



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2016 No: 33

BETWEEN:

W. O.

Petitioner

and

S. O.

Respondent

JUDGMENT

Final Application for Ancillary Relief

Date of Hearing: 27 February 2019

Date of Ruling: 5 April 2019

Adam Richard of Marshall Diel & Myers Limited for the Petitioner
The Respondent, In Person, Failed to appear

JUDGMENT of Registrar, Alexandra Wheatley

Introductory

1. The parties were married for approximately 20 years. There are two children of the family aged 11 and 9 years old respectively. Whilst Decree Absolute was granted on 12 June 2017, the Respondent did not vacate the former matrimonial home located in Smith's Parish ("the FML") until October 2017. This was predicated upon the Petitioner

obtaining a Temporary Protection Order requiring the Respondent to vacate. The Petitioner has sole care and control of the children of the family.

2. The Petitioner filed an application for Ancillary Relief on 15 September 2017 (“the Application”) seeking: periodical payments for the children of the family, a lump sum payment, a property adjustment order in relation to the FML and such further relief as may be deemed appropriate.
3. The Respondent was initially represented by Counsel, but they subsequently made an application to be removed as attorneys of record which was granted. Despite numerous orders made by the Court by way of case management directions, the Respondent failed to comply with any terms. I am fully satisfied the Respondent has been served with every order the Court has made subsequent to his Counsel being removed as attorneys of record, as well as being satisfied he was served with the Notice of Hearing for this final hearing. Thus, resulting in the Respondent not filing any affidavit evidence and this hearing proceeding in his absence.

The facts

Petitioner’s position

4. The Petitioner’s evidence was clear, succinct and supported by documentary evidence. The Petitioner relied on her Affidavit sworn on 15 October 2018, as well as provided *viva voce* evidence at the hearing updating her financial position since the filing of her Affidavit. I have no reason to doubt the Petitioner has presented an accurate picture of her financial circumstances as well as her understanding of the Respondent’s financial position.
5. Since the Respondent vacated the FML in October 2017, he has been residing in his mother’s property which the Petitioner understands has been left to him free and clear of any debt. The Respondent has not made any contribution to the expenses of the FML since he vacated.
6. The Petitioner’s monthly income is approximately \$30,000 per month which she obtains from various roles. In Counsel for the Respondent’s letter dated 21 July 2017, the Respondent alleged his monthly income as being \$6,747 per month. Mr Richards reiterated the lack of evidence to support the Respondent’s income. The Petitioner also gave evidence that during the marriage, the Respondent at times earned between \$8,000 and \$10,000 per month. Her evidence is the Respondent is simply choosing not to earn the level of income he has previously been able to.
7. Furthermore, the Petitioner gave evidence the Respondent owns a taxi (and taxi permit) which he inherited from his father. Rather than taking advantage of the use of the taxi to earn extra income, the Respondent allows his brother use of it and the income produced is kept solely by his brother. Again, I have no reason to doubt the veracity of the evidence provided by the Petitioner and find the Respondent can be obtaining an additional source of income from the taxi if he chose to do so.

8. In regards to expenses, the Petitioner's evidence (see pages 250 to 252 of the Exhibits to the Petitioner's Affidavit) is that her monthly household expenses amount to \$14,012.45. This is inclusive of the mortgage secured against the FML which is approximately \$8,200.00 per month. The Petitioner lists her personal expenses as being \$5,894.00 per month. This sum includes monthly payments towards credit card payments which are currently maxed out. In terms of the children's expenses, the Petitioner presented them as being \$3,975.00 for each child; i.e. \$7,950.00 per month for both children. The large expenses for the children include \$2,000.00 per month for babysitting and \$3,350 for school tuition. Despite the babysitting expense seeming quite high, the Petitioner confirmed the Respondent exercises no access to the children and has not done so since separation. Therefore, the sole burden for their daily care rests with the Petitioner who has a professional employed position on a full-time basis. In these circumstances and given the high cost in Bermuda for child-care, this is a more than reasonable sum. The Petitioner's total monthly expenses are therefore \$27,856.45. As a whole, I accept all of the expenses presented by the Petitioner are reasonable, particularly given they have not been challenged in any manner by the Respondent.
9. Counsel for the Petitioner helpfully provided a schedule of matrimonial and non-matrimonial assets which are as follows:

Matrimonial Assets

Description	Net Equity
FML	\$197,233.25*
Land	\$301,150.25
Car	\$8,500.00
Boat	\$70,000.00
Respondent's Pension	\$133,858.00
Petitioner's Pension	\$46,000.00
Respondent's cash	\$85,000.00
Petitioner's cash	\$65,000.00
Credit Card Debt	(\$50,486.16)

*The value of the property in 2016 was \$1,275,000.00. Taking into account the current outstanding mortgage secured against the property which is \$917,962.00 and also taking into account the hypothetical costs of sale of \$94,474.75, the net equity in the property is \$262,563.25. However, the Petitioner's evidence is there are repairs/renovations which require immediate attention (whether she chooses to sell the property or reside there with the children) and the estimate for these to be completed are \$65,330.00; hence, the net equity in the property being calculated as being \$197,233.25. I accept this is an accurate reflection of the value of the FML.

Non-matrimonial Assets

Description	Net Equity
Respondent's Inherited property from his mother	\$1,000,000.00
Respondent's Taxi Permit	\$100,000.00
Respondent's Car Inherited from his mother	Unknown

10. The Petitioner is seeking to retain the lion share of the matrimonial assets based on the needs of the parties as well as given the Respondent's unpredictable income position. Mr Richards submitted the Respondent's needs are being met by him having obtained the inherited property which allows him to live rent/mortgage free and well as having adequate transportation. The Petitioner is therefore seeking the following matrimonial assets be transferred to her: the FML, the boat and the land. This is subject to the Respondent maintaining the status quo as it relates to the children by way of retaining them on his major medical insurance as well as paying 50% of the children's educational expenses. The Petitioner is also seeking that both parties be equally responsible for the costs of the children's tertiary education.

Respondent's position

11. The only evidence presented to the Court in respect of the Respondent's financial position was set out in a letter of his former attorneys dated 21 July 2017. This was exhibited to the Petitioner's Affidavit at pages 209 to 217. Whilst the Respondent disputed matters raised by the Petitioner, his position was not supported by any documentary evidence. Additionally, the Respondent failed to submit any evidence whatsoever in support of his financial position.
12. No correspondence or Affidavit evidence was sent to the Petitioner's attorneys or to the Courts at any stage after 21 July 2017, by either the Respondent's former attorneys or by the Respondent himself. The Respondent did not participate in the opportunity to appear in any case management hearings, which resulted in orders being made in his absence. Furthermore, the Respondent, despite having notice of his requirements set out in the Court orders to file Affidavit evidence, chose not to do so.

The law

13. I have a statutory obligation to have regard to all the components set out in Section 29 of the Matrimonial Causes Act 1974 ("the Act"). When assessing "needs" courts will have regard, in particular, to the matters set out in section 29(1):

"29 (1) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters -

- (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;*
- (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 contributions by looking after the home or caring for the family;*

.....
and so to exercise those powers 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.”

14. The Learned Chief Justice recently confirmed in his decision in *C.R.M.R v K.L.R* [2019] SC (Bda) 7 Div, the principle driving the determination of ancillary relief applications is that of fairness. He reiterated the leading authority on the distribution of assets continues to be *Miller v Miller; MacFarlane v MacFarlane* [2006] UK HL 24. At paragraph 29 the Learned Chief Justice stated as follows:

“29. ...*In order to give some content to the notion of fairness the judgments in Miller identified three strands: needs of the parties, compensation payable to one of the parties relating to relationship disadvantage and the sharing of matrimonial assets.*” [Emphasis added]

15. This is not a case where compensation arises and as such the two strands which I must address are those of needs and sharing. In *Miller v Miller; MacFarlane v MacFarlane* Lord Nicholls addressed these two strands as follows:

“11. ...*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...*

...
 16. “*A third strand is sharing. This “equal sharing” principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals...the parties commit*

themselves to sharing their lives. They live and work together. When the 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 made not a rule.”

16. The importance of addressing the needs and departing from the principle of equal sharing in lower value cases was addressed by Baroness Hale in *Miller v Miller; MacFarlane v MacFarlane* at paragraph 136:

“136. Thus were the principles of fairness and non-discrimination and the ‘yardstick of equality established [in White]. But the House was careful to point out (see p 605f) that the yardstick of equality did not inevitably mean equality of result. It was a standard against which the outcome of the section 25 exercise was to be checked. In any event, except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, equality of outcome is difficult both to define and to achieve. Giving half the present assets to the breadwinner achieve a very different outcome from giving half the assets to the homemaker with children.” [Emphasis added]

17. *Miller v Miller; MacFarlane v MacFarlane* also addressed the issue of inherited property being considered part of the matrimonial assets to be divided between the parties. The starting point is that inherited property should not comprise the pool of matrimonial assets for division; thereby, the principle of “fairness” (needs, sharing and compensation) is generally not applicable to inherited assets. However, in *White v White* [2001] AC 596, Lord Nicholls addressed in his case where there were minimal assets share and/or meet both parties’ needs. At paragraph 610, he stated as follows:

“610. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant’s financial needs cannot be met without recourse to this property.” [Emphasis added]

18. For the sake of completeness, I will address the issue of my ability to draw adverse inferences given the Respondent’s lack of participation in these proceedings. It is trite law that the failure of one party to provide full and frank financial disclosure in matrimonial cases, adverse inferences in respect of this non-disclosure can be drawn (see *Vernetta Mae Shelley Howe v Douglas Colby Howe (SC) No. 55 of 2012 (14 March 2016) at para. 30*). The Respondent’s failure to provide any financial disclosure whatsoever in this matter is a clear-cut case where this principle applies.

Applying the facts to the law

19. The Petitioner's evidence was clear and succinct. I have no reason to doubt the reliability of her evidence. The Respondent's failure to produce any evidence to contradict the Petitioner's position merely heightens my acceptance of the Petitioner's evidence and also allows me to draw adverse inferences in relation to his financial circumstances.
20. This is not a matter where there is a large pool of matrimonial assets and/or income to "share" between the parties. As such, the needs of the parties, particularly those of the children of the family must be put at the forefront. It is clear that an equal division of the matrimonial assets between the parties would put the Respondent in a far superior financial position given his inherited assets and would leave the Petitioner and the children of the family without a roof over their heads. Therefore, a departure from equality is necessary to meet the needs of both parties. Furthermore, given the limited matrimonial assets, there is also great justification for departing from the principle that inherited property would not normally be taken into consideration in the division of matrimonial assets.
21. The Respondent's inherited property has placed him in a position where his needs are fully met by a residence, which is free and clear from any debt and consists of 3 bedrooms, 2 bathrooms, a dining room, a living room and a kitchen. This residence is located on a lot of land which is approximately .25 acres of land and has a minimum value of \$1,000,000.00. The Respondent also inherited a car for transportation and owns a taxi, the permit for which alone is worth approximately \$100,000. The Respondent also has \$85,000 in cash which he unilaterally withdrew from the parties' joint account, leaving \$65,000 in the account. The Respondent also has a pension of \$113,858.00 in comparison to the Petitioner's pension of \$46,000.00.
22. The Respondent's household expenses and personal expenses would be minimal, particularly given that he does not have any care of the children. The only expense the Respondent is currently paying for the children is for one of the children's school fees and is retaining them on his major medical insurance.
23. The Petitioner is currently residing in the FML with the two children of the family which has a net value of \$197,233.25, the land in her name with a net value of \$301,150.25, a car with a value of \$8,500, and cash of \$65,000; however, she has credit card debt of approximately \$50,500, which means if she were to retain these assets, the total value of assets she would retain would amount to \$521,383.50. If the Petitioner were to retain the boat, this would increase her net asset position to \$591,383.50.
24. In comparison, an equal division of the matrimonial assets would provide the parties each with \$386,877.67, which would clearly require the sale of the FML and the land. This would leave the Petitioner and the children without a home when the Respondent now has a property free and clear, which has a minimum value of \$1,000,000.00. This would not produce fairness and would neither meet the needs of the Petitioner, nor (and more importantly) the children of the family.

Conclusion

25. I fully accept both parties' needs, including the children of the family, are fully met based on the proposal for the distribution of capital assets made by the Petitioner. This means the Petitioner shall retain the following matrimonial assets: the FML, the Land, the car and the boat. In the event the Petitioner wishes to sell any of these assets and the Respondent is required to sign documentation to complete the transfer, in the event he fails to sign the documents within seven days of being requested to do so, I shall have the ability to sign on his behalf to give effect of the transfer.
26. Additionally, each party shall retain any assets in their respective sole names and/or which are currently in his and her possession, save for that the Respondent shall transfer the database of family photographs which is currently in his possession to the Petitioner forthwith.
27. The Respondent shall continue to pay for half of the children's private tuition fees as well as continue to retain the children on his major medical insurance policy. For the avoidance of doubt, I do not accept this contribution truly reflects what the Respondent should be providing for the direct and indirect expenses of the children in accordance with the law; however, the Petitioner believes the Respondent's employment position is unstable and as such, any reliance on what would be an appropriate contribution of child maintenance could be detrimental to her ability to cover the expenses necessary to care for the children. As such, I have ordered the status quo to continue also taking into consideration the Petitioner will be retaining the lion share of the matrimonial assets.
28. Furthermore, the Respondent made no contribution to the expenses of the FML for the 17 months following his vacating of the property. This left the Petitioner with the sole burden of paying the monthly maintenance expenses of the property which are as follows: Mortgage - \$8,200; Landscaping - \$255; Land Tax - \$112; Pool - \$355; and House Insurance - \$344. Therefore, the total monthly expense being \$9,621. On the assumption the parties contributed equally to this expense during the marriage, the Respondent's 50% share of this cost is \$81,778.50 (\$9,621 multiplied by 17 months = \$163,557, divided by 2 = \$81,778.50). Given the Respondent's asset position now being greater than that of the Petitioner, I believe it only reasonable taking into account the principle of fairness and needs, the Respondent pay a lump sum to the Petitioner of \$81,778.50. This lump sum shall be paid to the Petitioner within 30 days from the date hereof.
29. Given the Respondent's complete lack of participation in the Application and indeed not complying with any orders made by the Court, I will award costs to the Petitioner on an indemnity basis, to be taxed if not agreed.

5 April 2019

ALEXANDRA WHEATLEY
REGISTRAR FOR THE COURTS OF BERMUDA