big bills*” referred to items such as repayment of the loans which he obtained to purchase the dump truck, excavator (JCB) and cement truck and that the “*small bills*” refers to the utilities of the FMH and the land tax.
25. The Wife’s current monthly expenses are as follows which were not disputed by the Husband:

<b>Expense</b>	<b>Amount (\$) per month</b>
Car insurance	125
Car license	125
Gas (car)	200
Clothing	100
Credit card payments	800 <sup>1</sup>
Doctor co-pays	50
Hairdressing	400
Loan payments	1,100
Optometrist	150
Cell phone	150

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<sup>1</sup> The Wife has a total of \$5,000 of outstanding credit card debt.

Travel	200
Entertainment	100
Gifts	200
Miscellaneous	500
<b>Total</b>	<b>4,200</b>

26. The Husband's monthly expenses are as follows:

Expense	Amount (\$) per month
Internet (One Communications)	150
Electricity	150
Boat Storage in Brunswick, Georgia	1,000
Dentist	110 <sup>2</sup>
Clarien Bank Loan	1,400
Gas (Bike)	60
Entertainment	400
Clothes/Boots for work	100
<b>Total</b>	<b>3,370</b>

27. The Wife challenged the \$1,000 monthly expense to the marina in Georgia as the Husband accepted in his *viva voce* evidence that he has not paid this monthly fee and only recently paid \$2,000 as the marina were threatened to seize the boat due to non-payment monthly storage fee. It was accepted by the parties that after this payment made by the Husband, in addition to a \$1,000 payment made by the Wife at the same time, there is now approximately \$5,000 owed in storage fees to the marina.

28. The Husband's evidence is that he receives \$1,000 per month by way of rental income from Raynor Drive and this is applied directly to the Clarien Loan payments. In addition to this he receives mooring fees from two boats moored at Raynor Drive (\$450 and \$500 respectively). Notably, prior to the Husband giving his *viva voce* evidence, it was the Wife's understanding as well as what the Husband had written in his letter to the Wife's attorneys, that he only received \$400 per month for mooring fees rather than the \$950 he actually receives.

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<sup>2</sup> The Husband initially had this expense listed at \$1,329.25; however, in cross-examination it was confirmed by him that this represents the total sum he owes rather than being a monthly payment. Therefore, the sum of \$110 represents the monthly apportionment of his arrears being paid over a 12 month period.

29. The Husband also carried out works for his family by way of maintenance and/or renovations to their five properties throughout the island. He estimates that this income is about \$8,000 per annum (approximately \$666 per month); however, he purports that he will no longer be in receipt of these earnings as there is no work left to be completed. He has also been working part time doing excavation work as a subcontractor earning on average \$2,000 per month. As it relates to future prospects of income, the Wife contends the Husband has significant prospects of earning a greater income by chartering the Trojan with effect from summer 2022. This is likely to bring in significant income and appears to be part of the Husband's "*master plan*" insofar as meeting his income needs is concerned. The Husband was adamant this was not intended use of the boat and that it was simply to be a pleasure craft.
30. Furthermore, the Husband was very content to proclaim that he has brought in over 100 boats to Bermuda since 1986 and had recently brought one in for someone. The Husband denied receiving any payment for this as it as for a friend.
31. In addition to the Husband and Wife's earnings, the parties are also in receipt of the rental income from the FMH which is paid by direct deposit into their joint Clarien account to meet the monthly mortgage payments. The total rental income was \$6,200 until December 2021, but then increased in January 2022 by \$3,500 per month as the Wife vacated the FMH for the purpose further financial assistance in order to meet her monthly expenses.
32. At times when the rental income is insufficient to meet the mortgage, the Wife has covered the shortfall as best she can. The Covid-19 pandemic greatly impacted Bermuda's economy in 2020 and 2021 which resulted in the tenants losing income. Consequently, some have been given concessions during this period. Taking this into account as well as the arrears created by the Husband's use of rental income to pay for another generator, the mortgage is currently in arrears of approximately \$17,000. The Husband has never assisted in meeting any shortfall relating to the Mortgage and asks, "*Why should I?*" when asked why he has not done so.

33. The Wife has credit card debt amounting to about \$5,000 and owes about \$2,000 to the pest control in relation to the FMH. She also continues to owe \$18,000 on the Carib Cash Loan.
34. The Husband's debt position relates to the Clarien Loan which has an outstanding sum of \$36,300.88 and the sum of approximately \$10,000 owed on his American Express credit card used by him for boat expenses. The Wife's evidence is that the Husband owed \$10,000 for the purchase of a car from her mother, but the Husband was adamant this sum was not owed.

## THE LAW

35. I have a statutory obligation to have regard to all the checklist set out in Section 29 of the Matrimonial Causes Act 1974 (MCA) when determining an application for ancillary relief under Section 27 and/or Section 28 of the MCA. When assessing "needs" courts will have regard, in particular, to the matters set out in Section 29(1):

"29 (1) *It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters -*

- (a) *the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) *the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) *the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) *the age of each party to the marriage and the duration of the marriage;*
- (e) *any physical or mental disability of either of the parties to the marriage;*
- (f) *the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;*

.....

*and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.*”  
[Emphasis added]

36. Consideration must be had to the tailpiece of Section 29 (1) of the Act which requires the Court to place the parties insofar as it is possible and practicable to do so in the position that they would have been in if the marriage had not broken down and each party had discharged their respective financial obligations to the other. This tailpiece no longer exists in the UK legislation, but in determining what the aim of the court should be when exercising its discretion under Sections 27 and 28 of the Act, the House of Lords in the *White v White [2001] AC 596* decision determined that the aim of the court is to come to a fair outcome as between the parties. This aim has been adopted in interpreting the tailpiece in our legislation. In the Bermuda case of *Green v Green*, in Justice Meerabux’s judgment of 1 November 2001, he concluded that the tailpiece has the same meaning as the concept of fairness enunciated in *White v White*. A key feature of fairness is that there shall be no discrimination between husband and wife and their respective contributions during the marriage.
37. In considering what is fair, the court distinguishes between two types of assets, matrimonial assets on the one hand and non-matrimonial assets on the other. Matrimonial assets are those assets which have been created by the efforts of the parties or either one of them during the marriage. They arise out of the efforts of the parties during the marriage. Non-matrimonial assets are different in character as they originate from sources exterior to the marriage. They include the pre-owned assets of the parties, gifted assets and inherited assets.
38. In *White v White*, Lord Nicholls of Birkenhead said the following in relation to defining what is matrimonial and what is non-matrimonial:

*“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...”*

39. In relation to matrimonial assets, there is a presumption that these assets will be divided equally by the parties upon the breakdown of the marriage unless there is good reason to depart from equality. There is no such presumption in relation to non-matrimonial assets. However, where needs cannot be met from the pool of matrimonial assets the court will look to the non-matrimonial assets to the extent necessary to meet needs.
40. *Miller v Miller; MacFarlane v MacFarlane* [2006] 3 All ER 1 also addressed the concept of whether inherited property should be considered part of the matrimonial assets to be divided between the parties. The starting point is that inherited property should not comprise the pool of matrimonial assets for division; thereby, the principle of “fairness” (needs, sharing and compensation) is generally not applicable to inherited assets. However, in *White v White*, Lord Nicholls at paragraph 610, stated as follows:

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

41. In the recent Privy Council decision of *Scatliffe v Scatliffe* [2017] 2 FLR, Lord Wilson JSC provided further guidance on the way that courts should treat non-matrimonial property. Lord Wilson JSC said the following:

“[24]... But the bigger question is: irrespective of the extent or value of the husband’s interest in the guest house, why was this asset ignored in both local courts? With respect to them, the board considers that the answer may betray a serious misunderstanding about the treatment of ‘non-matrimonial property’, indeed possibly about the very meaning of the phrase, in the determination of applications for ancillary relief under the 1995 Act. At least the husband’s ill-starred appeal enables the board to offer guidance in this respect, which it attempts to encapsulate in the 10 propositions which follow.”

[25]

- (i) Section 26(1)(a) of the 1995 Act obliges the court to have regard to the "property and other financial resources which each of the parties ... has or is likely to have in the foreseeable future".



- (ii) *Thus, when a court finds that an asset is not one in which either party has any interest (such as, in the present case, Parcel 174, beneficially owned by the son Derwin: see para 17 above), no account should be taken of it.*
- (iii) *It is, however, confusing for such an asset to be described as "non-matrimonial property". [This is because these assets are not relevant to the analysis, such as apartment 1G.]*
- (iv) *It was when introducing the "yardstick of equality of division" in the White case, cited above, at p 605, that Lord Nicholls proceeded, at p 610, to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the Miller case, cited above, at paras 22 and 23, he described the latter as "non-matrimonial property"; and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".*
- (v) *So the phrase "non-matrimonial property" refers to property owned by one or other of the parties, just as the phrase "matrimonial property" refers to property owned by one or other or both of the parties.*
- (vi) *Accordingly, it is contrary to section 26(1)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property". This raises the question: in what way should regard be had to it?*
- (vii) *As was recognized in Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at paras 65 and 66, it was decided in the White and Miller cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle. In the Miller case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non-matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the White case at p 610 that, irrespective of whether it fell to be shared, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's needs.*
- (viii) *In K v L [2011] EWCA Civ 550, [2012] 1 WLR 306, it was noted at para 22 that, notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need.*

- (ix) *Indeed, four years later, in JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J suggested at para 22 that the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard.*
- (x) *So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the Miller case at paras 137 to 144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other.*” [Emphasis added]

42. In summary, the principles to be applied in determining how to distribute, if at all, the matrimonial and non-matrimonial assets are as follows:

- (a) First, the court should determine what property is owned by one of other of the parties and exclude property that is not;
- (b) Next, the court should determine from the pool of assets owned by one of other of the parties, what is matrimonial property and what is non-matrimonial property;
- (c) Then, the court should divide the matrimonial assets equally between the parties and step back to see where that leaves them;
- (d) Thereafter, if needs require adjustment from an equal division then adjustment will be made first within the pool of matrimonial assets; and
- (e) Where needs remain unmet, the court may consider to what extent non-matrimonial assets should be accessed to meet the needs of the parties, but not for the purpose of sharing beyond what is required in meeting needs, although the sharing principle could be applied albeit “*rare as a white leopard*”.

43. As it relates to the Husband's lack of participation in these proceedings until his appearance at the final hearing, it is trite law that the failure of one party to provide full and frank financial disclosure in matrimonial cases, adverse inferences in respect of this non-disclosure can be drawn (see *Vernetta Mae Shelley Howe v Douglas Colby Howe (SC) No. 55 of 2012 (14 March 2016)* at para. 30).

## **THE WIFE'S POSITION**

44. It is the Wife's stance that the value of the land at the time the FMH was purchased (\$175,000) should be deducted from the net value of the FMH in order to calculate the value of the matrimonial portion of asset. This she says is due to the value of the land being considered a gift from her mother. The result being the net equity would be reduced to \$660,907 (\$835,907<sup>3</sup> less \$175,000 = \$660,907). However, the Wife further asserts that a further fifty percent of this value should be treated as a non-matrimonial asset as this represents the half value that the parties paid for the FMH that is the *inter vivos* inheritance received from her mother.
45. The value of the Trojan should be split equally between the parties which would amount to \$212,500 each.
46. Mrs Marshall submitted that on an equal division of the matrimonial assets, each party would receive \$330,000 (the FMH) plus \$212,500 (Trojan), a total of \$542,500 plus fifty percent each of the Wife's pension (\$362,000 divided by 2 = \$181,000). This would result in each party receiving fifty percent of the matrimonial assets being \$723,500.
47. It was further argued that the court must then stand back and see in what position this leaves the parties after taking into account the Husband's inherited, non-matrimonial property (Raynor Drive and the Taxi and the Taxi Permit):

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<sup>3</sup> See paragraph 15 setting out the calculation of the net equity in the FMH.

The Wife would receive the matrimonial aspect of the FMH as well as the portion which reflects the gift and inheritance from her mother *inter vivos* totaling \$853,907.

The Husband would retain \$425,000 (Trojan) plus \$331,910 (50% of remainder interest in Raynor Drive) plus \$113,400 (remainder interest in Taxi and Permit) for a total of \$861,310.

48. The above does not account for distribution of the Wife's pension as Mrs Marshall submitted that fairness would require that circumstances of the Husband's behaviour and contribution during the marriage must be considered and held to be in favor of the Wife retaining her Pension without any pension sharing between the parties.
49. The Wife avers that both parties, in their separate ways, contributed to the welfare of the family, however, asserts her full efforts both in kind and also her continuous employment and the provision of health insurance to the children and to the Husband as well as the management of the family finances and banking was a significant contribution not matched by the Husband. His contribution, in many ways covert and secreted from the wife, was in keeping with what he called "*old school*" which is understood to mean he was not compelled to discuss with the Wife or to seek her approval let alone agreement on financial decisions. In his affidavit at paragraph 11 he summarizes this view as follows,

*"Yes, I purchased dolphin ridge and sold it years later without Karen knowing. Simply because Karen never attributed one penny to this project. I paid for all of it...."*

50. The factors which Mrs Marshall submitted must be taken into account and which would not result in fairness if there was a sharing of the Wife's pension are as follows:
- a) The matrimonial resources utilized by the Husband for mooring fees for the Trojan over the last 12 years which he assesses to be \$150,000;

- b) The Husband received the totality of the proceeds of sale of the construction equipment without any reference to the Wife nor any account of what he did with the proceeds of sale;
- c) The Husband sold the boat, "Grapes" during the marriage without accounting for what he did with the money which he says was about \$60,000;
- d) The Husband ceased employment in 2007 without prior discussion with the Wife and without any steady stream of income being brought into the household for the last 12 years;
- e) The Husband spent four to six months each year in Florida after 2007 without any contribution being made to the household coffers;
- f) There is no accounting for what the Husband did with the additional \$82,000 secured against Dolphin Ridge; i.e. the unexplained increase in the mortgage shown at the date of sale; and
- g) There is also no accounting for what the Husband did with the \$140,000 proceeds of sale of Spicelands.

51. Mrs Marshall further submitted that the needs of the parties is not a factor which plays any part in the division of the assets as the needs of the parties are met with the above division. Therefore, the Wife is seeking a property adjustment order in her favor in relation to the FMH, the Mercedes and that she retain her pension without any property adjustment order. As it relates to the Husband, he should retain the Trojan, the Centre Console, Raynor Drive and the Taxi as well as any cash in his "*stash*".

52. As it relates to the Clarien Loan and Carib Cash Loan outstanding debts, the Wife submitted that should the Husband be retaining the Trojan, it would only be fair that he be responsible for the full remainder of this debt. In the event there is a pension sharing order made, the

Wife submitted fairness would call on the Husband to retain this debt as it also relates to funds obtained for the Trojan. However, the Wife accepted to be solely responsible for the Carib Cash Debt in the event she retained her pension in full. The Husband's \$10,000 credit card debt on the American Express should also be fully his as it again, relates to expenses he has used for the Trojan, particularly during the periods of four to six months each year when he was residing in Florida.

## **THE HUSBAND'S POSITION**

53. The Husband disputed virtually everything raised by the Wife in respect of the assets acquired during the marriage, either gifted, purchased or inherited. The Husband submitted it is only because of his ambition and hard work that the parties have the assets they acquired during the marriage, albeit he accepts he has not made any contribution to the marriage during the last three years.
54. The Husband submitted that the value of FMH should be divided equally between him and the Wife and that he should retain the Trojan which could ultimately be given to their son. Albeit, the Husband further argued that there should also be no reduction from the value of the FMH in the sum of \$175,000 in the favour of the Wife as he does not accept this was an *inter vivos* gift (i.e. inherited property) from her mother. He further submitted that Raynor Drive and taxi (and respective permit) should remain as his absolutely as "*they have nothing to do with*" the Wife as they are his inherited property. He further submitted the Taxi should not be considered at all for distribution as his mother may pass away before him which would mean he would not obtain the benefit of it.
55. As it relates to the Clarien Loan, the Carib Cash Loan and the American Express debts, the Husband believes these should be apportioned equally between the parties. It should be noted that on cross-examination, the Husband admitted he has no intention of paying the costs of the divorce as per the Orders on Making the Decree Nisi on 9 April 2021 in the sum of \$4,000 as well as in relation to the costs of the valuations of the FMH and Raynor Drive which were ordered to be paid equally between to the parties, but which the Wife had to pay

the full sum due to the Husband uncooperativeness. The total sum paid for these valuations by the Wife was \$1,725.

## **APPLYING THE FACTS TO THE LAW**

56. The Wife's evidence was clear and consistent. I have no reason to doubt the reliability of her evidence. The lack of transparency of the Husband's financial resources from his *viva voce* evidence is further exasperated by his deliberate refusal to participate in the financial discovery and case management process from the date when the Wife filed her Application until his appearance at this hearing. Therefore, where there is conflicting evidence, I prefer the Wife's evidence and adverse inferences will be drawn in relation to his financial circumstances.
57. Having heard from the Husband it was clear that he was and is a very savvy business man which resulted in him earning a significant income as well as profits from capital investments (certainly from the start of the marriage until 2007). The transactions he carried out during the marriage (both with the Wife's knowledge and without) appeared to be carefully planned and executed. Having said this, given his deliberate hiding of capital transactions from the Wife during the marriage such as the purchase and sale of Dolphin Ridge, the Wife never truly knew the extent of his financial resources. I also do not accept the Husband's evidence that he did not know what he did with large sums money received from the sale of businesses and vehicles. No matter how historical the sales of these things, it is simply unbelievable he does not remember what he did with these funds, particularly when he gave evidence of what his monthly earnings from his Businesses were back in 1998.
58. Further, his evidence of holding "*stashes*" of money was unavailing in presenting a true and complete picture of his past and current financial means; albeit his evidence is that the Wife "*used all of his stashes*" and he currently does not have any. I find this challenging to believe given the financial resourcefulness he demonstrated throughout the marriage. Additionally, the amount of time the Husband spent in Florida since 2007, it is far-fetched to contemplate he was not carrying out any business from which he earned an income in Florida.

59. Little is left to the imagination as to the possibilities as to what cash and/or assets the Husband has in Bermuda and in Florida which are unknown to the Wife and the Court.
60. Having identified all of the property owned by the Husband and Wife the property owned by one or other of the parties is summarized as follows:

<b>Jointly owned:</b>	FMH
<b>Wife's Assets:</b>	Pension Mercedes
<b>Husband's Assets:</b>	Trojan Centre Console Boat Raynor Drive (50% remainder interest) Taxi and Permit (remainder interest)

61. These assets must then be defined as either being matrimonial or non-matrimonial property. The below tables set out my findings in respect of the parties' assets followed by the narratives addressing the values of these assets where they were disputed:

Matrimonial Assets

Description	Net Equity
FMH	\$835,907
Trojan	\$425,000
Wife's Pension	\$338,362
Mercedes	\$9,000
Centre Console Boat	\$6,000
<b>Total</b>	<b>\$1,614,269</b>

Non-matrimonial Assets

Description	Net Equity
Raynor Drive (50% remainder interest)	\$331,910
Taxi and Permit (remainder interest)	\$113,400
<b>Total</b>	<b>\$445,310</b>

62. Whilst the Wife has attempted to argue that the gifted portion of the FMH (fifty percent plus the value of the land at the time of purchase), I cannot accept anything other than the full value of the FMH as being a matrimonial asset. This would contradict the legal principle set out in *Miller v Miller; MacFarlane v MacFarlane* that not only is it a matrimonial asset, it is one which was central in the marriage and is held on different footing than all other matrimonial assets. I have no doubt the Wife's mother had intended



the FMH to remain in her family; however, her intent and graciousness do not go far enough.

63. I do not accept the Husband's contention that the Trojan only has a value of \$150,000. There has been, at minimum, a total of \$425,000 invested into the Trojan which is inclusive of the purchase price. This does not include the approximately \$150,000 the Husband has spent on storage fees for the Trojan since it was purchased to date. Therefore, I accept a reasonable value of the Trojan is \$425,000 which reflects the matrimonial funds invested in its purchase and refurbishment.
64. The Wife's assertion as to the distribution of the assets (see paragraph 47 above) wherein the non-matrimonial assets were accounted for in considering the Husband's asset position and then consider whether fairness would require the Wife's pension to be shared, does not follow the principle of fairness or the principles of how the division of matrimonial and non-matrimonial property should be made.
65. In the first instance, and applying the principle of fairness (encompassing needs, compensation and sharing) which require consideration to be given to of all the factors set out in Section 29 of the Act, it is presumed there will be an equal division of the matrimonial assets. This would result in the parties each receiving the benefit of the matrimonial assets to the value of \$807,134.50 each (see matrimonial asset value calculation at paragraph 59 above).
66. If the equal division of the matrimonial assets will meet the needs of both parties then the second and third limbs of fairness of compensation and sharing must be considered. However, if parties' needs are unmet which would require there to be an adjustment from an equal division, then adjustment will be made first within the pool of matrimonial assets. In this case the equal division of the matrimonial assets meet the needs of the parties.
67. The circumstances of this case do not require the second limb of compensation to be considered. Therefore, the only remaining limb is that of sharing, with the only assets remaining of the parties being the Husband's non-matrimonial assets. Raynor Drive is

non-matrimonial property, notwithstanding, this may be such a case where that white leopard makes an appearance. The Husband's evidence was clear about the benefit he has received from Raynor Drive by way of rental income since he was just eighteen years old. The Husband has used this income throughout the marriage for the benefit of the family. For example, he gave evidence that this rental income was used (and still is) pay the monthly payments for the Clarien Loan which was obtained for the refurbishment of the Trojan (a matrimonial asset) and which is secured against the FMH (a matrimonial asset). Albeit, the Husband did not obtain his actual interest in Raynor Drive until 2020 when his father passed, he obtained the benefit of it which contributed to the welfare of the family through the entirety of the marriage. As such, fairness requires that Raynor Drive be considered for distribution between the parties under the sharing principle.

## **CONCLUSION**

68. Having considered all the factors of Section 29 of the Act, applying the principle of fairness and having drawn adverse inferences as to the Husband's true financial position the Wife shall obtain the full benefit of the value of the FMH. Therefore, I grant a property adjustment order to be made in her favor in relation to the FMH. The Wife shall also retain the Mercedes and her pension as her property absolutely, free from any further claim by the Husband. The Wife will also be responsible for the balance of the Carib Cash Loan (which is in her sole name).
69. The Husband will retain the Trojan, the Centre Console as well as his interest in Raynor Drive as his absolutely, free from any further claim by the Wife. The Husband shall also be solely responsible for the outstanding debt on the American Express Card and the balance of the Clarien Loan (which is a joint loan).
70. In the event the Husband fails to sign the any documents necessary to give effect to this ruling, such as the transfer his share of the FMH to the Wife, within seven days of being requested to do so, I shall have the ability to sign on his behalf.

71. Additionally, each party shall retain any assets in their respective sole names and/or which are currently in his and her possession and free from any further matrimonial claim from the other.
  
72. Given the Husband's lack of participation in the Application and indeed not complying with any orders made by the Court which had the effect of unnecessarily increasing costs for the Wife, I will award costs to the Wife on an indemnity basis, to be taxed if not agreed.

7 June 2022

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**ALEXANDRA DOMINGUES**  
**REGISTRAR FOR THE COURTS OF BERMUDA**