



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2015 No: 8

KLM

Petitioner

-and-

RPSMM

Respondent

JUDGMENT

(In Chambers)

[Ancillary Relief]

Date of Hearing: 17th October, 2016

Date of Judgment: 26th May 2017

Mrs. Georgia Marshall, of Marshall Diel Myers for the Petitioner

Mrs. Karen Williams-Smith of Trott & Duncan, for the Respondent

Introduction

1. This judgment follows the hearing of the wife's ancillary relief application. By way of Notice of Application for Ancillary Relief dated 13th May 2015 the Wife seeks lump sum provision, a property adjustment order in relation to the former matrimonial home, and a property adjustment order in relation to a jointly owned business.
2. The Wife application is supported by three affidavits :-

- i. First Affidavit of 15th May 2015;
 - ii. Second Affidavit of 11th September 2015, and
 - iii. Third Affidavit of 6th July 2016.
3. The Husband filed one affidavit dated 19th November 2015.

The issues

4. The issues to be determined in this case relate to the valuation of the former matrimonial home ('FMH') and what property adjustment order, if any, ought to be made in relation to the parties jointly owned business ('the Business') and FMH.

Background Facts

5. The Wife is aged 52 years and the Husband is aged 60 years. The parties separated in 2014 after a relationship of approximately 30 years during which they enjoyed a good standard of living. There are no children of the marriage. Decree Nisi was pronounced in June 2015 and made Absolute in August 2015.
6. Early in the marriage, the Husband suffered mental health challenges. However, with the use of medication, he was able to maintain a stable mental state for some twenty years. During those years, the parties jointly acquired the FMH and established and operated the Business employing a number of staff.
7. In or about 2013 the Husband on his own accord stopped taking his medication. His mental health deteriorated resulting, *inter alia*, in threatening and aggressive behaviours often toward the Wife, members of staff and clients.
8. Upon separation in 2014, the Wife went to live with her elderly mother. Unfortunately, the Husband's threatening and aggressive behaviours toward the Wife became so distressing that it became necessary for her to shield her mother by moving into rental accommodations.

9. Early in 2015, the Husband's threatening behaviours escalated to such an extent that the Wife successfully applied to the Court for a Protection Order restraining the Husband from threatening and harassing her, including, *inter alia*, restricting his access to the Business premises, and restraining him from accessing the Business bank accounts, pending the resolution of these ancillary relief proceedings.
10. By Consent Order dated 2nd June 2015, the Husband was ordered, *inter alia*, to produce through his attorneys, an updated psychiatric report. At the date of this hearing the report was neither produced to the Wife's attorneys nor to this Court.
11. Since about April 2015, the Wife effectively operated the day-to-day running of the Business due in part to the Husband's deteriorating mental state and the Court ordered restrictions imposed on his access to the Business premises.

The Matrimonial Assets

12. There is no controversy in this case regarding the creation of the assets. It is agreed that all assets were created during the marriage by reason of the joint endeavours of the Husband and Wife.
13. The assets consist of a jointly owned property in North Carolina, USA. It was purchased a number of years ago for \$55,000. The property is free of any debt and clear of any encumbrances. It is currently occupied by the Husband's sister. The Wife contends that similar houses along the same street have recently sold for approximately US\$70,000. The Husband contends that the current value would be far less than \$70,000. It is agreed that the Husband will retain this property.
14. The parties jointly own a jeep motor vehicle. This motor vehicle remains in the Husband's possession. It is owned free of any debt. The agreed value of this vehicle is approximately \$52,000 and that the Husband will retain it.
15. The Husband owns a Harley Davidson motor cycle held in storage in the USA. The Wife contends that the value of the Harley Davidson is \$20,000. The Husband contends that \$20,000 is a generous valuation and assigns a

value in the region of \$12,000 - \$15,000. It is agreed that the Husband will retain this motor cycle.

16. The Wife owns a second hand motor vehicle for which she paid \$47,000 upon vacating the former matrimonial home in 2014.
17. Upon separation in June 2014, the Husband and Wife divided on a 50/50 basis their joint bank account savings and the value of their life insurance policies, with each retaining approximately \$435,000.
18. It is agreed that the contents of the FMH will be shared equally or sold. If sold, the proceeds of sale would be divided equally between the parties.
19. The remaining assets available for distribution, the subject matter of these proceedings, are:-
 - a. The Business, and
 - b. The FMH

The Business:

20. The parties jointly established and operated the Business which offers wellness solutions to clients. The Wife had responsibility for the administration and management of the company including Human Resource matters, banking, accounting and day-to-day operation of a specific wellness program. The Husband was tasked with 'hands-on' functions and responsibilities including day-to-day interfacing with clients, maintaining equipment and controlling inventory of Business related merchandise.
21. The ownership of the Business is held 60% by the Wife and 40% by the Husband. Notwithstanding the legal share ownership, the Wife acknowledges that the parties operated the Business as joint and equal partners.
22. The Business was financially supported by the Wife's family who raised in excess of \$1,000,000.00 so that upgrades could be made to equipment and the rental premises from which the Business operates. The parties agree that

there would be no Business but for the financial assistance provided by the Wife's family.

23. A business valuation report dated June 2016, prepared by a chartered surveyor on the joint instructions of the Husband and Wife, estimates a fair market value of the Business to be \$1,265,791. At the time of the hearing, this valuation was not disputed.

The Former Matrimonial Home:

24. The parties jointly own the FMH. The home was purchased in 2006 for \$1,850,000.00 and is subject to a mortgage in favour of Clarien Bank Limited outstanding in the sum of approximately \$800,000. The monthly mortgage payment was some \$12,300.
25. As set out in the Realtor's sale listing, the FMH is described as having 180 degrees of stunning ocean views – "*Sit a while and enjoy this view to the distant horizon where ocean meets sky – see birds soar, boats sail, watch weather change, sun-sets and moon rise*". The FMH was designed for entertaining with all the living areas accessing the pool deck. The house is said to be in pristine condition.
26. From the date of separation in June 2014 until May 2015 all mortgage payments were met from savings funds held by the parties in their joint bank account.
27. Subsequent to the Wife vacating the FMH the Bank agreed to receive interest only for a period of six months. Interest only payments commenced in or about December 2014.
28. In June 2015 the outstanding mortgage balance was re-amortized bringing the monthly payment down to \$7,046. At that time a property appraisal valued the FMH at \$1,595,000.
29. Soon thereafter the parties entered into a listing agreement with a Realtor to list the FMH for sale at \$1,795,000.

30. In or about April 2016 the Husband insisted on a non-negotiable sale listing significantly greater than the property valuation appraised by the Realtor.
31. In or about June 2015, when the joint savings funds were depleted by the mortgage payments, the Husband took over the full monthly payments.
32. By agreement, the Wife continues to meet 100% of the property insurance whilst the Husband pays 100% of the land tax.

The Parties Position

The Wife's Position:

33. The Wife currently lives in rental accommodations for which she pays \$3,500 per month. She contends that the Husband has been behaving in a manner detrimental to their joint income.
34. The Wife's position is that all of the assets are matrimonial assets subject to an equal distribution between the parties. She proposes that the FMH should be listed for sale per the Realtor's valuation of \$1,795,000 and that in the meantime the FMH should be rented as soon as possible.
35. The Wife contends that the rental income generated should be used to meet the monthly mortgage payment of \$7,046 and that any sum remaining should be divided equally so that the parties may meet their ongoing needs, including the costs of their respective rental accommodations.
36. In respect of the Business, the Wife proposes that she should retain it at a value of \$1,265,790. On this basis, the Wife proposes that depending on the final sale price of the FMH, she will make an equalization payment to the Husband. In other words, she and the Husband would equally share the net equity of the FMH and share 50/50 the value of the North Carolina property, the Jeep, the Harley Davidson and the value of the Business.
37. The Wife put forward the following calculation to illustrate her proposal:-

a. <u>If</u> the FMH sold for	\$1,795,000
Less: Legal fees	\$ 5,106

½ Stamp duty	\$ 42,325.00
Real Estate commission	\$ 89,750.00
Outstanding mortgage	\$ 800,000.00
Net equity	\$ 857,819.00

i. North Carolina property	\$ 70,000.00
ii. Jeep motor vehicle	\$ 52,000.00
iii. Harley Davidson	\$ 17,500.00

	+	
The Business value		\$1,265,790.00
Total net asset value		\$2,263,109.00
<i>Divided 50/50</i>		<i>÷ 2 (Husband and Wife)</i>
Each party receiving		\$1,131,554.00

38. Mrs. Marshall submitted, *inter alia*, that in the above illustration i.e. if the FMH sold for \$1,795,000 and the Wife retained the Business at the value of \$1,265,790, she would distribute to the Husband an equalization sum of \$134,235, calculated as follows:- \$1,265,790 less \$1,131,554 = \$134,235.50.

The Husband's Position:

39. As of the date of the hearing, the Husband continues to reside in the FMH. He maintains the property in pristine condition.
40. The Husband's position as set out in his affidavit dated November 2015 is that if the Realtor advises that the current market price is too high he is more than prepared to consider reducing the listing price of the FMH. The Husband also contends in his affidavit that he is more than prepared to consider selling his shares and shareholder rights in the Business.

41. In an email exchange with the Realtor dated April 2016, the Husband's position was that the FMH should be listed for sale at \$2,250,000 and that the Business was available for sale at \$3,500,000.
42. In a subsequent email exchange with the Realtor dated June 2016, the Husband expressed the following: - *"...I am going to set something perfectly clear once and for ALL –and that is my price is at \$1.95 mil. And it is absolutely not negotiable and with due respect to all you judges of the earth that is my price, so unless they agree to my terms and conditions please don't waste my precious time otherwise!!!"*
43. Notwithstanding these variances, Mrs. Williams-Smith, Counsel for the Husband accepted, depending on the actual sale price of the FMH, the totality of the net assets figures put forward by the Wife's Counsel. Although, Mrs. Williams-Smith contends that an adjustment should be made having regard to the fact that the Husband paid the monthly mortgage for the FMH from January 2015 to date.
44. Mrs. Williams-Smith urged the Court to consider the length of the marriage, the Husband's age, his mental health challenges, and the investment made by the parties into the Business. Mrs. Williams-Smith submitted that to allow the Wife to retain the Business would negatively impact the Husband's mental health.
45. Mrs. Williams-Smith submitted that having regard to the lengthy duration of the marriage and the parties joint investment into the business, the fair way would be to liquidate the FMH and the Business and then divide the net proceeds equally to enable the Husband and Wife each a fresh start.

The Law

46. On an application for ancillary relief, the Court has power pursuant to Sections 27 and 28 of the Matrimonial Causes Act 1974 ("the Act") to make any one of the following orders:-
 - Periodical payments, for such period of time, as the court determines;
 - Lump sum or sums as may be determined by the court;

- Lump sum provision for the benefit of a child;
- Transfer of property to the other party, to a child of the family, or to a third person for the benefit of a child of the family;
- Settlement of specific property for the benefit of the other party and/or children of the family;
- Variation of any nuptial settlement or trust which was established for the benefit of a party to the marriage

47. In deciding whether to exercise such power, the Court has a duty under Section 29(1) of the Act to have regard to all the circumstances of the case, including the various factors specified in paragraphs (a) to (g) of that section.

48. Section 29(1) obliges the Court so to exercise its 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”.

Applicable Principle

49. In exercising this statutory duty, the Court must strive to reach an overall outcome which is fair to each party as identified in the decisions of the House of Lords in White v White [2001] 1 AC 596 and later developed in Miller v Miller; McFarland v MacFarlane [2006] UKHL 24, [2006] 2AC 618.

50. Lord Nicholls in White v White at 605 G proposed the following approach:-

“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 will always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should only 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 upon the need to ensure the absence of discrimination”

51. Lord Nicholls went on to stress that the ‘yardstick of equality’ should not be treated as a starting point, but simply as a form of check as opposed to a legal presumption of equal division.

Conclusion

52. In my judgment, this is a case which could have been very easy to settle. Settlement affords parties confidentiality and an opportunity to take ownership of the outcome rather than undergo the immense stress of court proceedings and a Court imposed order.
53. In preparing this judgment, I have had regard to all the circumstances of this case including the matters specified in paragraphs (a) to (g) of Section 29(1) of the Act, as well as the relevant case law.
54. I have carefully considered all of the affidavit evidence of the Wife and Husband, and taken full account of the submissions of Counsel, when reaching my decision.
55. Sadly, the Husband’s mental health has deteriorated in recent years and perhaps provides some explanation for the variances in his position throughout these proceedings.
56. Thankfully, there is agreement regarding the nature and creation of the matrimonial assets. It is agreed that the assets were built up during the marriage by reason of the joint endeavours of the Husband and Wife.
57. Therefore, I am satisfied to treat the parties as having made equal contributions during the course of their marriage, save for the significant

financial contribution made by the Wife's family to the Business. I will deal with this contribution later in this decision.

58. Given that Mrs. Williams-Smith, Counsel for the Husband accepts, depending on the final sale price of the FMH, the totality of the net assets put forward by Mrs. Marshall, Counsel for the Wife, I am satisfied to conclude that the total value of the assets agreed to be retained by the Husband is \$139,500; comprising \$70,000 (North Carolina house) + \$52,000 (Jeep) + \$17,500 (Harley Davidson). It would be fair that the parties share equally the total value of such assets.
59. In respect of the valuation of the FMH, the Court's view is that the true value of this property can only be ascertained when it is sold. Consequently, I am satisfied to conclude that the Wife's proposal that the parties share equally the net equity of the sale of the FMH, is fair in all the circumstances.
60. In light of the Husband's failure to produce at the hearing of this matter the ordered updated psychiatric reports, his current mental state is unknown. In this circumstance, I consider it fair to the overall outcome of these proceedings that the Wife should have sole conduct of the sale of the FMH including the ability to list for sale, to negotiate and accept any offer within 90% of the listing price. In my judgment, any reasonable sale price within those parameters does not require any further sanction of this court.
61. Moreover, I consider it fair in all the circumstances that the Husband should vacate the FMH within 60 days so that the FMH may be rented pending its sale, to create an income stream which could be used to meet the monthly mortgage payments and other outgoings of the property, including property insurance and land tax. In my judgment, any surplus income should be shared equally.
62. I am also satisfied to conclude that given the significant financial contribution of \$1,000,000,000 by the Wife's family by way of borrowed monies, it would be fair in my judgment that the Wife should retain the Business and any associated debt.

63. On the basis that the Wife will retain the Business, I accept Mrs. Marshall's submission that it would be fair in all the circumstances of this case that the Wife makes an equalization payment to the Husband. The calculation of this equalization payment can only be determined upon the final sale of the FMH, as only then will the net equity of the FMH be known.
64. The payment of this equalization payment should be made immediately upon the completion of the sale of the property.
65. The Registrar of the Supreme Court is empowered to sign on the Husband's behalf any and all agreements necessary for the transfer of shares in the Business and such other documents required to complete the sale and or rental of the FMH including the property conveyance.
66. I turn now to whether any adjustment ought to be made as a consequence of the Husband making 100% of the monthly mortgage payment since January 2015 to date. In my judgment, this amount is *De Minimis* given that the Husband will receive one half of the benefit upon the final sale of the FMH. I therefore decline to make any such adjustment.
67. In practical terms, having considered all the evidence including the Husband's age and health, I am concerned that he may struggle with the realities of this decision. I mean no disrespect to the Husband when expressing this concern.
68. The Husband is strongly encouraged to seek professional assistance to treat his mental disorder, which hopefully will improve his quality of life and give him the necessary tools to fully appreciate this decision. The Wife might well benefit from some counselling to cope with the stress in all the circumstances.
69. I invite Counsel to prepare an order for the Court's approval.
70. I shall hear from the parties as to costs and as to any further directions which may be required for the implementation of this judgment.

71. Lastly, I wish to thank Mrs. Williams-Smith, Counsel for the Husband and Mrs. Marshall, Counsel for the Wife, for their professionalism and compassion displayed in these proceedings.

Dated this 30th day of May, 2017



Stoneham J