

[2014] SC (Bda) 20 Div (12 March 2014)



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2012: No. 183

BETWEEN:

F

Petitioner

-and-

F

Respondent

Date/s of Hearing: 13 and 14 November and 17 December 2013

Date of Judgment: 12 March 2014

Petitioner in person

Marshall Diel & Myers – Georgia Marshall for the Respondent.

1. The parties in this matter are the wife and the husband (so called, although they are now divorced).
2. There are two applications before the Court: the husband filed his application on 7 March 2013 seeking a lump sum provision order, while on 18 March 2013 the wife filed an application seeking maintenance payment orders for herself, the children and lump sum provision and a transfer of property. The husband filed one affidavit and the wife filed two affidavits. Both parties gave oral evidence.
3. The Petitioner (the wife) is Bermudian, and the Respondent (the husband) is an American citizen.
4. The wife is 41 years old and the husband is 40 years old.
5. The parties cohabited for two years before they were married on 12 July 1997. They separated in December 2012. Decree Nisi was pronounced on 22 February 2013, and was made absolute on the 11 April 2013 – the marriage lasted 16 years.
6. There are two children: LPF (born 30 October 2003) and GMF (born 25 June 2006). The wife has care and control of the children, and they reside with her in the former matrimonial home. The children attend private school.
7. The husband has access to the children. He lives in New York and currently returns to Bermuda from time to time where he exercises his access rights to the children. He is hoping to regularize this position and has made a separate application to the Court seeking permission allowing him to exercise access in the United States of America.

The wife's income

8. The parties met in United States of America when they were both students at a design school. The husband studied product design and the wife studied textile design. Thereafter, she pursued a Masters degree in teaching. After graduating they worked overseas for two years. Eventually a teaching position became available in Bermuda and the parties moved to Bermuda so that the wife could pursue her teaching career.
9. In Bermuda the wife worked full-time at various schools for 14 years. She was last employed on a full-time basis in 2011 where she earned \$6,622 net monthly.
10. Counsel for the husband submits that as a teacher the wife has always enjoyed long holiday period – summer, Christmas, mid-term and Easter breaks – providing her with the ability and the time to offer after-school art classes as well as summer art camps which naturally increased her income.

11. Since 2011 the wife has been teaching at an institution on a part-time basis. Currently she earns \$3,559.87 net monthly on a pro-rated part-time basis.
12. In her submission Counsel for the husband outlined a number of scenarios whereby the wife could increase her earnings by simply working an additional ten hours monthly leaving her with 11 weeks of holiday time and the additional school holidays off.
13. Counsel urges that the wife's reasonable employment earning potential should be taken into account 'albeit tempered with her need to be available for the care of the children after school and during holidays when they are not with their father'.
14. Further, Counsel for the husband submits that the wife's reasonable employment income should be assessed at no less than \$5,907 per month. This figure is derived by taking into account her part-time income of \$3,559 for 12.5 hours of work per week, plus \$2,348 per month as her reasonable available income from her after-school art classes and summer camps.
15. The evidence reveals that the school where the wife works has a full time position that is currently held by a non-Bermudian; this position will become available by the beginning of the next school year. Counsel for the husband urged that, should the wife be successful in obtaining this full-time position at her current school, her income will be at least \$95,000 per annum or \$7,916 gross monthly. Additionally, she will have the ability to increase her income by a further \$28,000 per annum by running her one afternoon per week afterschool art class and her summer camp.
16. It is the wife's position that she reduced her hours of work to enable her to adjust to running a single parent household and to be available for the children.
17. While the Court accepts that, particularly when young children are involved, there is usually significant stress and adjustment following the breakdown of a marriage, based on the evidence there is room for the wife to increase her hours of work to augment her earnings without adversely affecting her care of the children.
18. The Court is satisfied that the wife can increase her earnings but it is not quantifiable at this stage.
19. By September 2014 the wife should be able to increase her earnings. However, the parties' contribution to the welfare of the children must reflect the parties' current income.

The husband's income

20. The husband, who is not Bermudian, is employed in the marketing department of an exempted company. The Petitioner submits that as a result of the Respondent's marriage to

her he benefited substantially by being able to secure his employment and all the attached benefits as a spouse of a Bermudian.

21. The Court accepts the husband's evidence that as a result of cost-cutting measures the company reduced the size of his department and indicated to the husband *inter alia* that if he wished to remain with the company he would have to relocate to New York. Further, the Court accepts the husband's evidence that due in part to the breakdown of the marriage he accepted that option and relocated to New York in December 2012. This relocation has had an impact on his earnings.
22. The Court accepts the evidence and finds that the husband earns \$142,530 annually. His monthly income net after tax is \$7,471.
23. During the period the husband lived and worked in Bermuda he received an annual discretionary bonus and a long-term incentive payment (LTI). The husband testified that he has been told the LTI is likely to be phased out. Before moving to New York the husband was able to take advantage of a \$92,000 per annum overseas tax exemption given to US citizens living abroad. This allowance resulted in a reduction of his taxable income. He no longer enjoys this exemption since moving back to the USA. The wife accepts that while the husband's income has remained roughly the same his tax burden has increased substantially.
24. Counsel for the husband submits that the annual bonus and LTI is 'variable, discretionary and paid annually' therefore it cannot be relied on as if it were cash in hand. Further, the husband seeks an order confirming that he may seek to claim the child exemption in his tax returns and that the wife will make no claim in relation to this so that he can reduce his taxable income.
25. On the other hand, the wife complains that the husband is asking her to sign 'Form 8332' annually. She believes this involves her husband receiving a tax rebate for the children's maintenance, but the husband has refused to disclose what benefits he would receive.
26. Counsel for the husband submits that the husband's bonus and LTI has been taxed and all future bonuses and LTI payments in a similar fashion will be taxed.
27. The wife accepts that the husband's bonus is discretionary but submits that the discretion is based on the husband's performance and he has always received his entire bonus.
28. In the Court's judgment it cannot pro-rate what is variable and discretionary. Nevertheless, the Court factors in the average bonus of about \$2,600 per month over the last few years as a feature of the husband's income notwithstanding it is entirely discretionary.
29. The husband is asking the Court to take into account that given that the wife can reasonably earn \$5,907 plus her other rental income, her reasonable monthly income should be assessed at \$6,385. Net tax the husband receives the sum of \$7,471. Their apportioned monthly income one to the other is 45% to the wife and 55% to the husband.

30. While the Court accepts that the wife has additional earning capacity which the Court cannot quantify at this stage, the wife can and should increase her earnings by working more hours. Nevertheless the Court must deal with the present reality. It ought not immediately take the wife's potential earnings into account. She should be allowed a reasonable period to organize her current work life. By September 2014 the wife should be able to put herself in a position to increase her earnings. The husband's contribution to the welfare and maintenance of the children will reflect the current income of the wife but will be reduced beginning November 2014.

The wife's expenses

31. The husband does not challenge the wife's expenses apart from her housekeeping and holiday expenses of \$325 and \$250 respectively.
32. Regarding the housekeeping expenses, he says this expense would be reasonable if the wife was working on a full-time basis, but given that she works only 2.5 hours per day with an additional 1.5 hours once per week when teaching afternoon classes it is difficult to accept that this is a reasonable expense. The Court agrees with the husband's assertion. A claim of \$325 monthly is approximately \$80 per week. The Court takes judicial notice of the hourly rate paid to a housekeeper. This figure can only cover the cost of very basic household chores for about three to four hours per week. The wife has plenty time in her current schedule to deal with these household chores.
33. Regarding the holiday expenses, the Court disagrees with the husband that given the cost that he has to incur to enable him to exercise meaningful access to his children he should not be required to contribute in any way towards travel for the wife and children. When the wife takes a vacation with the children this forms part of the expense of her budget. Insofar as it is reasonably practicable, from time to time, the wife and children must be allowed to take a vacation and the husband should contribute towards the children's vacation travel expenses.

The husband's expenses

34. The husband puts forward a budget of \$10,702.70 monthly. The wife challenges the husband's claimed monthly expenses of \$10,702.70 as set against his claimed income of \$6,111 monthly.
35. The Petitioner argues that the husband has either padded his monthly expenses in order to minimize his residual monthly income, or that he relies on his bonus and deferred cash as an integral assessed part of his annual remuneration.

36. The Petitioner submits that if one accepts these figures, the Respondent would be accumulating a debt of ‘\$4,500 per month or \$55,092 per annum’.
37. The Petitioner puts forward an item by item analysis of the husband’s expenses and asserts that a figure of \$6,389 monthly represents a more realistic assessment of the husband’s expenses.
38. The Petitioner maintains that even after using a scaled down list of expenses, the Respondent’s expenses are far higher than the combined expenses of her and their children. After careful consideration of the Petitioner’s analysis, the Court finds no fault with this assessment and therefore the Court finds the husband’s household expenses to be in the region of \$6,500 monthly.
39. On balance, whenever there is a conflict in the evidence given by the Respondent and that by the Petitioner, the Court prefers the evidence of the Petitioner.

Education expenses

40. The children attend a private school. They benefit from financial aid provided by the school which reduces the fees for the children to \$28,000 per annum. The Petitioner feels that such an application by parents with a combined monthly income in the region of \$16,000 raises moral questions, and that the school would be entirely within its rights to cancel or refuse any such aid. The Petitioner is therefore calculating the monthly educational obligation based on the unaided figure of \$34,000. The Court disagrees with the wife’s assessment. The question of the children’s maintenance can always be revisited in the event the financial aid to the children ceases.

Assets

Matrimonial assets

41. The husband lists the matrimonial assets of the parties as follows:

Accounts in wife’s name

HSBC market fund (had \$41,000)	\$ 311
Statement savings (305447-011)	2,519
Statement savings US\$(305447-511)	1,751
Schwab money market savings	110,257
Schwab mutual fund	<u>84,401</u>

Subtotal \$199,239

Accounts in husband's name

HSBC premier savings 5,200

HSBC premier 27,014

Subtotal \$32,214

Total \$231,453

42. On the other hand, at paragraph 52 of her submission, the wife maintains that the combined asset of the parties is \$316,081: \$95,055 (husband) and \$221,021 (wife).
43. Further, the wife submits that, due to combined usage, the sum of \$241,074.79 is available for distribution.
44. Each party proposed how the assets should be divided and their reasons why the Court should adopt their proposal.
45. There is a difference of approximately \$10,000 between the parties' calculations and the Court does not propose to get into the minutiae of the arithmetical calculations. The Court has had regard to the evidence and the parties' submissions as to the sums that were unilaterally depleted and ought to be reimbursed. The Court accepts that the combined asset of the parties is just under \$240,000 of which the husband retains \$32,214.
46. Having regard to the parties' contribution to the matrimonial assets, and to the Court's goal of overall fairness, I hereby order that the husband should be paid \$85,000 out of the joint matrimonial assets held in the wife's name, within 90 (ninety) days of the date of this judgment.

Pensions

47. As regards to the parties' pensions, the Court finds that they are of comparable value and both agree that they should retain their respective pension plans.

The husband's assets

48. The husband has 258 XL shares with a value of \$8,090.

The wife's inherited assets

49. The wife holds inherited assets as follows: account with HSBC \$203,659 and half share of a cottage in Wales valued at \$149,160. The husband assesses the value of the asset as worth \$381,443 but the Court accepts the wife's assessment of \$352,819.

50. The parties agree that the wife's inherited assets should not be taken into consideration as part of the 'matrimonial pot'. However, the Court takes the wife's inherited assets into consideration as 'one of the other financial resources' that the wife has in the foreseeable future.

Matrimonial home

51. The former matrimonial home is jointly owned. In 2013 a mutually agreed valuer appraised its value as \$850,000. There is an outstanding mortgage of \$155,000. Having regard to the necessary deductions, if the property were to be sold, the Court finds the net equity in the property is \$635,248.

Contents of the former matrimonial home

52. The parties were not able to agree the value of the contents of the former matrimonial home. The husband began with a value of \$50,000. However, the wife assessed the value of the remaining contents as \$7,000.
53. The Court accepts the wife's evidence that when the husband left the matrimonial home, he took certain items with him. The Petitioner does not recall all the items taken but recalls items such as hand-painted ceramics given to them as a wedding gift as well as a Leonard Baskin etching purchased for \$1,000. In subsequent conversation between the husband and the children it was recollected that there were two 'Elfs on the Shelf' which the husband took.
54. The husband produced a list of items and, in evidence, said he believes the value should be placed at \$21,000. He submits that he's prepared to agree a figure of \$14,000. The wife should keep the contents and pay him \$7,000 as his portion. On the other hand, the wife proposes that the children should be gifted the contents of their bedrooms et cetera.
55. The Court has had regard to all the evidence in respect of the contents of the matrimonial home. It accepts that these are second-hand furniture and the entirety of the household contents should remain with the wife. In the final assessment the Court will take into account the fact that the husband has taken a few items of the household contents and the wife retains the bulk.
56. It is clear from the evidence that both parties used matrimonial assets for their own benefit without disclosing this to the other.
57. To cite a few examples the husband used funds to pay off a debt for which the wife was not responsible. He also used mutual funds to pay the children's maintenance of \$1,000 monthly.

58. The wife exhausted joint funds of \$41,000 which was in an HSBC money market savings account. For example, she used \$21,000 to purchase a car and applied \$18,000 towards her legal fees. In cross-examination the wife agrees that the husband should have the benefit of an equal sum of \$18,000 to apply towards his legal fees as well as a sum equal to one half to the value of the motor vehicle.

Court conclusion

59. As a practical reality the outcome of cases depend on the facts of each case. In small money cases where the needs outweigh the resources the crucial question is how the needs are to be met. Although this is not a big money case, with proper management of the available resources the needs of the children and the parties can be met adequately. The Court has had regard to the welfare of the children, which is the primary consideration. Having regard to the available resources and the long-term needs of the children, the Court orders:

Maintenance of the children

60. The husband should pay 60% and the wife 40% of the children's private school fees and living expenses.
61. Starting November 2014 the payments should be adjusted and the wife should cover 45% the children's expenses and the husband 55%.

Matrimonial home

62. The former matrimonial home should be held on trust until the occurrence of the earliest of the following events:
- i. Completion of high school by the youngest child of the family (subject to the children remaining resident in Bermuda), or
 - ii. The remarriage of the wife, or
 - iii. The sale of the matrimonial home, or
 - iv. The matrimonial home ceases to be the primary residence of the children.
63. Upon the happening of the first of any of the events listed at (i) to (iv) above, the matrimonial home is to be sold and the husband will receive 50% of the net equity less the amount of \$106,000 which is ordered to be paid under paragraph 66 hereof.
64. The wife has the option of purchasing the husband's interest in the former matrimonial home. In the event she wishes to do so the property is to be valued by a mutually-agreed or

court-ordered appraiser and the net equity determined. The wife is to pay the husband 50% of the net equity less the sum of \$106,000.

65. If the property is not disposed of prior to the completion of high school by the youngest child; upon completion the wife has 14 days within which to indicate whether she wishes to purchase the husband's interest in the property. If the wife fails to do so the property is to be sold for its market value and the husband receives 50% of the net equity less \$106,000.
66. The wife is to pay the husband a lump sum of \$106,000 which is a portion of the ascertained value of the matrimonial home. The wife should have no difficulty paying this sum as it can be paid from liquid assets in her sole name.
67. Payment of the \$106,000 is to be made as follows:
 - a) \$53,000 payable within 30 days of the date of this order
 - b) \$26,500 payable on or before the expiration of one year from the date of this order
 - c) \$26,500 payable within two years of the date of this order.
68. In the event the wife fails to make the payments interest shall accrue at the statutory rate.
69. The wife shall retain the motor car and the household contents.
70. The wife shall retain her separate UK assets.
71. The husband shall retain his 258 XL shares with a value of \$8,090.
72. Each party shall retain their respective pension.
73. The husband shall be responsible for his credit card debts.
74. For the years 2014, 2015 and 2016, subject to the husband continuing to be employed by XL which is a pre-condition to his receipt of the LTI, the husband shall pay the wife 50% of his after tax LTI which the husband and wife will use to defray the cost of the private school fees of the two children with each party contributing such additional sums as may be necessary to top up their respective contribution so that in 2014 the husband would have met 60% of the fees and the wife 40%.
75. If, in the year 2014, the husband ceases to be eligible to receive the LTI, he will still be responsible for 60% of the children's school fees and the wife for 40%.
76. In 2015 and 2016 the top up should be so that the husband has met 55% to the wife's 45%. If the wife fails to increase her income, she has resources she can call on to augment her earnings.

77. The husband shall pay ongoing maintenance for the children at \$700 per month per child or \$1400 per month combined unless otherwise ordered by the Court or by agreement which must be filed with the Court.
78. The parties shall pay 50% (\$615 each) of the monthly mortgage.
79. The wife shall be responsible for the land tax, insurance on the property and ordinary maintenance and upkeep of the property. If there are any extraordinary expenses, the wife has liberty to apply to the Court if the parties cannot agree what is extraordinary and how it should be paid.
80. The husband shall claim the child exemption in his tax return and the wife shall sign the relevant tax exemption forms and shall make no claim thereto.
81. Within 14 days of the date of this judgment the husband is to disclose to the wife the nature of the benefits he will receive.
82. The parties will be heard on costs if they so wish.

Dated _____ day of _____.

Norma Wade-Miller
Puisne Judge