

IN THE SUPREME COURT

Family Division

BETWEEN

B.K.

Petitioner

AND

C.K.

Respondent

Before: The Honourable Justice Mr. Andrew Forbes

**Appearances: Mrs. Shavanthi K.Griffin-Longe on behalf of the
Petitioner**

Mrs. Carla Scott-Clare on behalf of the Respondent

Hearing dates: 4th May 2022; 30th June 2022 & 27th July 2022

DECISION

FORBES, J

1. These parties are before the Court following an application by the Petitioner seeking settlement of the matrimonial home pursuant to sections 28 (1)(b) and 29(1) and (2) of the Matrimonial Causes Act. The Court had the opportunity to hear from the Petitioner and Respondent as they gave evidence by way of their respective filed Affidavits and cross-examined from the witness box. Following this, the Court indicated it would reserve its decision and now renders it.

BACKGROUND

2. The Petitioner and Respondent were married on the 27th November 1998, in the City of Freeport on the Island of Grand Bahama one of the Islands of the Commonwealth of the Bahamas. There are no minor children of the marriage as their only child is sui juris. The petition to dissolve the marriage was heard on the 24th February 2015 and the marriage was dissolved by reason that since the celebration of the marriage the Respondent treated the Petitioner with cruelty. During the marriage, the Petitioner and Respondent jointly occupied the matrimonial home situated 260 John Rutt Court, Hudson Estate in the City of Freeport on the island of Grand Bahama (“the Matrimonial Property”).
3. The Petitioner re-filed her Notice of Application for Ancillary Relief on the 25th June, 2021 for an Order that there be settlement of the matrimonial property; a Declaration pursuant to section 73(1)(a) of the Matrimonial Causes Act and that each party bear their respective costs of the proceedings. In support of her application for Ancillary Relief, the Petitioner filed her Affidavit of Means on the 1st July, 2021; Supplemental Affidavit on the 10th December, 2021; Supplemental Affidavit of Petitioner (No. 2) on the 9th June, 2022 and an Affidavit in Response to Affidavit of the Respondent on the 27th July, 2022.
4. The Respondent filed his Affidavit of Means on the 14th December, 2021; Supplemental Affidavit on the 2nd June, 2022 and Supplemental Affidavit 2 on the 25th July, 2022.

EVIDENCE

5. The Petitioner's evidence in part as found throughout her filed Affidavits is:-

- a. *That in or around 2013 she left the matrimonial home with the child of the said marriage who is no longer a minor;*
- b. *That when she left the matrimonial home she could not afford to pay rent because \$900.00 per month was deducted from her salary towards the mortgage over the matrimonial home;*
- c. *That she currently lives at her mother's home in Eight Mile Rock, Grand Bahama and commutes daily from Eight Mile Rock to Freeport for work;*
- d. *That she is currently employed as an Administrative Assistant at the Public Hospitals Authority in Freeport, Grand Bahama, her gross monthly salary is \$2,775.00; her monthly expenses are \$2,960.00; her annual income is \$33,300.00 and her annual expenses are \$35,520.00;*
- e. *That the Respondent is 65 years old. In or about 2019 he retired from the Grand Bahama Shipyard where he was their Purchaser and received a lump sum from the company, that at that time the Respondent had enough money to pay off his portion of the mortgage but instead was careless and reckless with his money;*
- f. *That she and the Respondent jointly own the matrimonial home, the home was originally mortgaged in 2000, but in July 2012, they consolidated the mortgage with Bank of The Bahamas (in her Supplemental Affidavit filed the 10th December, 2021 she states that the house was originally mortgaged in 1999 with FINCO, her mother gave her the money for the deposit, in June 2012 her and the Respondent consolidated the mortgage with Bank of The Bahamas Limited);*
- g. *That from 2000 to present, \$900.00 per month has been deducted from her salary to contribute to the mortgage, that it was agreed that the Respondent would also contribute \$900.00 to the mortgage but his contributions fluctuated due to job change or unemployment from time to time;*
- h. *That she is now 59 years old and does not have any capital or assets save for her joint ownership in the matrimonial home;*
- i. *That by letter dated the 8th January, 2021 she was informed by the Bank of The Bahamas that the mortgage for the matrimonial home was in default and if payments were not made, the bank would repossess the house and advertise the same;*
- j. *That the mortgage is delinquent due to the Respondent's failure to pay his contribution and as a result of his failure the mortgage was not satisfied as anticipated in 2020;*
- k. *That the Respondent retired in 2020 and he no longer has a steady source of income;*
- l. *That the bank is aware that she alone is making the monthly mortgage payments and is willing to grant her another eight years extension with a revised monthly payment of \$900.00 and remove the Respondent's name off the conveyance and mortgage if she can obtain a court order;*

6. The Respondent's evidence in part as found throughout the filed Affidavits is:-
- a. *That he was employed at the Grand Bahama Shipyard and at that time he and the Petitioner paid the mortgage equally, but sometime in 2019 he retired from the company and paid his monthly mortgage contribution of \$900.00 up to February, 2020;*
 - b. *That his present gross monthly income is \$1,100.00 from his National Insurance Pension and his average monthly expenditure is \$1,450.00;*
 - c. *That after the Petitioner left the matrimonial home for more than eight years he was left with the responsibility to maintain the said matrimonial home;*
 - d. *That due to Hurricane Dorian in 2019 the home was unlivable and he had to relocate temporarily until the home was repaired to a livable state and that he used the monies he received from his retirement in 2020 to renovate and restore the matrimonial home that was partially destroyed by the said hurricane;*
 - e. *That he is of the opinion that the matrimonial home be sold and the proceeds are used to pay off the mortgage balance in full along with all outstanding utilities and outstanding service charges;*
 - f. *That the remaining sum after payment of the mortgage balance and other outstanding sums be equally divided between he and the Petitioner;*
 - g. *That his failure to make the mortgage payments were beyond his control as his monthly mortgage payments were delinquent due to his retirement and that prior to his retirement his portion of the monthly mortgage payments were made;*
 - h. *That he through his attorneys attempted to settle the property dispute by proposing the Petitioner buy out the Respondent's interest in the matrimonial home and have his name removed from the Conveyance but was informed by the Petitioner's attorneys that the Petitioner could not qualify for a further loan to buy out his interest;*
 - i. *That the proposal to the Petitioner to buy out his interest was done as he is presently unemployed, over 65 years old and could not qualify to the Bank for a further mortgage to buy out the Petitioner's interest in the matrimonial home;*
 - j. *That he has not received any financial assistance from the Petitioner for the upkeep of the matrimonial home and the monthly cost for the upkeep is \$330.00;*
 - k. *That he was the sole owner of the matrimonial property and after they were married the Petitioner was joined as a party to the Mortgage;*
 - l. *That he paid the sum of \$25,271.00 to Skyfran Builders for repairing the matrimonial home.*
7. In response to the Respondent's Affidavits, the Petitioner states in part:-
- a. *That she trusted the Respondent to act on their behalf and at the time that the mortgage was obtained she was not aware that her name was not added to the conveyance.*
8. The parties at the instruction of the Court supplemented their Affidavit evidence by giving viva voce evidence from the witness stand on the 27th July, 2022. The evidence of both

parties during examination-in-chief and cross-examination were similar to the evidence adduced by their respective Affidavits save for the Petitioner's evidence that from her leaving of the matrimonial home her only contribution was towards the mortgage payments and that the Respondent was responsible for everything else relating to the matrimonial home. Her evidence was also that she was not and is not in a financial position to contribute to any maintenance for the matrimonial home.

9. The Respondent's viva voce evidence in part is that the title document, i.e. the Conveyance over the home in Hudson Estates (the matrimonial home) was issued in his name and that he had been the one paying the first mortgage with FINCO that was held over the property. He continues that it was only when he and the Petitioner consolidated their debts that the Petitioner's deductions from her salary were made to pay the consolidated loan and that the Petitioner's name was only added to the consolidated mortgage and not the Conveyance. During cross-examination the Respondent stated that he received between \$27,000.00 to \$30,000.00 as his lump sum payment from the Grand Bahama Shipyard following his being laid off in or around July 2019; that he had considered paying off his portion of the mortgage after receiving his lump sum but he was trying to hold on to his funds, that shortly after receiving the lump sum the said hurricane damaged the matrimonial home and that he still consistently paid his portion of the mortgage until February 2020. The Respondent also states that from January 2021, he was aware that the mortgage was delinquent but still paid \$330.00 per month towards the maintenance of the matrimonial home; that during this time between 2020 and 2021, he would send money to his daughter who was away in school.
10. The Appraisal Report obtained in June 2022 prepared by Aston Jones and Associates of the matrimonial home assigned the market value of the house at One Hundred and Seven Thousand, Seven Hundred and Eleven Dollars (\$107,711.00).

SUBMISSIONS

11. Counsel for the Petitioner contends that the Petitioner is entitled to 80% of the interest in the matrimonial home and the Respondent is entitled to the other 20% arguing that her continued contribution towards the mortgage ought to count significantly in her favor. Further that the Respondent continues to enjoy the benefits of the matrimonial home. The following submissions were also made in support of the Petitioner:-

- a. *That the Respondent allowed the mortgage to fall into arrears, did not and has not discharged his financial obligations and responsibilities to the Petitioner;*
- b. *That prior to the mortgage falling into arrears due to the Respondent's failure to pay his monthly contribution, the Court could have proceeded on the basis of equal sharing and as such the instant matter is distinguishable from Miller v Miller and McFarlane v McFarlane and warrant a departure from the equal sharing principle;*
- c. *That the Petitioner needs consideration that would put her in a position to meet her financial needs and obligations and to compensate her for monies she paid towards the mortgage outside of the agreed period;*
- d. *That it is fair and equitable that the matrimonial home be sold and the Petitioner receive 80% and the Respondent receive 20% of the proceeds of the sale;*
- e. *That in the alternative the proceeds of a sale be split 50:50 between the Petitioner and the Respondent and that any additional money that has been deducted from the Petitioner's salary from the date that the mortgage became delinquent, up until the date the house is sold be deducted from the Respondent's portion and added to the Petitioner's portion to compensate for her continuous financial stress and contribution beyond the originally scheduled pay off date.*

12. Counsel for the Respondent contends that the Respondent's interest is based on the considerations found at section 29 of the Matrimonial Causes Act and makes the following submissions and observations in support:-

- a. *That the matrimonial home ought to be sold and assets distributed equally between the parties after satisfying the mortgage unless there is good reason to depart from the equal sharing principle;*
- b. *That the Petitioner's conduct led to the destruction of the marriage by abandoning the matrimonial home and marriage and the Respondent continued with the upkeep of the matrimonial home afterwards;*
- c. *That it would be inequitable to depart from the equal sharing principle and not award the Respondent an equal share to provide him with the necessaries [necessities] of life and establish a standard of living;*

- d. *That is it reasonable that the Respondent be awarded a higher percentage than the Petitioner as he carried out the repairs to the matrimonial home following the damage from Hurricane Dorian in 2019;*
- e. *That it is unreasonable for the Respondent to seek full-time employment at his age or set up his own business and such disparity of means between the Respondent and the Petitioner make it unreasonable to resolve particular financial and economic issues;*
- f. *That the Respondent's needs ought to be assessed and quantified by reference to factors such as age, health, financial needs, accustomed standard of living and available resources as provided by the Matrimonial Causes Act.*

13. Counsel for both parties have pointed this Court to the relevant law for consideration namely sections 28 and 29 of the Matrimonial Cause Act. Further they have also referred to the following authorities on the issues before the Court; **Charman v. Charman (2007) 1 FLR 1246**, **Miller v. Miller**; **McFarlane v. McFarlane (2006) UKHL24** and the Bahamian authorities such as **Collie v Collie SCCivApp No. 19 of 2015**. Having reviewed the various authorities submitted by Counsel the Court finds that they are beneficial and thanks Counsel for their assistance.

ISSUE

14. The issue to be determined in this case is whether the Court should depart from the equal sharing principle as it relates to the matrimonial home, given the evidence adduced on behalf of the Petitioner and Respondent.

THE LAW

15. Sections 28 and 29 of the Matrimonial Causes Act states:-

“28. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child, such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for

the benefit of the other party to the marriage and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or postnuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

subject, however, in the case of an order under paragraph (a) to the restrictions imposed by section 33(1) and (3) on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.

(2) The court may make an order under subsection (1) (c) notwithstanding that there are no children of the family.

(3) Without prejudice to the power to give direction under section 71 for the settlement of an instrument by counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.

29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27(1) (a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say —

(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 contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

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.

(2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1) (d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say —

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage;

(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

(3) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case) —

(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain the child.

(4) 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 under section 25(3) in relation to that property, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under this section.

(5) Without prejudice to subsection (1) where the court grants a divorce on the basis of the ground specified in section 16(1) (d) the court, in exercising the powers referred to in subsection (1), shall have particular regard to the conduct of the petitioner where the evidence discloses that but for the misconduct of the petitioner the parties would not have lived separate and apart.”

ANAYLSIS & DISCUSSION

16. This is not an action whereby each party is asserting his or her ownership entitlement or seeking an order that he or she is entitled to the sole interest in the matrimonial home. Additionally, the parties have accepted that the mortgage/consolidation loan with Bank of The Bahamas held over the matrimonial home is currently in arrears. It is also not disputed that the Petitioner continues to service the mortgage by way of monthly salary deductions in the amount of \$900.00 and the Respondent makes no contribution to the monthly mortgage payments.

17. In addition to the above, the Court makes the following findings based on the evidence adduced by the parties:-

- a. That due to the age of the Petitioner and the Respondent it would be difficult for either to obtain any additional financing to buy out the other’s respective interest in the matrimonial home or to discharge their respective mortgage obligations to the Bank of The Bahamas;*
- b. That the Petitioner continues to service the mortgage by way of monthly salary deductions in the amount of \$900.00 and does not reside at the matrimonial home;*
- c. That the Respondent currently resides at the matrimonial home and maintains the same.*

18. The Court recognizes from the pleadings and evidence that both parties essentially wish to discharge the burden of the mortgage held over the matrimonial home as the Petitioner has other financial commitments (such as maintaining the home she now lives in); no longer lives at the matrimonial home and is unable to enjoy the benefits of the same and the Respondent is unable to continue paying his portion of the monthly mortgage payments but remains in the matrimonial home.

19. Therefore, the Court is of the view that there is no fundamental disagreement between the parties on this application save for the manner in which the distribution of each party's respective share of the proceeds of the sale of the matrimonial home with consideration as to the mortgagee's interest and any other outstanding debt owed.
20. Ultimately, both parties in their respective submissions have proposed that the matrimonial home should be sold and the proceeds of the sale be divided equally between the parties. The challenge with making such an Order is that, should the matrimonial home not be sold given the economic realities of life on the island of Grand Bahama, the location of the matrimonial home, the propensity of flooding in that area and the previous storm damage it may present a substantial challenge for a sale. Additionally, should there be a sale, any proceeds of the same would first have to settle the outstanding mortgage debt before any sums can be paid to either the Petitioner or Respondent.
21. There is of course the possibility that the property is never sold either purposefully or through unforeseen circumstances and at some point the bank will be compelled to move to realize its facility and both parties may become financially liable. The Respondent continues to enjoy the benefit of residing while not contributing to the Bank but has financially ensured that the matrimonial home was repaired after the Hurricane and has continued to maintain it. Whereas the Petitioner has had to relocate and has contributed to the renovation of other premises so that she could have a place to reside which according to her, has made it a challenge financially. The Court also acknowledges that if the Respondent leaves the matrimonial home, it would appear abandoned and likely overrun by trespassers or become dilapidated and hence significantly reducing its potential market value.
22. The Court takes note of the Court of Appeal decision of **Goodman v. Goodman SCCiv. App No. 275 of 2016**, the Court cited with approval the decision of the Chief Justice Michael Barnett (as then was) in which he set out the modern approach to property adjustment and I refer hereto

“19 In my judgment, the modern day approach to a division of property in a marriage is that fairness is an equal sharing of property unless there is a compelling reason to depart from that equality. The law is perhaps best summarized in the judgment of the English Court of Appeal in Charman v Charman [2007] 1 FLR 1246. "The yardstick of equality of division", first identified by Lord Nicholls in White at p. 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of "reasonable requirements". The origins of the yardstick lay in s.25 (2) of the Act, specifically in s.25 (2) (f), which refers to the parties' contributions: see the preceding argument of Lord Nicholls at p. 605D-E. The yardstick reflected a modern, nondiscriminatory conclusion that the proper evaluation under s.25 (2) (f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.....”

23. Although the Petitioner in this case may perceive that there is an unfairness in the current balance, the Respondent has made contributions that maintains the currency of the property and it is that currency that will allow both the Petitioner and the Respondent once the mortgage is satisfied to be able to retain some financial benefits.

DISPOSITION

24. Therefore, the Court makes the following order:-

- a. *That the Property be sold and that the Mortgage is satisfied therein and all other service charges are settled and thereafter the remaining funds are to be shared 50/50 by the Petitioner and the Respondent;*
- b. *That each party is to bear their own cost of these proceedings;*
- c. *That in the event that either the Petitioner or Respondent is unwilling or unable to execute the necessary conveyance for the sale of the property, the Deputy Registrar of the Supreme Court Northern Division is authorized upon application being made to execute the relevant conveyance and any funds paid into an account to held in escrow on behalf of the party for whom the conveyance was executed.*

Dated the 23rd Day of September, 2022

Justice Andrew Forbes