BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

No. 574 of 2003

BETWEEN:

GRANTLEY HERBERT ROBERTS **Applicant**

AND

SANDRA VERONICA ROBERTS **Respondent**

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court

2008: May 13, 26
2010: May 26
November 17
2014: April 17

Appearances:

Ms. Caroline Herbert, deceased for the Applicant
Ms. Cicely Chase Q.C. for the Respondent

DECISION

Background

[1] The Applicant, Grantley Roberts, and the Respondent, Sandra Roberts, were married on 14 April 1977. On 16 February 2004 a *decree nisi* was granted

under **s. 27 of the Family Law Act, Cap 214 ("the Act")**. An order under **s. 42 of the Act** was also made on that day, there being no minor children of the marriage.

[2] On 4 August 2004 the Applicant filed an application, with a supporting affidavit, pursuant to **ss. 56 and 57 the Act**, for a declaration and alteration of property interests of the matrimonial assets and in particular the matrimonial home situate at Clevedale, Black Rock, St. Michael ("the property").

[3] That application came before me on 13 May 2008 and after hearing Counsel for both parties the following orders were made:

1. The value of the property to be split in the following manner $45,399.00 to the Applicant/Husband and $41,125.00 to the Respondent/Wife;

2. Each party shall file an affidavit with supporting documents on his or her ability to buy out the interest of the other party on or before May 23rd 2008; and

3. Counsel for both parties shall submit to the Court on or before May 23rd 2008 written submissions as to their respective positions on which party should be allowed to purchase the same.

[4] In compliance with that Order the Applicant filed his affidavit on 23 May 2008. However, the Respondent did not and when the matter came on for hearing on 26 May 2008 her Counsel undertook to file the same.

[5] On that same date I also ordered the parties:

> To file affidavits which specifically address the issue as to the ability of either party to secure alternative accommodation if one party is given the right to purchase the property such affidavits to be filed on or before 23rd June 2008.

[6] In compliance with that Order affidavits were filed on 27 May 2008 and 24 June 2008 on behalf of the Respondent and the Applicant respectively.

[7] The matter next came on for hearing on 17 November 2010 and, at that time, I asked Counsel to file written submissions addressing the following issues:

1. Should the court take into account the allegations of domestic violence in determining who should be given the right to purchase the share and interest of the other in the property;

2. Whether the Respondent's state of health is a factor which ought to be considered in the court's determination of who should be given the right to purchase the property;

3. In considering whether the parties can secure alternative accommodation, should the court have regard to an undivided share and interest of the Applicant in an estate in which his five siblings are also entitled to an undivided share and interest;

4. What consideration, if any, should be given to the fact that the Applicant procured a loan to purchase the share and interest of the Respondent in the property, which loan the Applicant has been repaying pending the decision of the court;

5. Whether the Respondent's male companion resides in the property with the Respondent and, if so, should this fact be taken into consideration in determining which party

should be given the right to purchase the other's share and interest therein; and

6. Whether the fact that the Applicant has been out of occupation of the property in excess of 10 years should be considered in determining who should have the right to purchase the share and interest of the other party?

The Evidence

The Applicant's Affidavit Evidence

[8] On 23 May 2008 the Applicant filed an affidavit attesting to his willingness and ability to buy out the Respondent from the matrimonial property.

[9] He deposed that in March 2006 he was advised by his Counsel to apply for a loan from his credit union and, as consequence, applied for a loan from St. Stephen's Co-operative Credit Union Ltd. That application was subsequently abandoned because of certain difficulties encountered.

[10] He then applied for and obtained a loan in the sum of $30 000.00 in February 2008. That sum was deposited to his savings account at the credit union and he has been repaying that loan in installments of $650.00 per month since April 2008.

[11] On 24 June 2008 the Applicant also filed an affidavit attesting to his inability to secure suitable accommodation should the Respondent be permitted to purchase the property.

[12] He deposed that since the separation of the parties in the year 2000 he has taken up temporary residence at the home of his deceased mother at Yearwood Road ("Yearwood Road") and he shares that residence with his 27 year old son and his brother aged 65. That property was owned by his deceased father and consists of two lots totaling 5523 square feet of land. One lot is occupied by his son, his brother and himself and his brother's house is on the other lot.

[13] His mother was the sole executrix and beneficiary of his father's estate which has not been administered and the estate must be divided equally amongst himself and his siblings.

[14] He stated that the Respondent's mother owns 2 two-bedroom chattel houses in Yearwood Road and she currently resides in one of them and the Respondent's sister and her children reside in the other. It is his belief that the Respondent's mother would embrace the Respondent residing with her.

[15] He further deposed that he is 55 years of age and believes that he would experience undue hardship in securing and maintaining a mortgage at this stage of his life.

[16] The Respondent, he stated, is 52 years of age and has a three year advantage for the purposes of securing and maintaining a mortgage for a modest home.

Additionally, according to her statement of financial circumstances, her earning capacity is greater than his.

The Respondent's Affidavit Evidence

[17] On 27 May 2008 the Respondent filed an affidavit in which she deposed to her ability to buy out the Applicant's share of the matrimonial home. She stated that since the breakdown of the marriage on or about 4 August 2000, she has resided at the matrimonial home with one of the children of the marriage, Julian Roberts, who at the time of filing, was 30 years of age.

[18] She knows of no other home and has nowhere else to go. She has treated the matrimonial home as her home and provided all she can both financially and physically to ensure that it is preserved.

[19] The Applicant, she deposed, resides in a wall bungalow which has a sizeable portion of land attached to it and she is aware that the Applicant is carrying out renovations to that property.

[20] She has a boyfriend named Leroy Griffith whom she started to see on or about 16 September 2004. The relationship intensified in or about March 2005 and he started sleeping at the matrimonial home. He has his own home, a rental unit from the National Housing Corporation situate at Block 2F Maynards Housing Area, St. Peter. He visits frequently but does not reside at the matrimonial home permanently and comes and goes as he

pleases. He pays no bills or expenses for her and does not assist her with the upkeep of the matrimonial home and they have not talked about his assisting her with those obligations.

[21] She is aware that the sum of $43 399.00 represents the Applicant's share and interest in the property and she has been able to secure a loan to pay out the Applicant as well as pay her legal fees and expenses. In support, she produced a commitment letter dated 23 May 2008 from Scotiabank annexed to her affidavit as **Exhibit "SR2008 4"**. She asserted that she is ready, willing and able to purchase the Applicant's interest in the matrimonial property if permitted to do so.

[22] In her affidavit filed 6 November 2009 the Respondent further deposed that she believes that the Applicant can secure or is capable of securing alternative accommodation should she be given the right to purchase his share and interest in the matrimonial property. She is aware that the Applicant is, through his deceased mother's Will dated 11 December 1996, entitled to an undivided one-fifth share in the property at Yearwood Road as appears from a copy of the Will annexed to her affidavit as **Exhibit "SVR 1"**. That Will has not been probated. In para 3 of the said Will the Applicant's mother devised to each of the five children of her late husband an undivided share as joint tenants in the Yearwood Road property with the

stipulation that the property be kept by the five children as a "family house for their benefit". The Applicant is the named executor of the Will and a beneficiary thereunder.

[23] In para 4 of the said Will, the Applicant's mother also devised the smaller of the two lots at Yearwood Road to the Applicant absolutely.

[24] Based on the terms of the said Will, she believes that the Applicant is able to secure alternative accommodation should he be denied the right to purchase her share and interest in the matrimonial home and he has the means and resources with which to seek alternative and comfortable accommodation.

[25] She has no relative who can accommodate her should she be required to vacate the property. She can make an application to the National Housing Corporation, but has been advised that the waiting list is very long.

[26] A share and interest in the matrimonial home represents her only asset and, without the collateral equity in the said property, she would not be able to secure sufficient funding to secure alternative accommodation. She would suffer great hardship if she were ordered to vacate the property or if the property were offered for sale.

The Issues

[27] I now turn to address the issues outlined at para [7] above and on which Counsel for the Applicant filed written submissions on 10 December 2010

and on 25 January 2011 and Counsel for the Respondent on 15 December 2010.

Issue 1: Should the court take into account the allegations of domestic violence in determining who should be given the right to purchase the share and interest of the other in the property?

[28] In her affidavit filed 27 May 2008 the Respondent deposed that, during the marriage, she was the victim of serious acts of domestic violence which resulted in a domestic violence protection order being granted by the District "A" Magistrate's Court **(Exhibit "SR2008 1")** under which the Applicant was ordered not to visit the matrimonial home. She further deposed that she suffered a head injury as a result of that violence and sought medical attention both privately and at the Queen Elizabeth Hospital and, I quote:

> "Since that time until the present I suffer with dizziness and giddy spells which I am informed are a direct result of the attack on me. I struggle to maintain my present employment...I consider that with the effect of dizziness it will be difficult for me to secure alternative employment with such understanding employers such as those I have at the present time."

[29] And in her affidavit filed 6 November 2009, she deposed that she suffers from "headaches with blurred vision and dizzy spells" and has been advised by her general practitioner that those symptoms are "due to a past head injury inflicted upon her by the Applicant/Husband during one of his fits of violent physical abuse."

[30] Both Counsel for the Applicant, the late Ms. Caroline Herbert, and Counsel for the Respondent, Ms. Cicely Chase Q.C., agree that the authorities establish that, in order for the court to consider allegations of domestic violence in the resolution of marital property disputes, there must be a causal link between that conduct and the affected party's diminished earning capacity. And both Counsel cited the cases ***Barkley v Barkley* [1977] FLC 90-216** and ***Fergusson v Fergusson* [1978] FLC 90-500** in support of that proposition.

[31] Counsel for the Respondent also cited the authority of ***Kennon v Kennon* 139 FLR 118; [1997] FAM CA 27 (1997) FLC 92-757** where the court said **at p. 140**:

> "…our view is that where there is a course of violent conduct by one party towards the other during the marriage *which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been*, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s.79. We prefer this approach to the concept of "negative contributions" which is sometimes referred to in this discussion." (My emphasis)

[32] At issue is not an assessment of the respective contributions, but which party should be allowed to purchase the share or interest of the other party in the property. Nonetheless, I consider that principle to be equally applicable to the issue at hand.

[33] Counsel for the Respondent has submitted that on the principle of ***Kennon v Kennon*** the domestic violence inflicted on the Respondent by the Applicant should be taken into account in determining that live issue.

[34] However, Counsel for the Applicant has submitted that the Respondent has failed to adduce any medical evidence which substantiates her allegation that the injuries inflicted by the Applicant have affected her health adversely or even that she is indeed suffering from the alleged dizziness and giddy spells. It seems to me that, in the same way she produced the court protection order, she could and should have produced documentary medical evidence of the alleged injury, its physical consequences and how, if at all, it has affected her earning capacity.

[35] Indeed, when the protection order is scrutinised it shows that the Respondent lodged a complaint of threats against the Applicant. However, the order made by the learned Magistrate was that neither party should interfere with, threaten, harass or beat the other and the Respondent agreed not to return to the matrimonial property.

[36] I find that the Respondent has not produced evidence of a nature and quality to establish that the Applicant engaged in domestic violence against her and which affected her earning capacity. I therefore reject the submission of Counsel for the Respondent in this regard and find that the allegations of

domestic violence should not and cannot be taken into account in any determination as to who should have the right to purchase the share and interest of the other party in the property.

Issue 2: Whether the Respondent's state of health is a factor which ought to be considered in the court's determination of who should be given the right to purchase the property?

[37] Pursuant to **s. 57(3)(d) of the Act** I am obliged to take into consideration the relevant factors outlined in **s. 53(2) of the Act**. In so far as material to this issue, the relevant factors are:

> (a) the age and state of health of the parties; and
> (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment.

[38] The Respondent seeks to rely on her affidavit evidence as to her state of health. However, there is no medical evidence adduced before me to support the alleged state of her current health. Accordingly, I am not prepared to find that her health is so impaired that it ought to be taken into account in resolving the issue in question.

[39] The Applicant and the Respondent are now 61 and 58 years of age respectively. There is no significant age differential that, to my mind, places either party at a particular disadvantage.

[40] No evidence has been adduced as to the state of health of the Applicant. So it seems reasonable to conclude that his state of health is unremarkable.

[41] The statements of financial circumstances filed by the Respondent and the Applicant respectively disclose that the Respondent earns some $8 000.00 more annually than the Applicant. However, in light of the provisions of the Will of his late mother, the Respondent was devised not only a life interest in the Yearwood Road property but also one of two lots of land to the west of the Yearwood Road property, on which lot one Warrick Sargeant has constructed a house. *Prima facie*, it would seem that the Applicant has some financial resources which the Respondent does not have.

[42] Both parties are gainfully employed. However, the Applicant is a carpenter/mason and may use these skills to supplement his income.

[43] On a balance then, the Applicant seems to be in a somewhat more secure financial position than the Respondent.

Issue 3: In considering whether the parties can secure alternative accommodation, should the court have regard to an undivided share and interest of the Applicant in an estate in which his five siblings are also entitled to an undivided share and interest?

[44] In making an order under **s. 57 of the Act**, in so far as relevant to this issue, I am required to consider **s. 53(2)(g) of the Act** which states, "where the …

marriage has been dissolved, a standard of living that in all the circumstances is reasonable." The Applicant's evidence is that he is residing at the Yearwood Road property out of necessity and his Counsel submits that his one-fifth share in his deceased mother's estate does not constitute accommodation which can be deemed "a standard of living that in all the circumstances is reasonable."

[45] On the other hand, Counsel for the Respondent argues that the Applicant's life interest in the Yearwood Road property and his present accommodation there is incontrovertible evidence that he is in possession of alternative accommodation. Furthermore, she argues, the fact that the interest is held jointly with his siblings does not negate that it is an existing share and interest.

[46] I am satisfied that the devise to the Applicant in his mother's Will is a life interest to be enjoyed together with his siblings.

[47] However, it is coupled with a direction in the Will that the house is not to be sold but is to be retained as a family home. Effectively, therefore, the Applicant does have secure accommodation as his siblings, neither singularly nor together, can deny him the right to reside there.

[48] Accordingly, the Applicant does have alternative accommodation, albeit with his son and older brother, which may be considered as providing a standard of living that in all the circumstances is reasonable.

Issue 4: What consideration, if any, should be given to the fact that the Applicant procured a loan to purchase the share and interest of the Respondent in the property, which loan the Applicant has been repaying pending the decision of the court?

[49] As noted at para [10] above, the Applicant applied for and obtained a loan in the sum of $30 000.00 in anticipation of his being permitted to purchase the Respondent's share and interest in the property. His further evidence was that, since April 2008, he has been repaying that loan in monthly installments of $650.00.

[50] Counsel for the Applicant urged the court to take those facts into consideration in light of **s. 57(3)(a) of the Act** which mandates the court to take into account:

> "the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property ***or otherwise in relation to the property***." (Emphasis supplied)

[51] To my mind, that argument is misconceived as that provision applies to circumstances where a party to the marriage has made direct or indirect financial contributions to the acquisition, conservation or improvement of

the property. That issue has been determined and the share and interest of each party in the property also settled. It is irrelevant to the issue as stated above.

[52] I have no doubt that the Applicant obtained the loan to establish that he was in a position to pay out the Respondent. However, the background against which that decision was made is important and is reflected in paras 9 and 11 of his affidavit filed 23 May 2008, which read:

> "9. That in 2005, before Madam Justice Margaret Reifer, counsel for both the Applicant and the Respondent agreed to convene to discuss the purchase by either party of the other's interest based on a 55:45 settlement in favour of the Applicant/Husband. *Both the Respondent/Wife and myself insisted that each wanted to buy the other's interest so no settlement was reached.*
>
> …
>
> 11. That in order to be prepared when the Court made an order I obtained a loan of thirty thousand dollars ($30,000.00) in February 2008. This was deposited to my savings account at the [St. Stephen's Co-operative Credit Union]. I have been repaying this loan monthly in the sum of six hundred and fifty dollars ($650.00) since April 2008..." (Emphasis added)

[53] So it was clear that it was always a contentious matter as to which party should be allowed to purchase the interest of the other. It is equally clear that when the Applicant decided to obtain the loan, that issue had not been resolved between the parties and no order had been made by the court.

[54] I therefore accept the submission of Counsel for the Respondent that the Applicant was premature in obtaining the loan and he should not now be allowed to argue financial hardship in repaying the loan.

[55] I am satisfied that his actions were driven by a desire to gain an advantage over the Respondent. He took the risk of obtaining the loan prematurely and prematurely drawing down on the loan funds and must bear the consequences.

[56] I therefore find that, in all the circumstances, the actions of the Applicant in obtaining the loan and incurring a liability for the repayment thereof are immaterial to the determination of which party ought to be given the right to pay out the other for his or her share and interest in the property.

Issue 5: Whether the Respondent's male companion resides in the property with the Respondent and, if so, should this fact be taken into consideration in determining which party should be given the right to purchase the other's share and interest therein.

[57] I consider this to be an entirely irrelevant factor for the purposes of determining the live issue before the court.

Issue 6: Whether the fact that the Applicant has been out of occupation of the property in excess of 10 years should be considered in determining who should have the right to purchase the share and interest of the other party.

[58] Counsel for the Applicant contended that the Respondent's contributions to the matrimonial property after the departure of the Applicant should not be considered in determining which party should be permitted to pay the other out since it is only reasonable and prudent that the party remaining in occupation of the property pay the amenities and continue to contribute to the maintenance of the home for the period in which that party enjoyed sole occupation.

[59] In response, Counsel for the Respondent argues that the general approach is to discount those contributions in favour of the displaced spouse, having regard to the fact that that spouse has not had use of the matrimonial property during the period of separation. However, she urged upon the court, as the following passage from ***Wardman v Hudson*** **(1978) FLC 90,466 at 77, 383** suggests, that there are circumstances in which it may be appropriate to depart from the general approach. That passage reads:

> "In ordinary circumstances one is dealing with the former matrimonial home and is faced with a situation where one of the parties leaves the home and the other remains in occupation of the property until the date of hearing, which may be several

> years thereafter. During that time the party in occupation may have met the outgoings on the property, including mortgage payments and the like, and may also have made capital improvements to the property. *On the other hand the other party has been out of occupation of a property which he or she jointly owns and in respect of which he or she is equally entitled to occupation. In relation to normal outgoings, ordinarily that ought in a broad way to be set off against the accommodation value of the property to the party in possession unless, for example, the mortgage payments or other outgoings are exceptionally high and have resulted in a substantial increase in the net value of the property.* In that latter circumstance then some appropriate adjustment may be necessary in order to do justice and equity under s 79. *Similarly on the other hand it ordinarily would not be appropriate to bring directly into account the actual or nominal cost of accommodation of the party out of possession unless there was something particular or significant about that circumstance, as for example where a wife is forced to leave the home with a number of young children and is required to provide accommodation for those children at significant cost over a substantial period.* That may be a factor which the court again would need to take directly into account in making an equitable adjustment. (See generally *In the Marriage of Apathy*((5)).)" (Emphasis added)

[60] In this case, the Applicant vacated the property in or about August 2000 and the Respondent has remained in sole occupation of the home from that time. And it is her unchallenged evidence that, from the year 2003, she has borne the responsibly for the payment of the utilities and general upkeep of the property and has also made improvements thereto.

[61] On the other hand, the Respondent has been deprived of his use and enjoyment of the matrimonial home. And I am satisfied that he has not had

to incur the cost of renting alternative accommodation and, in the main, was relieved of the liability for the upkeep and maintenance of the matrimonial home.

[62] In light of the facts that:

1. the Applicant has been out of occupation of the property for some 14 years;
2. the Respondent has made unchallenged capital improvements to the property during that period;
3. the Applicant has alternative accommodation; and
4. there is no evidence that the Respondent does have alternative accommodation in her own right;

it would not be just and equitable in all the circumstances to allow the Applicant to pay out the Respondent when the effect of doing so would be to cause considerable upheaval in what has been a "settled" situation for some 14 years.

[63] Accordingly, it is just and equitable in all the circumstances that the Respondent be given the right to purchase the Applicant's share and interest in the matrimonial home and I so order.

Disposal

[64] For the reasons set out above, it is ordered that:

1. The value of the property situate at Clevedale, Black Rock in the parish of St. Michael shall be split in the following manner: $45 399.00 to the Applicant and $41 125.00 to the Respondent;
2. The Respondent is hereby permitted to pay to the Applicant the sum of $45 399.00 representing his share and interest in the said property, such sum to be paid on or before 30 June 2014 to the intent that, upon payment in full of the said sum to the Applicant, the Respondent shall thereafter be entitled to the legal and beneficial interest therein absolutely;
3. In default of payment of the aforementioned sum of $45 399.00 on the date hereinbefore specified, the said sum shall carry interest at the rate of 6% per annum from 1 July 2014 until paid in full;
4. Pursuant to **s. 94(1) of the Act**, each party will bear his or her own costs of these proceedings;
5. Liberty to apply.

Elneth O. Kentish
Judge of the High Court