

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
[CIVIL]

Suit No. DOMHMT2014/0022

BETWEEN:-

AUGUSTUS JEFFERSON MAXIME

Petitioner /Applicant

and

LISA MONDESIRE MAXIME

Respondent

Appearances:

Mrs. Gina Dyer Munro for the Petitioner/Applicant

Mrs. Dawn Yearwood Stewart for the Respondent

2015: May 22
October 21
December 8
2016: February 22
November 21

JUDGMENT

[1] STEPHENSON J: "The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a supplicant. Each party to a marriage is *entitled* to a *fair* share of the available property. The search is always for what are the *requirements of fairness in the particular case*".¹

¹ Per Lord Nichols of Birkenhead in *Miller –v- Miller & McFarlane –v- McFarlane* [2006] UKHL 24, [2006] 3 All ER 1 at paragraph 9

- [2] One of the very many tasks a court has is to determine where the balance of fairness lies in awarding financial relief to spouses on the breakdown of their marriages. Before the court are, in the main, two applications for ancillary relief; one filed by the Mr. **Maxime (“the petitioner”)** and the other by the Mrs. Mondesire **Maxime (“the respondent”)**.
- [3] The parties in this matter were married on the 29th March 2011. There are four children of the family born to the couple namely Séverin Augustus Maxime born on the 14th November 1997 and Sévan Augustus Maxime born on the 28th April 1999 prior to their marriage and Sévana Sheryla and Séverine Sherlisa Maxime (twins) born on the 13th February 2009.
- [4] The Petitioner/Applicant is a Bartender and is resident in Dominica and the Respondent is a huckster and is ordinarily resident in Guadeloupe.
- [5] The petitioner applied for Ancillary Relief on 25th September 2014 with the following prayers for:
- (a) A property adjustment order.
 - (b) Joint Custody of the children of the marriage.
 - (c) A review of the **maintenance order for the children granted in the Magistrate’s Court**
- [6] **The petitioner’s application is supported by** three Affidavits with supporting exhibits dated 25th September 2014, 15th December 2014 and 29th January 2015. The respondent filed two affidavits in reply with exhibits to the application for ancillary relief both dated 7th January 2015, she also called one witness, whose affidavit was dated 3rd December 2014.
- [7] The matter came up for trial and the deponents were all cross-examined.

[8] 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 petitioner on the 22nd February 2016 and on behalf of the respondent on the 8th December 2015 I will now render my decision.

RELIEF SOUGHT

[9] The petitioner seeks joint custody of the children of the marriage. He also seeks a property adjustment order. The respondent, on the other hand, seeks custody of the said children of the marriage plus maintenance and that the petitioner transfers his share and interest in the property located at Lot 23, Layou Housing Scheme which is currently jointly owned by the parties.

[10] The questions to be considered are:

- a. What is the entitlement of each of the parties as it regards their respective interests in the matrimonial home?
- b. Should the husband pay the increased amount for maintenance of the children of the family?
- c. What order for custody should be made as it regards the children of the family.

THE LAW

[11] The applicable legislation is the Matrimonial Causes Act 1973 Section 25 which gives the court a wide discretion as it regards ancillary awards which include vesting the matrimonial home in the either or both of the parties names and to direct the sale of the matrimonial home or to direct that either party pays 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.**"*

[12] In considering applications such as the one in the case at bar the court is cognizant of the need for a just and practicable result having regard to the circumstances of the case.

[13] In the English case of *White v Whiet*², Lord Nicholls of Birkenhead. in considering similar legislation, gave excellent guidance to the court in matters such as the case at bar. He said

"Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles... If, in their different spheres, each contributed equally to the family, then in

²[2001] 1 AC 596

principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer. ...

Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination"³

[14] 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*⁴ as has been applied in cases of this nature in our jurisdiction.

[15] In looking at the element of fairness in ancillary proceedings in divorce Lord Nicholls 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, homemaker, and child-carer. Mutual dependence begets mutual obligations of support. When the marriage 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.

[16] Lord Nicholls also 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

³ Ibid at page 605

⁴ [2006] UKHL 24

⁵ Ibid paragraph 11

*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”.*⁶

[17] It is now well established in our jurisdiction that there is to be no discrimination when assessing the roles of husband and wife.⁷

The property at Layou

The acquisition:

[18] The petitioner averred⁸ that the matrimonial property is owned by him and the respondent jointly. That at the time that property was purchased they were not married, however, the respondent signed her name to the documents as “Lisa Maxime”. The Certificate of Title to the property was exhibited.

[19] Learned Counsel Mrs. Dyer Munro on behalf of the petitioner asked the court to take note that at the time the property was acquired that the respondent signed a false name and asked the court to be cognizant of the fact that before, it is an application for ancillary relief by a respondent regarding property which she obtained dishonestly and fraudulently.

[20] It is important that there is a ruling on this point immediately. From the evidence before the court, it **is clear that the respondent’s name appears as Lisa Maxime** on the certificate of title. It is also clear that this was also done prior to their marriage when she was, in fact, Lisa Mondesire and that **this was done with the Petitioner’s knowledge and agreement** as there is no evidence to show that she acted solely, the petitioner was clearly a party to this transaction.

⁶ Ibid at paragraph 16

⁷ 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.

⁸ See Petitioner’s affidavit in support of Application for ancillary relief filed on the 25th September 2016.

[21] From his evidence, he said that when he first applied for a lot he was denied and then he applied a second time with the respondent she then calling herself Lisa Maxime even though they were not married. Therefore, if as Counsel for the petitioner submitted there was fraud and dishonesty clearly the petitioner was involved in it. He cannot therefore now seek to use that against the respondent.

[22] The case of *Gascoigne*⁹ whilst it is not on all fours with the case at bar is applicable provides some guidance. In *Gascoigne*, a husband brought an action against his wife for a declaration that she was a trustee for him of certain leasehold property. Whilst living with the wife the husband took a lease of the said land in her name and built a house on it with his own money. He was at that time of obtaining the lease in debt to money-lenders and with his wife's knowledge and connivance he put her forward as the lessee, with the object of protecting the property from his creditors. The husband and wife subsequently separated, and on her refusal to assign the lease to him he brought the action.

[23] The wife had never entered into any agreement to hold the property as trustee for the husband and claimed that having regard to the fact that the relationship between them was that of husband and wife, the presumption was that the conveyance was intended as a gift to her. The only fact relied on by the husband as tending to rebut that presumption was that the lease **was placed in his wife's** name solely to defeat his creditors. The husband succeeded in the county court.

[24] On appeal by the wife, it was argued by Counsel for the husband that the wife ought not to be allowed to set up the presumption of advancement where she was equally guilty with the husband. Counsel submitted that where the guilt of both parties is equal the Court should decide according to the true facts, and the real intention was that there should be a resulting trust in the husband's favour. The court held that the husband could not be permitted to set up his own illegality and fraud to rebut the presumption of advancement and his suit failed. The reasoning of the court as delivered by Lush, J. is instructive: -

⁹([1918] 1 K.B. 223)

"Now, assuming that there was evidence to support the finding that the defendant was a party to the scheme which the plaintiff admitted, but without deciding it, what the learned judge has done is this: He has permitted the plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this; and, whether the point was taken or not in the county court this Court cannot allow a judgment to stand which has given relief under such circumstances as that. If authority is required for the proposition that relief cannot be granted in such a case as this, there is ample authority to support it." (Emphasis added)

[25] *Gascoigne*, despite its vintage, has been held to be still good law and the case was expressly approved of by the English Court of Appeal (Lord Denning MR, Lord Salmon LJ and Cross LJ.) in *Tinker v. Tinker*³. In that case, a husband bought a garage business in Cornwall and found a house nearby for his family. His evidence was that first he intended to buy the house in his own name, but that he was advised by his solicitors that if the new business venture, of which he had had no experience, should fail, the house could be taken by his creditors as part of his business assets, that the solicitors recommended that it should be put in his wife's name and that that was explained to his wife by the solicitors. The house was bought in the wife's name and conveyed to her. Nine days after that, the marriage broke down. The husband applied to the registrar under section 17 of the Married Women's Property Act, 1882 for, *inter alia* a declaration that the wife held the house in trust absolutely for him. The registrar found that the husband was an honest businessman intending and able to honour his financial commitments. He held that he had rebutted the presumption of advancement, and so made the declaration asked for.

[26] On appeal by the wife it was held, allowing the appeal, that as the husband had been found to be an honest man acting sensibly and on good advice when embarking on a new and risky business, he must have genuinely intended that the house should belong to his wife because that was the only honest intention he would have. Accordingly, the house belonged to the wife absolutely. These cases were applied in our courts in the *Toovey Case*¹⁰ in the British Virgin Islands and I propose to do the same here. **Mr. Maxim was complicit in his wife's deception and in the**

¹⁰BVIHCV0067/2006

circumstances he cannot now want to use her action for which he was a part against her and in the circumstances I hold that the respondent is a part owner of the matrimonial property.

[27] It is also to be noted at the time that the property was acquired and mortgage taken from the bank the parties before the court even though they were not married they were in a relationship that had already borne two sons which is taken as evidence of commitment on each of their parts.

[28] Therefore the question to be decided is solely what percentage of the matrimonial property belongs to the respondent.

[29] **It is the petitioner's** case that he has always solely paid the mortgage for the property in the sum of \$1,300.00 per month from the time of the purchase of the property up to the time of his swearing the affidavit. The petitioner contended that the respondent has never made any contribution to the payment of the mortgage.

[30] The respondent, on the other hand, insisted that she sent money over to the petitioner to assist with the mortgage payments and to assist in the expenses of building the additional apartment on the house. The respondent called a witness in the person of Mrs. Priscilla Stephens who told the court that she brought the monies from Guadeloupe to the petitioner on behalf of the respondent.

[31] This witness said in her evidence that she brought money every month from the respondent to the petitioner from the year 2000 to 2011. Under cross-examination she initially insisted that she brought the money and took it to the petitioner at the Garraway Hotel and sometimes she met him on the port. When confronted with the fact that the petitioner was not in fact in Dominica in 2009 that he was, in fact, working on a cruise ship she then agreed that she could not have brought money to Dominica in 2009 as she initially stated.

[32] I observed Miss Stephens very closely when she gave evidence in the witness box. I did not find her to be a credible witness. I found that her evidence was tailored not to assist the court but to assist her friend. I, therefore, attach no significant weight to it.

[33] It is **the petitioner's contention that the respondent has never really worked and was never** in any position to send money to him in Dominica and that she had in fact been living on an allowance paid to her by the French Government.

[34] The petitioner also contended that he not only solely paid the mortgage but he made maintenance payments to the respondent for the children of the marriage as ordered by the magistrate's court.

[35] **I do not accept the respondent's evidence that she sent €600** to Dominica every week as if this were so the mortgage would have been long paid and I do agree with the submission of learned counsel Mrs. Dyer Munro when she submitted that under cross-examination the respondent admitted that she received money from the French Government because she could not afford to look after her children.

[36] Further, **I do not accept the evidence of the respondent's witness that she brought money** every month to the petitioner from the respondent. I find as a matter of fact that the respondent did not send the money from Guadeloupe to the Petitioner as she was seeking to persuade the court.

[37] **Having not accepted the respondent's evidence that she sent money to Dominica on a** weekly or regular basis to the respondent how does this impact upon **the court's decision** regarding the entitlement to the matrimonial home?

[38] I find as a matter of fact that the husband has been more or less solely responsible for the payment of the mortgage of the matrimonial home. Does this fact allow the court to diverge from the principle of equality? I think so.

[39] In deciding what is fair, the court ought to consider equality, this, however, is not a rule but an aid to the court in its considerations. In the case at bar, the court has formed the view that the respondent on more than one occasion was economical with the truth to the extent that the court cannot make a reasonable assessment as to what is her true financial

position. Her evidence totally failed to persuade me that she made the contributions to the mortgage as she represented it.

[40] She has asked this court to accept evidence that over the years she has been working as a huckster and making enough money to sent money to her husband on a weekly basis and at the same time making a case to the French authorities that she was unable to make sufficient money to support her children, that she and her children even lived in accommodation provided by the French authorities for her children. She told this court under cross-examination that “ ... **In order to receive the maintenance ... I have to show the French Government that I am unemployed first of all.**” At another time whilst undercross-examination **she also agreed with Counsel Dyer Munro’s suggestion** that she was receiving maintenance because she was not earning enough to support her children. She said, “**I agree that If you are working and receiving and it is because your income is not enough to support the children.**”

[41] The Petitioner has maintained that the respondent has not been employed as she claims.

[42] It has been held in our jurisdiction that the fundamental purpose of a property adjustment order is that in order to adjust the financial position of the parties the financial position of the parties should be known. In the circumstances of this case, the court is unable to make a clear finding as to what **is the respondent’s financial position and that is based primarily on her failure to be entirely truthful** with the court.

[43] Faced with this unsatisfactory state of evidence this court is constrained to do the best it can to achieve fairness. Taking all of the available family assets as a whole and bearing in mind the factors enumerated in section 25 of the Matrimonial Cause Act the court will seek to see what is **the respondent’s interest in the property.**

[44] The petitioner asks this court to either award the respondent no interest in the property and if in the event that the court is minded to make an award of interest in the property that the court should award her 12% share in the property.

[45] The respondent's submissions are way out on the other end of the spectrum, she is asking this court to award her 70% interest in the house.

[46] Now the respondent's evidence that she sent money to Dominica to pay for the house and all necessary things in Dominica has already been rejected by this court. Therefore it is clear that she will not be awarded a 70% interest as she wishes. She does, however, have a beneficial interest.

[47] When the house was purchased, the petitioner and respondent were involved in a relationship which at that time had produced two children, from the evidence it is clear that they both made the application for the property and for the loans at the bank resulting in the loans being granted and the Certificate of Title being awarded to the both of them.

[48] I am satisfied that the relationship at the time of the purchase of the house was intended to involve the same degree of commitment which culminated in them being married and bringing two more children into the family.

[49] The cases of *Wilson v Wilson*¹¹ and *Petit v Petit*¹² deal with this issue. In the *Petit* case,¹³ Lord Upjohn had this to say at

"In the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her but if he puts it into joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficiary tenancy..."¹⁴

[50] The title of the matrimonial property, in this case, is in the joint names of the petitioner and the respondent. The legal effect of the conveyance in their joint names was to give both parties a share in the property; it is clear from the facts as found in this case that it should not be in equal shares. In matrimonial cases, each one is determined on its own merits having regard to certain factors.

¹¹[1963]2 ALL ER 447

¹²[1969]2 ALL ER 385

¹³ *ibid*

¹⁴ *Ibid* at page 407:

[51] Having regard the decision in Petit¹⁵ and to the other authorities put forward by both learned counsel, and having regard to all the evidence adduced both by way of affidavit and viva voce evidence under cross-examination, and having taken into consideration all the factors as laid out in the Matrimonial Causes Act¹⁶, and doing the best that can be done in the circumstances of this case to try and achieve a fair result, it is **the court's considered view** that the respondent is entitled to a 20% interest in the matrimonial home.

[52] The respondent admits to living in Guadeloupe and the petitioner by court order has been barred from the matrimonial home, this is not fair to the petitioner considering all the circumstances of this case and I would, therefore, order that the respondent vacates the said home on or before the 30 January 2017.

[53] It is hereby also ordered that the petitioner pays to the respondent the 20% value of the house¹⁷ and that the respondent transfers her share of the house to the petitioner solely. Should the respondent fail to sign over her interest in the house to the respondent the registrar is ordered to vest the ownership of the matrimonial home in the name of the petitioner solely upon the petitioner paying to the respondent the 20% of the value of the said house.

[54] Likewise, should the petitioner fail to pay to the respondent the 20% value of the said house as ordered it is ordered that the said property is to be sold and the Mortgage paid off and the balance of the purchase price be divided 80% to the petitioner and 20% to the respondent.

[55] **As it regards the value of the house, it is noted that there are two valuations on the court's file** provided by the parties herein which are far apart and in the circumstances and in all fairness to the parties here in the court is minded to order that a fresh valuation be done of the premises by a Licenced Surveyor selected jointly by the parties herein and each party shall bear one-half of the cost of the said valuation.

¹⁵ Op cit

¹⁶ Op cit

CUSTODY OF THE MINOR CHILDREN OF THE MARRIAGE & MAINTENANCE

[56] During the course of the trial an order was made as it regards the visitation of the two younger children of the marriage.¹⁸ At that time, the children were resident in Dominica. Based on the nature of the relationship between the parties herein and the fact that the respondent and the children throughout the marriage have lived in Guadeloupe and upon the respondent informing the court that she and the minor children were now resident in Dominica and that they were living in the matrimonial home, I ordered *inter alia* that the respondent was not to take the children out of the jurisdiction without leave of the court.

[57] This order was never complied with culminating in the respondent taking the said children out of the jurisdiction without the leave of the court. The respondent has since appeared before this court and admitted that the children were taken back to Guadeloupe and is yet to ask the court to vary or discharge the said order.

[58] It is regrettable that the parties herein have not been able to work out their affairs as it relates to the minor children of the marriage as a perusal of the affidavits filed by both sides shows numerous allegations being made against each other as it regards the access to the children. The children are out of the jurisdiction of this court (in disobedience of the **court's order**) and out of the reach of the court and in the circumstances the court will decline to make an order as it regards the children at this time.

[59] From the evidence presented to the court, I am not satisfied that the respondent has any interest whatsoever in the motor vehicles as claimed by her and decline to make any order in that regard. Likewise, I decline to make an order against the respondent regarding the furnishings in the matrimonial home as the Petitioner has lived in the house and has enjoyed the use of same as has his children whenever they have been in the house. It would, therefore, be grossly unjust for an order to be made for the respondent to pay the petitioner for same.

¹⁸ See Order of Court dated 6th May 2015

[60] In relation to costs, the court has a wide discretion to order costs and usually costs follow the event but invariably in matrimonial matters, each party is ordered to pay his own costs.

[61] I would like to thank counsel for their helpful submissions made in this matter.

[62] Accordingly, judgment is granted in favour of the petitioner as follows:

1. A declaration that Petitioner is the entitled to 80% share in the matrimonial property located in Layou and registered in the names of both of the parties herein.
2. The said property is to be valued by a duly certified and registered surveyor either appointed by the court with the agreement of both parties or in the alternative that the parties agree to the appointment of a surveyor to provide the court with a valuation of the property. The cost of the survey shall be met equally by the parties herein.
3. That the petitioner shall pay to the respondent 20% of the value of the said property within 90 days of the valuation being obtained.
4. The respondent is to transfer her share in the said property to the petitioner upon her receiving payment from the respondent of the 20% value of the said property.
5. Should the respondent fail to transfer her share in the property to the petitioner absolutely and the petitioner has made the payment as ordered the Registrar is **ordered to transfer the respondent's share of the said property to the petitioner** upon proof that the petitioner has paid the 20% value as has been ordered by the court.
6. Should the petitioner fail to make the payment as ordered herein within the 90 days, the said property is to be sold at public auction, the mortgage paid off and the balance of the purchase price divided 80% to the petitioner and 20% to the respondent.
7. Each party shall bear his and her own cost.

M E Birnie Stephenson

M E Birnie Stephenson
High Court Judge