

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHMT 2005/0046

BETWEEN:

EARLIN O'NEALE

Claimant

AND

SEBASTIAN O'NEALE

Defendant

Appearances:

Mrs. Celia Edwards, Q.C. for the Petitioner

Mr. Derick Sylvester for the Respondent

2013: January 18

DECISION

[1] **HENRY, J.:** The parties were lawfully married to each other on 27th day of November 1982. Unhappily, issues arose between them and the wife (hereinafter "the petitioner") filed for divorce on 29th March 2005. The decree nisi was granted on 31st October 2006 on the ground that the parties had lived separate and apart for a period of at least five (5) years preceding the presentation of the Petition. The decree was made final and absolute on 12th December 2006. The petitioner now seeks a property adjustment order in the following terms:

- (1) An order that the petitioner be declared to own one-half or such other share as the court deems just of the property housing the matrimonial home situate at Mt. Gay in St. George's.

- (2) An order that the Respondent do pay the Petitioner one half-share or such other share as the court deems fit of the assessed value of the said matrimonial home.
- (3) In the alternative, an order that the said house be sold and the proceeds divided as the court shall deem fit.

[2] Like so many other couples, even though the marriage subsisted for almost twenty years (excluding the period of five years separation), the matrimonial home is alleged to be the only asset of the marriage.

Petitioner's Evidence

[3] The petitioner's evidence is that after the marriage the couple lived with the respondent's mother. In April 1988, a parcel of land measuring sixteen thousand and twenty three square feet (16,023 sq. ft) located at Mt. Gay was purchased for the sum of \$28,040.25. Legal title to the land was held in the name of the respondent. Construction of the home started sometime in 1989 with financing of \$60,000.00 secured by a mortgage on the land from Scotia Bank. The parties moved into the matrimonial home in 1990. There they lived as a family.

[4] There were no children born to the couple during the marriage. The respondent is twenty years older than the petitioner and has two children from a first marriage. The petitioner has a daughter from a previous relationship, who lived for some time with the couple at the matrimonial home. Sometime in 1998, the marriage broke down and the parties established separate lives within the former matrimonial home. The petitioner finally left the former matrimonial home in August 2005 after it had been badly damaged by Hurricanes Ivan and Emily.

[5] Petitioner's evidence is that the property remained in the sole name of the Respondent until June 1999 when the respondent by deed of gift conveyed the property to his children Jude and Gemma O'Neale.

- [6] The petitioner asserts that during the marriage she worked with the Ministry of Finance from 1983 up to the hearing of the application. She describes the respondent as an Educator who during the marriage earned much more than she did. She admits that it was respondent who made the repayments of the mortgage to Scotia Bank. She also admits that he also paid most of the utility bills with the exception of one year when the respondent was ill and in the USA seeking medical treatment. She asserts however, that it was she who purchased groceries and that as a couple they pooled their resources towards the smooth running of the home. The petitioner cites a joint account that the couple at one time operated. She asserts that after issues arose between them, respondent transferred the funds to his name.
- [7] The petitioner's further evidence is that after the passing of Hurricane Ivan, because of the severe damage to the home, the parties were forced to exist in a small downstairs apartment without running water or electricity. The insurance company, she says, paid to the respondent a lump sum under the policy of insurance. However, he refused to fix the said matrimonial property. Each time it rained the place would get wet, so eventually she was forced to leave the matrimonial home. It was only after she left that the respondent affected the much needed repairs.
- [8] The petitioner continues to be employed with the Ministry of Finance. She states her monthly gross salary as \$3,279.00. However, after deductions the salary advice from the Government shows her net salary as \$1,771.19. From this she pays monthly rent of \$750.00. Her estimated monthly food bill is approximately \$500.00. In addition she pays utility bills and transportation cost.
- [9] Petitioner states that in light of the above, it would be just for the court to make a property adjustment order as prayed for.

Respondent's Evidence

- [10] The respondent, now a retired School Principal, describes the petitioner in these words: "when I met the petitioner she was penniless and destitute. I educated her to get a job in the public service..." According to the Respondent's evidence, the parties lived at his parent's home even prior to their marriage from 1st September 1982. He states that when the Government offered retirement in 1987, he seized the opportunity and opted for retrenchment; that when he got his gratuity payment he used same to purchase the lot of land at Mt. Gay in April 1988. He admits that construction began in 1989 and was financed partially by a loan of \$60,000.00 from Scotia Bank. He asserts that to assist with the construction, he sold two lots of land at Marigot, St. John. The house was completed and they moved into the house in March 1990.
- [11] With regard to his income, he states that after retirement from teaching, he worked with Huggins Motor Department for approximately eight years. He affirms that he made the mortgage payments to Scotia Bank in addition to payment of all utility bills, except for Cablevision, which he asserts was installed for the benefit of petitioner's daughter. In addition, he asserts that he also paid for the groceries and all the upkeep of the house. He agrees that for the year he spent undergoing medical treatment in the USA, the petitioner paid for the upkeep of the house. He denies, however, the petitioner's assertion that she purchased groceries, except for some items of groceries purchased for her daughter. He also denies that there was ever any pooling of resources towards the smooth running of the home.
- [12] With regard to the joint bank account, the respondent admits that one was opened in their joint names in 1994. However, he asserts that the account was never operated as a joint account, in that the petitioner never deposited any money into the said account. According to him in 1996, he discovered that the petitioner had attempted to make a withdrawal from the account. In his view, since all the funds in the account had been deposited by him, the petitioner had no right to the funds.

- [13] With regard to the alleged payments he received from the Insurance Company, the respondent's evidence is that he received a total of \$27,000.00, but that the estimated damage to the house was "in the vicinity of one hundred thousand dollars (\$100,000.00)". According to his evidence, after the petitioner left, he made partial repairs to the house with assistance from his children.
- [14] Finally, the respondent asserts that because the petitioner had no expenses with regards to the running of the matrimonial home, the respondent was able to and did purchase in 2001 a parcel of land situated at Mardigras measuring 12,688 sq. ft. at a price of \$41,171.00. The respondent asserts no claim to any share in this lot. He states that he has a pension of \$1,700.00 per month plus an NIS pension of \$300.00 to \$400.00 per month. In the circumstances, he opines, it would be otiose to make a property adjustment order as requested by the petitioner.

The transfer to respondent's children

- [15] In June 1999, by a deed of gift, the respondent conveyed the former matrimonial home to his two children, Jude and Gemma O'Neale, in fee simple as tenants in common in equal shares. According to the deed, the transfer was subject to the outstanding mortgage balance of \$22,900.00. The Donees covenanted in the said deed of gift to pay the outstanding monies and interest due under the said mortgage.
- [16] Counsel for the respondent concedes that the transfer of the property would have to have been subject to the wife's interest. He asserts, however, that she is entitled to only a small percentage of the value. He points to the fact that it was respondent's gratuity that was used to purchase the land; that respondent was solely responsible for payment of the mortgage; that he sold two lots of land that he held prior to the marriage to assist in construction of the house. He also asks the court to take into account the damage done by Hurricane Ivan and the money the respondent would have spent on the premises after Ivan.

The Law

- [17] Section 25 of The Matrimonial Causes Act 1973 remains the starting point for applications for property adjustment orders. This section sets out the matters the court shall have regard to when exercising its powers on an application under section 24 or 24A. In particular section 25 (2) (a) requires the court to consider the income, earning capacity, property and other financial resources which each party to the marriage has or is likely to have in the future. Among the other matters, section 25 (2) (f) specifically requires the court to consider the parties contributions.
- [18] The court in **Miller v Miller**¹ re-confirmed that in these matters the search is always for what are the requirements of fairness in a particular case. The court expounded what is now known as the equality principle. The court endorsed the view that a husband and wife are for all practical purposes equal partners in marriage and therefore when the partnership end, each is entitled to an equal share of the assets of the partnership unless there is good reason to the contrary. As Lord Nicholls remarked at paragraph 9 of his judgment in Miller:
- "It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant [petitioner] is not a suppliant. Each party to a marriage is entitled to a fair share of the available property."
- [19] The Court of Appeal in **Charman v Charman**² sets down even clearer guidelines regarding the principles to be extracted from Miller/McFarlane. The court reiterated that 'the sharing principle' meant that property should be shared in equal proportions unless there is good reason to depart from such proportions. Secondly, the principle of equal sharing should apply to all property, whatever its source. The fact that property was non-matrimonial was likely to provide a reason to depart from equality. Thirdly, special or stellar contributions remain a ground

¹ [2006] UKHL 24

² [2007] EWCA Civ 503, [2007] All ER (D) 425

justifying departure from equality in exceptional circumstances. Such contribution can in principle take a number of forms: it can be non-financial as well as financial.

- [20] A judge is entitled to apply the principle of sharing at the outset of the case and look for reasons to depart from it, rather than as a cross-check at the end of its balancing exercise.

Findings and Conclusions

- [21] This was a long marriage. There was a disparity in not only age but also in education and earning capacity. Although, the respondent did not provide the details of his salary before retirement, he certainly earned more as a School Principal than the petitioner did as a Clerk in the public service. The respondent was a well-established School Principal, with enough years in the service to qualify for retirement within five years of the marriage. Unquestionable, he was the main provider for the family. He met the major expenses and upkeep of the family.

- [22] Despite the fact that the marriage lasted for about twenty years, it appears that the only asset which falls to be considered on this application is the former matrimonial home. Reference was made during submissions to a parcel of land purchased by the petitioner. That land however, was not purchased during the subsistence of the marriage. The evidence is that the land was purchased in 2001, some four years after the parties established separated lives, which according to the petition was sometime in May 1997. Mention was also made of a joint account maintained during the marriage. It was alleged that upon the breakdown of the marriage, respondent closed the account and all funds were transferred to his name. No evidence was presented as to the amount of funds in the account at the time it was closed. No request was made by the petitioner in respect of this account. Therefore, the court is left with the former matrimonial home located at Mt. Gay as the only asset of the marriage.

- [23] Other than respondent's mother's home, the house at Mt. Gay was the only matrimonial home the couple shared during the long marriage. I find that the evidence reveals that it was built with the intention of serving as the matrimonial home. It therefore played a central role in the marriage.
- [24] I accept that the money for the purchase of the land came exclusively from the respondent. Financing for the construction of the home was also borne by the respondent. Repayment of the mortgage was from the respondent's salary, in addition to his other contribution to the upkeep of the home.
- [25] However, even though less educated, the petitioner also made a contribution. She took care of the respondent and the home, as well as holding a job throughout the marriage. I find that she also, at times, purchased groceries. When respondent took ill, she was in a position to take care of the expenses of the home, including payment of the mortgage for a year without him. I find that she has made a strong contribution to the welfare of the family both financially and non-financially.
- [26] I start with the premise that upon the dissolution of the marriage, the petitioner is entitled to an equal share of the assets. Respondent urges a case of special or stellar contribution which, he asserts, provides reason to depart from the equal sharing principle. Having considered all the circumstances, I find that there is in fact sufficient good reason to depart from equal sharing in this case. The respondent is some twenty years older than petitioner. At the time of the marriage he was already well established in his profession and was already close to retirement. The funds used to acquire the matrimonial property were mostly derived from assets that he had acquired before the marriage. He sold two lots of land to raise cash. These lots he had acquired before the marriage. If they had not been sold they might well have been considered non-matrimonial property and would have provided a good reason to depart from equality. He also invested his entire gratuity upon retirement. His gratuity was mostly based on his working

years before the marriage. I therefore find that his contribution towards acquisition of the property amounts to a special or stella contribution.

[27] However I disagree with respondent when he states that the petitioner is only entitled to a small percentage of the value of the property. I have already found that she made a strong contribution both financially and non-financially to the welfare of the family.

[28] In making property adjustment orders the court must weigh each side's resources and try to ensure that neither party is rendered homeless. As Stamp LJ stated in **Martin v Martin**³, "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account in applying section 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there are children of the marriage."

[29] While the respondent continues to have the use of the former matrimonial home, petitioner will need to acquire a home. She is currently in rented accommodation. Had the marriage not broken down, both parties would have had the benefit of remaining in the matrimonial home. Now that the marriage has ended, fairness requires that she be given a sufficient share to enable her to acquire a roof over her head. While petitioner has purchased a parcel of land, she needs to be able to put a structure on it.

[30] A fair distribution of the only asset of the marriage requires that the petitioner be awarded 1/3 of the value of the matrimonial property.

[31] Two valuations were obtained by the parties: the current replacement value stated to be \$490,000.00 and the value before the repairs to the damage caused by Ivan

³ [1977] 3All ER 762 at 765

were completed stated to be \$300,000.00. The evidence is that the property was badly damaged during the passage of Hurricane Ivan and that the cost of repairs greatly exceeded the \$27,000.00 received from the insurance company. I accept this evidence. The valuation noted that the damage from Ivan included complete loss of the roof and water damage to the interior. At the time the repairs were completed, petitioner had already left the matrimonial home. The un-contradicted evidence is that the funds used to affect the repairs came from respondent's children, who also assumed the balance of the outstanding mortgage due.

[32] The petitioner is therefore entitled to a 1/3 interest in the home calculated at the value of the home before the repairs were affected, less the amount of outstanding mortgage at the time of the conveyance. I also find that she is entitled to 1/3 of the proceeds of the insurance the respondent admits he received.

[33] In addition to a declaration of her ownership of a share in the matrimonial property, the petitioner prays for an order for sale of the property. Section 24 A (1) provides that where the court makes a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order... However, subsection (6) further provides that where a party to a marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not a party to the marriage also has a beneficial interest in that property or in the proceeds of sale thereof, then, before deciding whether to make an order for sale under this section in relation to the property, it is the duty of the court to give that other person an opportunity to make representations with respect to the order.

The property has been conveyed to third parties. There is no evidence that this application was served on them. The court therefore cannot make an order for sale at this time.

[34] Judgment is accordingly granted in favour of the petitioner as follows:

- (1) A declaration that petitioner is the owner and entitled to 1/3 share in the former matrimonial home situate at Mt. Gay, calculated on the value of the home before the repairs after the passage of Hurricane were effected; that is to say \$300,000.00 and subject to the mortgage at the time of the conveyance to Jude and Gemma O'Neale.
- (2) Unless within sixty days agreement is made with the other owners of the property for the sale to them of the petitioner's interest in the former matrimonial home, leave is granted to the petitioner to renew the application for sale on notice to Jude and Gemma O'Neale, the other owners of the property. Until such time, the petitioner's 1/3 interest is to be protected by defiling of a Caution in the Deeds and Land Registry.
- (3) Judgment is also granted in favour of the petitioner for the sum of \$9,000.00, her 1/3 share of the proceeds from the insurance company.
- (4) Cost to the petitioner in the sum of \$4,000.00.
- (5) Liberty to apply.

Clare Henry
HIGH COURT JUDGE