

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Family Division

No. 15 of 2004

BETWEEN

BETTY ANN HURLEY *Applicant/Wife*

AND

MATTHEW ALPHAGE

IRWIN CRONEY *Respondent/Husband*

Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court.

2006: July 26, 27

August 14

October 12

2007: January 5, 15

August 3

November 19

Dr. Waldo Walrond-Ramsay for the Applicant/Wife.

Mr. Wilfred Abrahams for the Respondent/Husband.

DECISION

The Application

[1] In an Application For Dissolution of Marriage filed January 4th 2004 the Applicant/Wife in this action filed for divorce from her husband Matthew Croney. This was followed on June 6th 2005 by an Amended Application for Ancillary Relief (an amendment of an earlier application dated 2nd April 2004), which is the matter presently before this court for determination.

[2] In this application of 6th June 2005, the Applicant/Wife is seeking the following relief:

- “(a) A Declaration that by virtue of my contributions to the purchase of the property at No: 4 Heywoods Park, St. Peter, Barbados as a wife and by quantified financial contributions from the Joint Bank Account of the Respondent and myself held at Lloyd’s TSB Bank in London (15,000.00); from City of Bridgetown Credit Union (15,000.00); from Barclays Bank, Barbados (\$15,000.00), the Applicant/Wife is entitled to a one-half share in the said property at No. 4 Heywoods Park, St. Peter, pursuant to Section 57 of the Family Law Act of Barbados.

- (b) An Order that the said property at No.: 4 Heywoods Park, St. Peter be sold upon the open market to the highest bidder and the proceeds of sale divided equally between the parties herein or however this Court may decide, pursuant to Section 57 of the Family Law Act of Barbados.

- (c) That the Parties herein be given joint-custody of the child of the marriage Matthew Hurley-Croney who was born on 7 August 1994, the Appellant be given care and control and that the Respondent continue to pay to the Applicant/Wife \$400.00 per month together with one-half of all medical, dental, ophthalmic and educational expenses of the child, as already **ordered** by this Court; and to have liberal access to the said child, at his own expense.

- (d) That either Party hereto be at liberty to own the said house at No: 4 Heywoods Park, St. Peter solely, only after a professional evaluation has been made thereof, and the one-half or other financial proprietary interest determined by this Court has been made by way of payment to the other Party in a reasonable time following an agreement to so settle the ownership by the Parties.

- (e) Any other Order this Honourable Court may decide.

[3] Issues arising under part (c) were settled between the parties and a Court Order recorded by Justice Sherman Moore (as he then was) on the 15th day of April, 2005. The following Affidavits were filed in support of and in response to the other limbs of the above application:

1. An Affidavit filed April 2nd 2004 by the Applicant/Wife;

2. An Affidavit filed June 6th 2005 by the Applicant/Wife;

3. An Affidavit filed January 6th 2006 by the Respondent/

Husband;

4. An Affidavit filed July 4 2006 by Denease Eleene Croney, the mother of the Respondent/Husband.

[4] The parties also gave their sworn testimony to the Court and were cross-examined.

The Case For The Parties

The Case for the Applicant/Wife

The evidence of the Applicant/Wife is that the parties were married in England on the 30th September 1994. She was 35 at the time and the Respondent/Husband 26. It was a first marriage for both. The Applicant/Wife is British born of Barbadian parents. She met the Respondent/Husband on one of her visits to the island in 1989, he joined her in England where they lived together from around 1991, before they married in 1994. The couple resided at the wife's residence at Walthamstow in London, a property which she states was purchased by her with the assistance of her mother in 1987. The Applicant/Wife had two pregnancies but gave birth to one living child, namely Matthew Junior Jermaine Hurley-Croney on the 7th August 1994.

[5] The marriage appears to have been rather turbulent as it is the Applicant/Wife's evidence that the Respondent/Husband was forced to leave England in 1995 "after he had burnt (her) and the police put him out of the house." He returned to Barbados but she alleges that they did not separate until 2003. She initially denied that the parties separated but subsequently stated that they fell out for a time but they traveled back and forth between Barbados and England and in the Applicant/Wife's words maintained "a loving relationship". She stated that she would come to Barbados 3 or 4 times per year and would stay at his family's home in Flat Rock. She stated that the Respondent visited London often and would stay at her home while there.

[6] In her Application for Dissolution of Marriage of January 2004 the Applicant/Wife alleged that she separated from

her husband in 1995. In a document allegedly titled "Affidavit of Amendment of The Application For Dissolution of Marriage" filed in December 2004 (and later struck out by this court on the 5th January 2007), the deponent thereto stated that the parties were separated in 2002. In an Affidavit dated June 2005, the Applicant/Wife states that the parties went their various ways in 2003.

[7] When the divorce application and the fact that it was sworn by her was put to the Applicant/Wife she was rather evasive in her responses, but ultimately blamed her then attorney, stating that this attorney made a mistake.

[8] After Matthew was born they started investigating the purchase of properties. She states that the property at Heywoods was purchased in 1999 for about \$130,000. She stated initially that she dealt with the finances and dealt with Mr. Gittens at Ideal Homes. She said that she collated all the details concerning the property and the Respondent came to Barbados to look for land. She later admitted in cross-examination that she was never involved in the negotiations to purchase Heywoods. The Respondent dealt with this, she simply worked and sent money. She never saw any kind of paperwork because the Respondent kept everything away from her.

[9] Her case is that she made the following contributions to the acquisition of the property at Heywoods:

1. She alleges that when the Respondent left England in 1995, he cleaned out their Bank account which had in approximately £15,000 or Bds. \$65,000 at the time. There is no allegation that this was a direct financial contribution to the acquisition of the property at Heywoods;
2. Sometime in 1997/1998 she was present at her home in England when her mother gave the Respondent £10,000 or Bds. \$48,000 in cash to assist them in purchasing a property. This is an alleged direct financial contribution to the acquisition of the property at Heywoods;
3. She had \$7500 in a Credit Union in Barbados and around 1998/1999, she took this money off the account "in dribs and drabs" and gave it to the Respondent to invest in pig pens at his family property at Flat Rock. This was a business venture to raise pigs and was on her admission not a direct contribution to the acquisition of a property;
4. She had \$25,000 in a bank account at Barclays in Barbados and she handed this money over to the Respondent towards the purchase of a property. This would be the second allegation of a direct financial contribution.

[10] She never lived in the property at Heywoods because the intention was to rent it out. Thus, whenever she came to Barbados she stayed at the Respondent/Husband's family home in Flat Rock.

[11] When shown the Affidavit of Denease Croney she denied any knowledge of the matters contained therein and expressed total surprise at the same. She alleged that this was the first time that this information was brought to her knowledge.

[12] The only witness for the Applicant/Wife was her mother Esme Hurley. She states that she visited the parties in London and became aware of a project they were undertaking in Barbados. They told her that they wanted to reside in Barbados and obtain a home there. They decided to get a home in Heywoods and asked her to lend them some money because they did not have enough money to acquire this home. She looked into the matter and then took the money that she had to repair her house in Barbados and put it into the hands of the Respondent/Husband. It was £10,000 in cash that she had at her home. This was sometime in 1998 and it took place at her daughter's home in London.

[13] She knew her daughter's husband to be "very destitute and poor", and that her daughter paid for him to fly to England and about the world. As a mother this did not please her as she saw her daughter work and the respondent take everything, but she loaned them the money nonetheless because it was her daughter and she wanted to help her and do the best for her. It was not a gift, but a loan and after she placed the money in his hands, she said that he was going to get a property down Heywoods but she does not know when it happened.

[14] It was put to the witness that she greatly disliked Mr. Croney and that her evidence was a fabrication to assist her daughter. She denied this. Her evidence ended the case for the Applicant/Wife.

The Case for the Respondent/Husband

[15] He was merely tendered for cross-examination and stood by his Affidavit filed on the 10th January 2006. The gist of his case as therein deposed is:

1. That the marriage ended in 1995 when he was forced to leave England and return to Barbados. They never resumed cohabitation, but when the Applicant/Wife came to Barbados he would arrange for them to stay in the house at Flat Rock as he wanted to ensure that his son had a place to stay;
2. When he left England in 1995 the Lloyd's account contained between £300 and £400. No money was used from this account for the acquisition of Heywoods;
3. Heywoods was acquired after their separation and was financed by the proceeds of a mortgage obtained by his mother. The house is his mother's and was only executed in their joint names "because (his) mother lived overseas and because of her age the bank was unwilling to lend the money in her name alone and required me to be a party to the transaction;"
4. The Applicant/Wife has no interest in the property at Heywoods.

[16] In cross-examination he stated that he presently lives in the house at Heywoods with his brother. After initial attempts to rent the house were unsuccessful, he and his brother took up residence there. He denied that there was any intimate contact between himself and the Applicant/Wife between 1997 and 1998. He went to England in 1998, but he did not go to his wife's home, he merely called and spoke with his son. He never saw the

Applicant/Wife's mother and he never received any money from her. The largest sum that was ever in the account at Lloyd's was £500. He earned about £300 per week and his money went into that account after meeting his expenses. There was never £15,000 in the account and when he left England in 1995, he did so with merely £40 or £50. He never received any money from his wife towards the pig-pens in St. George. He knows nothing of a Barclays account and he never received \$25,000 from his wife. He knows of no account at City of Bridgetown Credit Union and he never went there with his wife in 1998/1999 to withdraw \$7500 to help with the furnishing of the house at Heywoods.

[17] The only time that he discussed with the Applicant/Wife the buying of land was in 1992. He showed her some pictures and told her that there were selling houses down there. She was interested but neither of them could afford it at the time. There was never any agreement to purchase a house at Heywoods and he never received any money to do so.

[18] The only witness for the Respondent was his mother Denease Eleene Croney. Her evidence was by Affidavit filed on the 4th July 2006 and she was tendered for cross-examination.

[19] Her Affidavit deposes to her requesting her son in 1998 to find a property for her to buy in Barbados. She resides in Brooklyn New York. When her son informed her of the availability of land and a house to be constructed thereon by Ideal Homes at Heywoods, she went to her bank and withdrew and sent to him the sum of \$21,000 as a deposit. She sent this money to an account at Barclays Bank Rendezvous which she held jointly with her son Matthew. She came to Barbados in 1998 saw the land and went to Ideal Homes and selected a design for the house that they would build on the land. She secured the services of attorney-at-law Barry Gale who assisted her in securing a mortgage from the Barbados National Bank for \$130,000. Both the conveyance and mortgage were in her name and that of her son Matthew because she was told by the Barbados National Bank that because of her age and due to the fact that she did not live in Barbados, they would prefer to have another name on the deed. The property was purchased for her as it is her intention to retire to Barbados in due course.

[20] The property was financed by the deposit from her personal savings and the mortgage from the Barbados National Bank. In May 2000 she inherited US\$40,000 from her father, and pays the mortgage from this fund. Her Affidavit exhibits the mortgage and conveyance, copies of wire transfers from the Carver Federal Savings Bank to her account at Barclays Barbados for the period 1997 to 2002 and from 2003 to 2005 directly to the mortgage account at the Barbados National Bank.

[21] The court had the opportunity to observe the witness when she was briefly cross-examined by counsel for the Applicant/Wife. She stated that she knows nothing of any sums received by her son from his wife. She knows however that "he nor his wife did not put a cent towards the acquisition of Heywoods". She said that the Applicant/Wife visited the house at Heywoods while she was there and asked her who owned the house, whether Matthew or herself. When she informed her that it was owned by her, she said that the Applicant/Wife told her that she intended to get half of this house.

[22] The case for the Applicant/Wife was not put in its entirety to this witness. It was merely put to her that the real

reason Matthew's name was added to the documents was because he had contributed and she denied this.

[23] In re-examination by counsel for her son and when shown the conveyance showing joint ownership by her son and herself, she stated that she did not understand when she signed the documents that she would need Matthew's permission if she wanted to sell the property, but she would not expect a problem in that event because it is all her money. She never appreciated that joint tenancy meant that Matthew would inherit if she died. It is her intention that both her sons would inherit in the event of her death. At the time of the purchase her son Everton was only 17 or 18 years of age and that is why she did not use his name. She also has a daughter but the day that she went to open the account her daughter did not show up, but Matthew did and she felt Matthew would have been more reliable in looking after her business than her daughter.

The Issues

[24] The fundamental issue for determination is: What contribution, if any,

did the Applicant/Wife make to the acquisition of a property at #4

Heywoods Park, St. Peter. Intrinsic to this assessment is the ancillary

determination of when the parties separated and the marriage ended.

The Law

[25] The principles of sections 56 and 57 of our Family Law Act are now quite familiar. Section 56 empowers this court to declare the interests of the parties in the 'relevant' property, while section 57 empowers the court to alter those interests.

[26] In **Proverbs v. Proverbs** in 2004 and more recently in **Wilson v. Wilson** in 2007, our Court Appeal has adopted the three-step approach of the Australian cases as follows:-

- (i) assessing the value of the property of the parties based on the evidence;
- (ii) evaluating the contribution of the parties within the terms of section 57 (3); and
- (iii) considering section 53 (2) factors."

[27] The court in **Wilson v Wilson at p. 18** thereof went on to outline what some Australian cases have deemed the "fourth step" by stating as follows:

“Further, and importantly, the court should, after a determination of the three steps, apply “the overriding principle in section 57 (2)” “that the order must be just and equitable as between the parties.” **Proverbs** at paragraph (67).”

[28] In step (i) I must make findings as to the identity and value of the property of the parties and the financial resources and liabilities of the parties at the date of the hearing. **Hickey v Hickey (2003) FLC No. 93 – 143 at paragraph 39.**

[29] This proved an interesting challenge in this case. The Applicant/Wife submitted a Statement of Financial Circumstances which disclosed no property. While subsequent affidavits and oral testimony revealed her to be the owner of a property in England which was the matrimonial home of the parties between 1991 and 1995, and from which she derived/derives rental income which was undeclared, this document remained unchallenged even in the face of this glaring omission which was pointed out by this court on more than one occasion.

[30] The Respondent’s first Statement of Financial Circumstances revealed the property the subject of the application for ancillary relief. He filed a later Statement on December 16 2005 removing this property from his Statement of Financial Circumstances. His affidavit and subsequent oral evidence effectively put into question whether this was “property of the parties or either of them”, a fundamental requirement of the Family Law Act.” He was not cross-examined on his financial statements.

[31] The parties are reminded that the function of section 57 of the Family Law Court:

“requires the court to consider the whole of the property of the parties, however and whenever acquired, notwithstanding that the parties may only seek an alteration of interests in some of the property.” **Hickey and Hickey (2003) FLC 93 – 143 at paragraph 39** quoted by **Williams JA at P. 19 of Wilson and Wilson Civil Appeal No.5 of 2003 delivered March 2007.**”

[32] In this case, the Applicant/Wife only sought a declaration of her entitlement to a beneficial interest in the property at No. 4 Heywoods

Park, St. Peter.

[33] **Third Party Rights in Family Law Proceedings**

This case raises interesting issues with respect to third party rights, firstly those of Esme Hurley and more importantly those of Denease Crony. Neither of these two parties applied to be joined as intervenors. This raises jurisdictional issues as it is settled law that the Family Court, (in the absence of evidence of a sham) cannot make orders adversely affecting the rights of a third party or depriving, a third party of its right by the exercise of its jurisdiction: see **Antonarkis v Kelly [1976] 10 ALR 251, Ascot Investments Property Ltd. v. Harper (1981)**. The Family Law Act only allows orders to be made ‘inter partes.’

[34] This is directly relevant to the evidence of Esme Hurley, mother of the Applicant/Wife. She alleges that she loaned the Applicant/Wife and the Respondent the sum of £10,000. Under the Family Law Act, this Court has no power to declare that this money is owed to her or to directly order its repayment: see **Af Peterson and Af Peterson [1981] FLC 91-095**. The law does however allow the court to take the existence of the debt into account in effecting division of property between husband and wife, but only where the debt is not disputed and I will address that issue later in this decision. Suffice is to say that a disputed debt is an issue for determination by a civil court.

[35] As it relates to Denease Croney, she is the legal owner of the property situate at No. 4 Heywoods Park, St. Peter together with her son Matthew Croney. Unless the transfer to her can be shown to be a 'sham' this court can make no orders directly affecting her property rights or depriving her of her rights. It is the view of this court that it only has jurisdiction to determine on the facts, whether No. 4 Heywoods Park is a financial resource of or property of the Respondent Matthew Croney, and if so, to what extent.

Findings of Fact

[36] This court was not impressed with the veracity of either the Applicant/Wife or the Respondent/Husband. However a picture does emerge from the evidence given.

[37] The Applicant/Wife was older (almost 10 years older) when the parties met and compared to the Respondent would have appeared financially secure. She owned her own home and she had a good job as a clerical officer working for the Home Office in London. During the course of the marriage she was promoted to Executive Officer. He joined her in England, ostensibly to study part-time, and it appears that his brief and part-time employment as a post-man and a job cleaning Woolworth's for about an hour a day, only earned him enough during this time to meet his personal needs. The Applicant/Wife worked, paid the mortgage and maintained them both and their child when he was born. They opened a joint account at Barclays in London into which his earnings were paid. The Applicant/Wife's salary was paid into another account, but from time to time she would put small sums of money into this account. No other funds were paid into this account.

[38] I accept the Respondent's evidence that in 1995 this account contained