



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2014: No. 37

BETWEEN:

D

Petitioner

-and-

D

Respondent

Dates of Hearing: 22, 23 and 30 June 2015

Date of Judgment: 21 July 2015

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

Respondent (husband) in person

RULING

The Parties

1. The parties in this matter are the wife (Petitioner) and the husband (Respondent).
2. The wife is a schoolteacher and is about 38 years old. The husband is a network administrator and is about 41 years old.
3. The parties married on 23 July 2002. The marriage lasted 12 years. Decree Nisi was pronounced on 9 May 2014; it was made absolute on 22 October 2014.
4. There are two children of the marriage: C who was born 25 December 2002 and S who was born 5 January 2005.
5. The parties were granted joint custody of the children, with the issue of their care and control and ancillary relief adjourned to Chambers.

The Applications

6. The Petitioner filed an application on 9 June 2014 seeking maintenance pending suit for her, interim periodical payments for the two children of the family, secured provision, lump sum or sums provision as may be just, make such payments or otherwise by way of property adjustment or variation of settlements as may be just, or such further or other relief as may be just.
7. In pursuance of this matter the parties filed three affidavits (two by the wife and one by the husband) and at the hearing gave oral evidence.
8. On 3 July 2014 the husband filed a summons seeking an order that:
 - i. there be joint custody with shared care and control of the two children of the family with each party having alternate weeks with the children
 - ii. the parties will share equally the reasonably agreed expenses for the children
 - iii. a Social Enquiry Report be ordered if the Petitioner is not in agreement with shared care and control
 - iv. the cost of this application be provided for.
9. In response to this summons, on 14 August 2014, the wife filed an application for the sole care and control of the two children and that this application be consolidated with the

Respondent's summons for shared care and control dated 3 July 2014. The summonses were consolidated by order of court on 19 September 2014.

This application is adjourned awaiting *inter alia* production of a Social Enquiry Report, which will make recommendation on the issues in the parties' applications.

10. Currently the husband pays half the school fees for the eldest child of the family (about \$215 monthly) plus \$900 per month for general maintenance for both children.

Although the wife has applied for the Court to consider periodical payments for the children – to make a reasonable contribution towards their direct and indirect expenses – the Court is of the view that the current payments should continue and further consideration on a final order will be assessed when it makes an order in respect of the parties' applications for care and control.

Background

11. The Court states at the outset that there is a conflict in the evidence on several crucial issues. Whenever there is a conflict the Court prefers and accepts the evidence of the wife.
12. The wife currently earns \$5,915 net monthly. The husband is employed and earns \$5,138 net monthly which is net his maintenance obligations of \$400 (\$250 maintenance plus \$150 in reduction of outstanding arrears) monthly for his other child from a previous relationship.
13. The Court is satisfied on the evidence that throughout the marriage the husband had several different jobs and a few periods of unemployment.

The Court is satisfied on the evidence that throughout the marriage the husband earned additional income from his side businesses – auto accessorizing and entertainment. They are both cash businesses. There is no evidence of monies coming in from these businesses as he receives payment in cash and keeps some of the funds in cash.

14. In cross-examination Mrs Marshall asked the husband if he earned about \$12,000 per annum from these businesses. He said something along the lines of about \$10,000.
Mrs Marshall has urged the Court to make a finding that he earns about \$1,000 monthly from his side businesses. She submits that this would increase his earnings to about \$6,150 per month.

15. The wife alleges that the husband made several imprudent financial decisions during the marriage. There is a conflict in the evidence of the Petitioner and the Respondent whenever these allegations are made.

16. It is clear that from the outset of the marriage the parties faced financial troubles. The wife says that their financial predicament was due to a number of unilateral imprudent decisions made by the husband.

17. After the parties married they lived with the husband's mother in her apartment. The wife says that she had agreed to finance their wedding and the husband was to secure the down payment to purchase a car for the family and to renovate the mother's apartment in which they were to reside. They agreed to sell their bikes to help offset the cost of this plan. The wife sold her bike and gave the husband \$2,000 – the proceeds of the sale.

Some time later she learned that the husband had borrowed money from his mother to make the down payment on the car and to pay for the renovations to the apartment. He used the monies received from the sale of the bikes to buy accessories for the car. The wife said that they were unnecessarily indebted to the husband's mother because of the husband's unilateral decision to use the proceeds of the sale of the bikes in the way he did. The wife considers this the first of the imprudent financial decisions the husband would unilaterally make throughout the marriage.

The husband spent money accessorizing the car for two years thus leaving them without a car. The wife had to borrow the aunt's car.

18. The wife said she discussed with the husband and put in place a 3-year savings plan to save enough money as a down payment on a home. One and a half years into their marriage the Respondent's brother was getting married and the Respondent approached her and asked if they could give \$5,000 that they had saved to his brother as a down payment towards purchasing a home. She told him while she had no objection to making a contribution she did not wish to use all of their savings. She discovered some time later that the Respondent had unilaterally withdrawn \$5,000 from their account and given it to his brother.

19. The Respondent says that they had discussed the loan to his brother. It was a 'good deal and he had to move quickly'. It was agreed that his mother would pay back the money. The Petitioner agreed to the terms of the loan and the money was sent. His mother secured a loan and repaid it in full especially after the Petitioner kept badgering her about it.

20. Before the birth of their second child the wife says that she discovered a bank statement showing large sums of money withdrawn from their joint account and when she confronted her husband he responded that the 3-year plan was her plan not his.

21. The husband says that they did discuss their financial strategy but he did not agree to the savings plan the Petitioner set forth. They never came to an agreement that they were both comfortable with.

22. The Court is quite satisfied that the wife's evidence on these incidents is accurate. The Court finds the wife to be thrifty, cautious and prudent while the husband is somewhat inattentive with his expenditure.
23. In 2006 the parties purchased a condominium (the condo) from the wife's aunt for \$450,000. They were able to purchase the condo with the aunt advancing them the money for the deposit and they received the balance of \$360,000 from the bank. They secured a further loan of \$60,000 for renovations. They managed to pay back the aunt the money she had advanced them.

The Petitioner said that for a while everything was going well: finances were stable, they had their own home with space and things were stable. Finances became a problem once more when the Respondent started to fall behind in paying his 50% of the agreed financial obligations.

The husband says that they were in financial debt because they did not work together. The Court is quite satisfied on the evidence that the wife paints a more accurate picture of their respective activities throughout their married life.

24. In or around 2009 the husband's uncle died and left his home to his widow. The parties approached her and enquired if she would sell them her share of the property and she refused. About a year later the widow approached the Respondent's mother indicating that she was ready to sell her share. The Respondent's mother informed the parties and told them it was a good time to purchase. The Petitioner said that she expressed concern to the Respondent and his mother and requested that they see a lawyer before making any decision. However, the Respondent and his mother unilaterally purchased the property ('Property B') without involving her.

She said soon after the purchase of Property B the husband approached her requesting that they sell the condo and use the proceeds to renovate Property B and move into that property. The husband's unilateral decision to purchase Property B placed them under final difficulties. She was opposed to selling the condo and the husband, who had started to have financial difficulties, suggested that they rent the condo and apply the rent towards the mortgage payments. This would allow them to save what they would otherwise be paying on the mortgage secured against the condo and eventually use these funds towards the renovation of Property B.

25. The husband's mother could not have purchased Property B without the husband's assistance. Paragraph 6 of the tenth schedule shows that the widow conveyed her one half interest in the property to the husband and his mother in fee simple as joint tenants. Consequently, the husband's legal interest is one undivided quarter of the legal interest. If the husband dies tomorrow his mother would receive his entire legal interest and vice versa. Presently, the husband is paying the mortgage shortfall, the land tax, the insurance cable and electricity. The husband transfers money regularly to his mother.

26. As regards the value of the husband's interest Mrs Marshall cites *Hassell v Furbert and Furbert*, Supreme Court Civil Jurisdiction 2004 No. 248 [2005] Bda L.R.22 where Bell J. displaced the presumption that in the case of joint tenants both the legal and beneficial interest is presumed to be divided equally.

Bell J. dealt with the nature of the relationship between common law and equity:

equity does not directly overrule the common law but nevertheless the Court is entitled, applying equitable considerations, to come to the conclusion that the equitable or beneficial ownership differs from the legal ownership established pursuant to a joint tenancy.

In that case although the property was conveyed to the petitioner and the Respondent's as joint tenants in fee simple, Bell J went 'outside' of the conveyance and took into account the fact that 85% of the contribution was made by the Respondent's.

27. Mrs Marshall submits that the case at bar is not so cut and dry as it is not clear how much of the \$616,000 mortgage related to the purchase of Property B and how much was for renovations. The husband is meeting the shortfall; his mother is holding the interest in the property as trustee for the husband. How should the court apportion this interest? The husband is meeting the total shortfall between the rents and the monthly mortgage payments.
28. The Court infers from the facts of this case that the Respondent has a substantial beneficial interest in Property B. He pays the lion share of his and his mother's bills. This Court believes that it is admirable that he is assisting his mother in the manner that he does. Nevertheless, he ought to do the same with his other obligations. Given the facts of this case the Court apportions 55% of the equity in property B to the husband.
29. The family moved out of their comfortable home to Property B. It did not have a functioning kitchen, it was dusty and damp and had plumbing and electrical problems. The wife had to use an electric burner for cooking. When she moved to these premises she purchased a washer and dryer and tiles for the laundry room floor and retiled it by herself. The wife said that she significantly contributed towards their joint expenses.

The apartment was so shabby that she was embarrassed to have any of their friends or family to visit. The wife stressed that she would not have moved except for the Respondent manipulating her into believing that they could save money by moving there and renting out the condo.

30. The condo was rented out for \$2,800 monthly; the mortgage was \$2,900 monthly plus \$1,000 monthly payable in reduction of the loan. The monthly outlay for the condo was therefore \$3,900.

The Respondent indicated to the Petitioner that only \$1,000 monthly was payable on Property B of which he was responsible for \$500 monthly only. Based on this arrangement

the Respondent's monthly obligation on both properties was \$1,900. The condo rent has decreased to \$2,000 monthly. This increased the Respondent's obligation to \$2,500 monthly. The parties tried to sell the condo in 2012 at a listing price of \$525,000 but it received no interest.

Presently the condo has a debt secured against it in the amount of \$397,377 (balance on the mortgage) plus \$43,286 (loan).

31. Property B comprises three apartments. It has recently been valued for renovation purposes at 1.2–1.4 million dollars. The Respondent resides in one of the apartments. His mother resides in a one-bedroom apartment and a family member occupies a three-and-a-half-bedroom apartment.
32. Regrettably, despite a number of requests from Counsel for the wife and orders of the Court, the Court does not have any credible evidence of the actual amount paid to purchase the Respondent's aunt's interest in Property B. The husband says that she was paid the sum of \$500,000 for her interest. The husband and his mother took up a mortgage of \$616,000: \$500,000 to buy out his aunt and \$116,000 to be used for renovations. The evidence shows that the area that the husband's mother lives in has been improved.
33. Contrary to the Respondent's paying \$500 per month, the Petitioner has been advised that Respondent is paying \$1,500 per month. Although requested to do so he has failed to provide documentary proof of his payments towards the mortgages on the condo and on Property B.
34. In May 2014 the wife and the two children moved into a rented accommodation with a monthly rental of \$2,100. The wife's income takes care of the family expenses. As mentioned above she receives a monthly sum towards the children's maintenance; however, until the Court is in a position to address and make a final order in respect of the care and control of the children it declines to further address the issue of the cost of their maintenance as this may change.
35. Repeated requests were made for the husband to provide full particulars of his property and income and his bank records. His retort was words to the effect 'it cost money to produce bank statements'.
36. During cross-examination of the husband it was revealed that he had an active account at Clarien bank. The Court made an order for production of that account. The statements were produced to Counsel for the wife. Perusal by Counsel revealed that part of the record was missing from the statement. The bank contacted the husband and he refused to give the bank authorization to produce the statements which covered the missing period. The wife had to obtain the Court's order to serve on the bank to obtain the statements for the missing period.

37. Once produced, Counsel for the wife's cross-examination on these statements and the information disclosed was instructive. It revealed that the Respondent had been collecting the rent from the condo from around January 2015 as opposed to the tenant putting the money into the mortgage account. Since receiving the rental income he paid \$2,000 in February and a \$1,000 in May.

Aside from those payments he accepted that he retained the rental income but said that some of it was used for maintenance purposes.

The husband also accepted that when the account shows a mortgage transfer of \$1,000 the monies are going to the house that he owns with his mother.

38. In a careful review of the bank records Counsel for the wife has demonstrated unmistakably that the husband has been collecting the rent from the condo and in several instances has not paid the condo mortgage. The records confirmed that he is operating his two side businesses and they are cash businesses; he has not deposited the monies received by him nor shown the profits made. The statements shows a certain level of his spending for example, albeit not substantial sums, he routinely transfers monies to his mother. It shows the movement of monies – from time to time he wire transfers sums overseas in relation to his customizing business.

The husband accepted that he uses some of the cash he earns and he keeps some of it in his pocket. He also accepted that in addition to the customizing side business he arranges parties as paid entertainment.

39. This Court has no doubt that the husband, on an extensive basis, kept all the cash from his businesses and spent it on himself – eating out, travel, purchasing electronic equipment to list a few. It is impossible to put a figure on the monies kept by the husband but the Court agrees with Mrs Marshall that based on the spending revealed by the evidence \$1,000 is appropriate. The Court agrees and so finds. The husband has failed to satisfy the Court that he does not make a substantial profit from his business. It is satisfied that he minimizes his earning.
40. Mrs Marshall submits that the husband's assets include his interest in Property B, which constitutes matrimonial property. In this Court's judgment his interest in Property B is a family asset. It was purchased during the marriage and due to his intermingling of funds the Court deduces that it was funded in part by the husband's earnings and in part by rental from the condo.
41. The husband submits that his financial details have been gone through with a fine toothcomb. On the other hand the wife has not made any disclosure, she has not produced any documents to show or confirm her expenses. She had a position which gave her a substantial salary, and when she was living at Property B she did not pay rent or electricity in the past five years, consequently she should have substantial savings.

42. In reply Mrs Marshall submits that the husband filed an affidavit on 20 July 2014 and the wife replied on 12 September 2014 and none of her expenses were challenged. She has heard a number of new things which were not put to her client in cross-examination. The wife gave very clear evidence that from September 2014 she would not be having her resource position. The allegations regarding the trips were not put to the wife.
43. As regards the Rule 77 disclosure request the husband did not put anything at issue. There were no challenges or requests from the husband or his attorney when he was represented.
44. The Court is aware that Mr D is a layman to legal matters; however, if the proper procedure was not adopted during the proceedings it cannot be rectified during the hearing. The matters of which he is now complaining ought properly to have been raised before the hearing.

The Court

45. The identifiable matrimonial assets are the condo, which was purchased at the height of the market and which has a negative equity, and the husband's equity in Property B.
46. In dealing with this issue the Court must be guided by precedent and Section 29 of the Matrimonial Causes Act 1974 which sets out the matters to which the Court must have regard. The Court has considered each paragraph of Section 29. The concluding words of Section 29 requires the court to exercise its powers so 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.
47. The Court has taken into account all the evidence placed before it in arriving at this decision and, although it has not rehearsed all the facts, it has highlighted all relevant facts that make this decision comprehensible.
48. It is impossible to put a figure on the husband's earnings but the Court finds that it can ascribe at least an additional \$1,000 per month to his earnings. The husband has his legal interest in Property B, which provides him with a stable home environment in the apartment where he currently resides. His legal interest is a matrimonial asset. Although this is not a big money case the precedents are plentiful that there is equality before the law.
49. What are the wife's reasonable requirements? In the Court's judgment having regard to the standard of living enjoyed by the parties during their 12 years of marriage, the wife's age and her contribution that a home to provide her and the children stability would be required, the best course is to have the wife reinstated in the condo. A home is necessary irrespective of the outcome of the care and control proceedings.

50. In so far as the debt on the condo is concerned the Court departs from dividing the debt equally. In so doing the Court has regard to the husband's equity in Property B, which is a matrimonial asset. This is achievable by the husband absorbing the sum of \$120,000 of the debt, which constitutes a portion of the outstanding arrears and the negative equity in the condo. The parties would have to approach the bank to see if they would work with them. With her present income and expenses listed in her affidavits the wife should be able to manage.

Each party must absorb some of the debt for the condo. Based on his earnings and his equity in Property B the husband will be able to absorb the higher percentage of the debt. The wife would take over the balance of the debt after the \$120,000 is applied.

With imaginative refinancing of Property B the husband would be able to increase the mortgage on Property B so that a capital sum can be raised to satisfy the lump sum to the wife.

Leaving aside the Respondent's earnings from his side businesses the Court is satisfied that the Respondent would be able to absorb this increase in the debt to a large extent from his basic salary as he has a surplus of over \$600 per month he would be able to fund an additional amount of \$120,000 amortized. This would allow the husband's name to be removed from the condo – a clean break – so they can go on with their respective lives.

51. Alternatively the husband is to be responsible for \$120,000 of the debt on the condo and the wife the remainder. Currently the mortgage on Property B is \$4,000 monthly. The rental income pays \$2,500 and the husband pays the balance of \$1,500. Based on his earnings he is well able to absorb this re-amortized payment. Once each party assumes the debt in the ratio stated the husband is to convey his 50% in the Condo to the wife. Liberty to apply effecting this transfer.

52. Some of the points raised by Mrs Marshall and Mr D have not been specifically dealt with in this summary, but their relevance for the purpose of this decision has been fully considered.

53. The Court shall hear the parties on costs if they are unable to agree.

Dated 22nd day of July 2015

Justice Norma Wade-Miller
Puisne Judge