

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHMT2014/0012

BETWEEN:

CHRISTINE JNO. JULES HAMILTON

Petitioner /Applicant

and

JERRY BRIAN HAMILTON

Respondent

Appearances:

Mrs. Singoalla Blomqvist Williams for the Petitioner/Applicant

Mr. J. Gildon Richards for the Respondent

2015: October 15;
November 30
2016: June 24

JUDGMENT

[1] **STEPHENSON J:**

“Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone’s life is different. Features which are important when assessing fairness differ in each case and, sometimes, different minds can reach different conclusion on what fairness requires. The fairness like beauty lies in the eye of the beholder. ...¹”

¹ White –v- White [2000] 3 WLR 1571 per Lord Nicholls of Birkenhead Para 1

[2] The parties in this matter were married on 29th June 2002. There are two children of the family born on 23 April 2000 and 30th June 2009. The petitioner/applicant(hereinafter called the wife) is a Marine Pilot employed by the Dominica Airports and Sea Ports Authority and the respondent (hereinafter called the husband) is an Aircraft Engineer employed by LIAT (1974) Limited and is resident in Antigua.

[3] The wife, in this matter made an application for Ancillary Relief on 11th May 2015. She sought the following orders:

- (1) "That either the former matrimonial home be transferred to me free of encumbrances or that the same be sold and that I be awarded a lump sum sufficient to enable me to purchase a property for myself and that in either event an order made for maintenance of the children;
- (2) That the respondent pays maintenance in the sum of \$1,000.00 for the two minor children;
- (3) Additionally that the respondent pays school fees and medicals for the two minor children until they attain the age of majority;
- (4) That the respondent pays me a lump sum of \$50,000.00 in lieu of maintenance for myself.
- (5) Custody of the minor children Brinee Hamilton born on 23rd April 2000 and Brijorn Hamilton born on 30th November 2009.
- (6) That the vehicle registration No PJ986 be transferred to the petitioner;
- (7) Costs."²

[4] This matter came up for trial on 15th November 2015. The wife relied on two affidavits filed in support of her application on 11th May 2015 and 15th July 2015 with the exhibits and the husband relied on his affidavit in response filed on 25th June 2015. These affidavits and

² Application for Ancillary Relief filed on 11th May 2015

exhibits were treated as the evidence in chief of the parties for this ancillary relief application.

[5] At the conclusion of the hearing the parties were ordered to make written submissions to the court which submissions with authorities were filed on behalf of the husband on 30th November 2015 and no submissions were filed on behalf of the wife. I will now render my decision

[6] The questions to be considered are:

- (1) What is the entitlement of each of the parties as it regards their respective interests in the matrimonial home?
- (2) What is the entitlement of each of the parties as it regards their respective interest undeveloped piece of property?
- (3) Whether the husband pays the increased amount for maintenance of the children of the family?
- (4) Whether the husband be ordered to pay a lump sum to the wife for her maintenance?
- (5) What order for custody should be made as it regards the minor children of the family?

The Assets

[7] The ancillary issues before the court relate to the following assets:

- (1) The Matrimonial Home located in Morne Daniel and registered in Book N16 Folio 26 comprising 11,639 square feet and registered in the names of both of the parties as joint tenants.

- (2) A portion of land comprising 11,528 square feet registered in the name of the parties as joint tenants.
- (3) A Toyota Rav 4 in the physical and legal possession of the wife. The issue regarding this vehicle was settled by the parties in favour of the wife during the ancillary hearings.³

(1) The Matrimonial Home:

- [8] The matrimonial home comprises a single building with two separate living spaces. The wife and the children live in the upper portion of the building comprising four bedrooms bathrooms kitchen and sitting room and there is an unoccupied three bedroom apartment below.
- [9] There is no dispute that the building is to be considered as the matrimonial home. The wife is asking this court to either order that the ownership be transferred solely to her free of all encumbrances or that it be sold and the mortgage paid off and that she be awarded a lump sum sufficient to enable her to purchase a property for herself. The husband on the other hand urges that the property be either ordered registered solely in his name or that it be sold and mortgage paid and the equity divided according to the parties respective financial contribution towards its acquisition, bearing in mind that it was he who financed the addition to property solely; that is the building of the apartment was from his sole financial commitment. The husband also asks the court to consider that he has paid 68.2% of the original mortgage of the property and the wife 32.8% and seeks an order that their respective interests in the house be proportionate to their payments.
- [10] The wife in her affidavit in reply filed on 15 July 2015 asks that the court to consider ordering the Husband to continue paying the mortgage until the younger child of the

³ This aspect of the matter was dealt with in Order of Court dated the 5th October 2015

marriage attains the age of eighteen and thereafter that the said property be sold and the equity be shared equally between them.

- [11] The matrimonial home was bought by the parties and registered in their joint names as joint tenants. The house was bought with four bedrooms, bathroom, kitchen and sitting room with a mortgage from Scotia Bank, which mortgage is currently in arrears.
- [12] An apartment was added to the house comprising three bedrooms. The wife contends that the mortgage taken from Scotia Bank in 2006 in the sum of \$450,000.00 was to purchase the house and to construct the downstairs apartment.
- [13] The husband contends that he used his personal funds to pay for the construction of the apartment downstairs and that the money borrowed from Scotia Bank was not used for that purpose. The husband says that the apartment was constructed with funds that he transferred to Dominica from Africa where he was working and with a small loan of \$89,000.00 taken in his name only from Scotia Bank. The husband averred that this smaller loan was subsequently consolidated with amounts from small loans belonging to the wife to the amount of \$155,000.00 and that he pays the monthly sum of \$1,385.00 towards the repayment of this loan. This loan was taken from the credit union and is also in arrears and the husband is currently making increased payments to bring this loan current.
- [14] As it regards the building of the apartment the wife averred that during the construction of the apartment the husband lived out of Dominica and in his absence she had to purchase materials for the project, that she also prepared meals for the workers and that the project was a joint effort of both of them. She further stated that regarding the loan at Scotia Bank, he volunteered to make the monthly payments to the second mortgage at Scotia Bank because his salary was bigger than hers.
- [15] The wife averred that whilst the husband worked overseas and came home from time to time, it was she who had the primary responsibility of being the primary care giver of the matrimonial home and to the children of the marriage. That sacrifices were being made but that she never complained because they were a family unit and sacrifices had to be

made. The wife averred that the husband made a bigger financial contribution because his earnings were more than her but that she paid her share of the mortgage, that she worked after hours and met some of the bills and looked after the family.

- [16] The mortgage payments for the matrimonial home were made jointly by the parties with the husband paying \$2,282.00 and the wife paid \$1,000.00.
- [17] This mortgage is now in arrears as the husband in December 2014 stopped making payments to this mortgage the wife however continues to make payments to same. It is noted that the wife has said that based on her income she is unable to make the mortgage payment solely. She however asks this court to order that the property be transferred to her solely free and clear of all encumbrances. It is also clear from the evidence adduced that the husband's income that he is unable to make the full mortgage payment for this property.
- [18] The husband avers that he stopped paying his share of the mortgage in December 2014 when he moved from the matrimonial home. He thereafter rented a house in Belfast for the monthly sum of \$900.00, he also has had to pay utilities for the said premises. The husband said in the circumstances of having the responsibility of maintaining residences both in Dominica and in Antigua coupled with the uncertainty of continuing regular employment that in those circumstances it would be unreasonable to expect him to continue paying his share of the mortgage as he did previously.
- [19] There was a request from the husband to the wife to sever the joint tenancy of the matrimonial home. The husband stated that this was to allow his share and or interest in the property should go to his children in the event of his passing.
- [20] The other piece of land also located in Morne Daniel was purchased prior to the marriage and registered in the joint names of the parties. The husband averred that he has paid for this property solely with a loan from Barclay's Bank in the sum of \$49,000.00. He further averred that the wife's name was put on the title of the property by a third party without his permission and approval and that she was never paid any money towards the actual purchase of the land. According to him the loan payment for this land was \$750.00 per

month for ten years. It is clear therefore that he would have been making payment for this property during the marriage.

- [21] There are other loans taken by both parties which were for the purposes of their studies and professional training. The husband pays for a loan at the National Cooperative Credit Union this loan is secured by the undeveloped property at Morne Daniel and an acre of land owned by the Husband at Cockrane.

(2) The earnings of the parties

- [22] The wife is employed as a Marine Pilot and informed this court that her net pay is \$3,050 from which she furnishes her loans and provides for the home. That is, she pays for food, utilities and gas for the vehicle. She receives \$800 per month from the husband and occasionally either money or goods from her mother who lives in the USA. Her total expenses she stated amounts to \$3,110.00. She averred that she is able to make ends meet with the assistance she gets from her mother.
- [23] The husband's net income amounts to \$11,183.03 and his total expenses amount to \$10,957, leaving him with \$225.00. His expenses do not include his annual license and insurance payments which amount to \$2,600.00.

The Law

- [24] The governing statute is the **Matrimonial Causes Act 1973 (UK)** which grants the court a wide discretion as it regards ancillary awards which includes vesting the matrimonial home in the either or both of the parties, to direct the sale of the matrimonial home or to direct that either party pay to the other a sum which is deemed to be reasonable. The court is

required to consider the matters as set out in Section 25 of the **Matrimonial Causes Act 1973** which are:

- “(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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire;
- (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 contribution by looking after the home or caring for your family;
- (g) The conduct of each of the parties, if that conduct is such that it would in the opinion of the Court be inequitable to disregard it;
- (h) In the case of proceedings for divorce or nullity of marriage, the value of each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”

[25] The court is guided also by the principles regarding how to achieve fairness in the division of property following divorce as laid down in **Miller –v- Miller** ⁴as has been applied in cases of this nature in our jurisdiction.

[26] In looking at the element of fairness in ancillary proceedings in divorce Lord Nicholas in **Miller –v- Miller** had this to say

“...every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-care giver,. Mutual dependence begets mutual obligations of support. When the marriage

⁴ [2006] UKHL 24

ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter"⁵.

[27] Lord Nicholls went on to say

"Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that "husband and wife are now for all practical purposes equal partners in marriage": *R v R* [1992] 1 AC 599, 617. This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasize the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule".

[28] It is now well established in our jurisdiction that there is to be no discrimination when assessing the roles of husband and wife.⁶

Discussion and Analysis

[29] The parties in the case at bar were clearly a young ambitious couple who were prior to their break up were upwardly mobile. Both of them being professionals in their own sight with what seemed to be a clear plan for their success life.

⁵ Ibid paragraph 11

⁶ Re: **Stonich –v- Stonich** BVI Civil Appeal No 17 of 2002, **Leah Zilpha Richardson –v- Ovin Whitfield Richardson** AXAHMT 2006/0006, **FUSse Durham –v- Fusse Durham** Anguilla Civil Appeal No 21 of 2005.

- [30] I am compelled to view the situation broadly, and to look at the entire circumstances of the case, in an effort to ensure that justice is done and to achieve a fair division of the matrimonial assets.
- [31] Applying these principles to the fact of the case at bar this court find no need to go to the contrary. When I examine the contributions made by both parties to the acquisition of the property and the welfare of the family, this court sees them as having worked in partnership to achieve what was best for the family as a unit and to the acquisition of the family assets to the mutual benefit of the family.
- [32] Even though the wife's contribution was quantitatively less than the husbands this is to be considered in light of the fact that for the most part she bore the burden of the day to day looking after the children whilst he worked abroad. This court has formed the view that apart from the financial contribution made to the family by the wife there was a emotional support rendered to the husband by her enabling him to pursue his career more particularly that she enabled him to go abroad leaving her here in Dominica with the children of the family whilst he pursued his career, in the circumstances this is significant.
- [33] It is trite law that when a wife looks after the home and the family, she is considered to have contributed as much as if she pays the mortgage. Her contribution is considered as contribution in kind. She is entitled to a share after she looks after the home and family for years in the same way as the wife who makes substantive monetary and contributes.⁷
- [34] There was in this case, obviously a mutual giving and taking which resulted in a benefit of the family. This court having considered the evidence in this case I find that each of the parties contributed financially to the welfare of the family even though the husband gave more in this regard and that they both contributed to the emotional and everyday support of the family with the wife contributing more in this regard.
- [35] The evidence before the court and which the court has accepted is that both parties at one stage paid the mortgage for the matrimonial home on the percentage basis of 68.2% to

⁷ Watchel –v- Watchel [1993] 1 All E R 829 @838-839.

32.8%. It is noted that both parties each had other loan commitments. It is clear that the wife was left with looking after the day to day responsibilities of looking after the children of the marriage for the most part particularly when the husband lived and worked overseas. This court does not find that there is evidence that would permit a departure from the equality yard stick as the starting point of making an award.

[36] The wife in this matter paid the lesser share of the mortgage on the matrimonial home she also made contributions towards the home in kind, in that she looked after the family. We have the husband living away from the family when he worked first in Antigua and then in Africa. She can be described as the primary care giver for the children and her earnings along with monies received from her husband were utilized in the payment of the utilities, groceries, acquisition of the furniture and some her personal loans for her studies.

[37] In making its reckoning the court is obliged to take into contemplation the matters as set out in section 25 (as quoted above). In the circumstances of this case, having considered the evidence of both of the parties, the factors as set out in section 25 along with the submissions counsel for the husband and having regard to the respective contributions of the parties this court is satisfied that the wife is entitled to one half share in the matrimonial home.

[38] It is observed and noted that consideration has been given to the fact that neither party given their current income and expenses can pay solely the current mortgage payment for the matrimonial home which mortgage is in arrears and in the circumstances of this case this court considers it best that the property be sold, the bank paid off and the equity divided equally between the parties herein.

[39] As it regards the other piece of property at Morne Daniel, the evidence before the court is that this piece of land was bought prior to the marriage, registered in the joint names of the parties and paid for solely by the husband. The property was bought in 1998 and paid for over a period of ten years which means that payments would have had to be made by the husband during the course of the marriage. This is an undeveloped piece of property which has been used as collateral for the various loans taken by the husband.

[40] The husband's prayer is that this property be transferred to him solely or that it be sold and the proceeds of sale shared between the parties two thirds to the husband and one third to the wife.

[41] Having taken into consideration the evidence adduced and in consideration of the total circumstances of this case this court is going to award the wife one third of that property and order that it is either sold and the bank paid off or that the husband pays to the wife one third of the value of the said property and the wife transfers her share of the property to him.

[42] The other property at Cochrane currently registered in the name of the husband but acquired by him as a gift from his family, during the course of the marriage in the round of things will remain in his sole name and there will be no order regarding this property.

[43] The wife has also asked this court to make an order for maintenance in the form of a lump sum payment of \$50,000.00 for herself and for an order that the husband pays \$1,000.00 per month as maintenance for the two children until they attain the age of majority. It is noted that the husband currently pays \$800.00 a month for the two children. He maintains that based on his income and expenses as given to the court he is unable to pay an increased amount as requested.

[44] The court in these circumstances must make an assessment which bears a genuine relationship to the assets available to the parties. Denning MR in **Wachtel –v- Wachtel** in discussing the award of lump sums in ancillary matters said

“No order should be made for a lump sum unless the husband has capital assets out of which to pay it--without crippling his earning power. Another thing is this: when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on.”

[45] The Court therefore declines to make the lump sum payment as prayed by the wife. The Court is also compelled to look at the general welfare of the family if and when the matrimonial home is sold. The wife will then have to find a home for her and the children of the marriage. It is trite law the family should live in the standard to which they have

come accustomed to and in the circumstances the husband will have to make contribution to a roof over the head of the family until the children of the marriage reach the age of 18 years to ensure that happens.

[46] In matters such as these the court is concerned about the welfare of the minor children of the marriage it therefore means that the court is concerned with ensuring that the housing needs and the day to day income needs of the children are met.

[47] This is a case where there are modest and limited assets. The court has to seek to achieve fairness and in doing so this court has to give and has given due consideration to the parties' needs. This court has considered the welfare of the minor children of the marriage. Consideration has also been given to the financial needs, obligation and responsibilities of the parties herein, the standard of living enjoyed by the family, the age of the parties and their respective professional achievements and qualifications.

[48] The cost of supporting, providing for and bringing up the children is not necessarily required to fall entirely on one parent. In the case at bar both of the parties have resources and therefore the question before the court should be 'what *contribution* towards the total cost should be borne by the parties.

[49] Taking into consideration all of the facts of this case, looking closely at the practicalities of this case and the needs of the parties to try and achieve a fair result, reflective of all the facts and figures and to make an order which provides fairly for both sides whilst keeping the primary consideration generated by section 25 of the Matrimonial Causes Act 1973 in the forefront of the court's mind, this court is minded to order that when the matrimonial home is sold the husband shall pay one half of the cost to rent a home of comparable standard to the matrimonial home up until the youngest child attains the age of 18 years or until that the wife remarries or lives in a conjugal situation.

[50] It is clear from the evidence before the court regarding the husband's income and expenses and his current commitments this court is of the considered view that based on that evidence adduced that the husband would be unable to make a bigger payment than the \$800.00 he paying as maintenance, the court also has taken into consideration that the

husband will also be required to pay one half of the rent of suitable and comparable accommodation for the wife and children of the marriage up until the youngest child attains the age of eighteen or when the matrimonial home is sold.

[51] The court's conclusion and order therefore is as follows:

- (1) It is declared that the wife is entitled to one half share of the matrimonial home.
- (2) It is directed that the matrimonial home is to be sold and the mortgage paid and each party shall be paid one half of the equity.
- (3) That the wife is entitled to one third share of the value of the undeveloped property located at Morne Daniel currently registered in their joint names. The husband shall pay to the wife the one third value of the current valuation of the said property within 180 days hereof and the wife shall transfer her share of said property to the husband upon receipt of the said monies. Should the husband be unable to make the payment as ordered, the said property is to be sold and the mortgage paid off and the equity be divided between the parties; two thirds to the husband and one third to the wife.
- (4) That the husband shall pay to the wife the monthly sum of \$800.00 as maintenance for the two children of the marriage until the eldest child of the family attains the age of 18 years. Thereafter the husband shall pay the monthly sum of \$600.00 to the wife until the youngest child of the marriage shall attain the age of eighteen years.
- (5) The husband shall pay one half of all educational and health expenses over and above the deductible on any health insurance either parent may have for the benefit of the children.
- (6) The court declines to make an order for the husband to make a lump sum payment to the wife as prayed.

(7) Each party shall bear their own costs.

M E Birnie Stephenson

High Court Judge