COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law Division
2007/FAM/div/00411

Between

SSW

Petitioner

And

JAW

Respondent

Before:	The Hon Mrs Justice Hepburn
Appearances:	Sean Moree for the Petitioner Dwayne Hanna for the Respondent (Troy Kellman for the Ruling)
Hearing:	1 April 2009
Written Submissions:	7 March 2009 and 7 April 2009

R U L I N G

HEPBURN, J

This is an application by Notice of Application for Ancillary Relief filed 11 March 2008 (the notice). The parties were married in Keuruu, Finland on 10 June 2000. Following the marriage, the parties moved to New Providence, The Bahamas, and resided in a condominium unit at Royal Palm Court off West Bay Street (the Condominium). There is one child of the marriage, Henrick, born 15 August 2003 at Doctors Hospital, Nassau. In May 2004 the petitioner moved out of the matrimonial home and returned to Finland. On 25 August 2004 the District Court of Jyvaskyla (the Finnsh Court) dissolved the marriage on the petition of the petitioner to the Finnish Court. On 27 July 2005 the Finnish Court ruled that that the parties were to have joint custody of Henrick; and that he was to reside with the petitioner. The respondent was also ordered to pay maintenance in the sum of €800 per month.

2. The respondent remarried following the divorce and now has a child by his second marriage.

3. By order of this Court dated 27 September 2007, Gray-Evans J ordered that the divorce granted by the Finnish Court on 25 August 2004 was valid and further ordered that the custody and maintenance order made on 27 July 2005 by the Finnish Court be recognised and adjourned all other matters to chambers.

4. The notice first came on for hearing on 4 June 2008 before Nottage J. Counsel for the parties addressed the court on a preliminary question of jurisdiction. On 7 October 2008 in a written decision, Nottage J ruled:

> **"that the courts of this Commonwealth have jurisdiction as the '*lex situs*" of the matrimonial home which was situate at Unit #19, Royal Palm Court Condominiums, West Bay Street, New Providence, in consequence of which all ancillary matters related thereto, including the proceeds of sale arising there-from, must necessarily follow the law applicable to the house itself."**

5. Nottage J's decision was not appealed. The substantial hearing of the notice took place on 14 April 2009.

6. The respondent filed a summons on 31 March 2009 to have the petitioner's affidavit of means sworn 27 November 2007 and filed 11 December 2007 struck out under O.41r 6 of the Rules of the Supreme Court but withdrew the summons at the hearing on 14 April 2009, stating that he would take up the issues in his summons on his cross examination of the petitioner.

7. The petitioner is a citizen of Finland and at the date of her petition was a permanent resident of The Bahamas. She now resides in Finland. At the date of the hearing, the petitioner was employed at a travel agency earning €1,530.00 after taxes. During the marriage she was a housewife. The respondent indicated to this Court that she was not seeking maintenance or alimony from the respondent.

8. The respondent is a citizen of the United States of America and Sweden and a permanent resident of The Bahamas. At the date of the hearing he was employed as a Site Manager with Albany Developers earning $7,653.00 per month.

9. In his oral evidence, the respondent stated that when the Condominium was acquired, it was his intention that it would be the matrimonial home for the family.

10. The foregoing facts are not disputed nor is there any dispute that during the subsistence of the marriage, the petitioner was a housewife whilst the respondent was the breadwinner of the family.

11. The matrimonial assets are not substantial. They comprise the proceeds of sale of the Condominium and the furniture of the matrimonial home; wedding

gifts which the parties received jointly and individually on the occasion of their marriage; certain gifts which were given to the petitioner solely; gifts given to the parties during the subsistence of the marriage; and funds that were in the parties' bank account at the date the parties separated.

12. The petitioner itemised the wedding gifts and other gifts which the parties received during the marriage and their value at paragraphs 8 through 12 of her affidavit of means sworn 27 November 2007 and filed 11 December 2007. The petitioner valued the wedding and other gifts received by the parties at $11,599.20; gifts given to her by the respondent including her engagement ring at $15, 504.00; gifts she received from the respondent's parents at $5,222.00; and the furniture was valued at $17,530.00, making for a total of $49,075.20. The respondent in his oral evidence accepted as being correct this aspect of the petitioner's evidence.

13. The petitioner also claimed that she was entitled to the value of the motor vehicle which she used during the marriage but she did not put a value on it. The respondent's evidence was that he purchased the motor vehicle with insurance payments he received from J S Johnson as a result of a motorcycle accident and that he sold it following the divorce. It appears that the motor vehicle was purchased sometime in 1999.

14. The petitioner's evidence was that when she left the respondent she took with her their son and two suit cases full of clothing. In his affidavit of means filed 4 March 2008, the respondent deposed that the petitioner told him that she needed time apart so he allowed her to return home for eight months with his son. He said she tricked him into believing that she would be gone for only eight months by taking only two suitcases with her and then had him ship her personal effects to her at his expense. However, in his oral evidence, the respondent said that when the petitioner left the matrimonial home she took with her four boxes; that he had to pay the shipping on the boxes; and she has in her possession

75% of the gifts. I am not satisfied that the respondent was being truthful in his evidence when he said that the petitioner had in her possession 75% of the gifts.

15. Further, the respondent admitted to having some of the gifts in his possession. He said that the petitioner was free to inspect his home and take an inventory of the gifts in his possession and that he was prepared to let her have all of the gifts in his possession, save for her engagement ring, and to pay one half of the cost of shipping them to her address in Finland. The furniture, he said, had been sold with the home.

16. The petitioner took advantage of the respondent's offer and her counsel provided the court with a copy of the inventory, which did not include any of the gifts of jewelry given to the petitioner. The value of the gifts in the respondent's home $7,119.60.

17. The respondent confirmed that he gave the petitioner an engagement ring but took it back when the parties separated. His said he did so because the ring has sentimental value for his family. He said he did not say this to the petitioner at the time of the engagement because he thought it would have been inappropriate (the word he used was "tacky") to do so. The ring was valued at $12,000.00. The petitioner would like to have the ring back. The respondent would like it to remain in his family.

18. The respondent said he managed to save $10,000.00 prior to the separation and that when the petitioner left the matrimonial home and returned to her country of origin she withdrew $5,000.00 from the account to help her with resettlement costs in Finland. I formed the view that he was speaking the truth in this regard. The petitioner would have needed some funds to help her resettle in Finland and as the petitioner had not disclosed that she was leaving permanently, it is reasonable that the respondent would have given her some money to travel with.

19. On the question of the Condominium, the petitioner said it was purchased on 21 March 2001 for a purchase price of $215,000.00. She said the respondent told her that the Condominium was purchased by his father, Anders Weiberg (Mr Weiberg), in his name because he (the respondent) was unable to obtain a loan in his name due to his immigration status. She said the respondent told her he was to repay his father by way of monthly payments of $1,000.00 per month. The respondent confirmed this part of the petitioner's evidence in his cross-examination save that he said the monthly payments were initially $1,600.00, which were later reduced to $1,000.00 per month

20. The petitioner exhibited to her affidavit of means, *inter alia*, a copy of conveyance dated 15 March 2001 by which the respondent purchased the Condominium for $215,000.00 and a copy of the conveyance dated 21 April 2006 by which the respondent sold the Condominium to a third party for $245.000.00. When asked to explain the conveyances exhibited to the petitioner's affidavit of means, the respondent's response was that he had not read the documents before signing them. This is not an acceptable explanation.

21. The respondent's oral evidence was also that at the date of his evidence was still paying his father for the loan on the Condominium but he produced no supporting evidence of the loan or the repayments to his father or the payment to his father by way of a manager's cheque in the sum of $200,000.00, which he said was deducted from the sale proceeds. The respondent also gave evidence that when the Condominium was sold his father allowed him to keep $15,000.00 out of the sale proceeds. He did not call his father to give evidence that he provided the purchase price for the Condominium and the payment or payments received from the respondent in repayment of the loan.

22. The respondent admitted that the petitioner did not receive any part of the proceeds of the sale of the Condominium.

The Law

23. Where there is an application for a property adjustment order, in deciding whether to exercise its powers under section 28 of the Matrimonial Causes Act (MCA) the court is under a duty pursuant to section 29 of the MCA to consider all of the circumstances of the case including 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,

24. The statutory framework for the determination of property adjustment orders is set out fully in section 29 of the MCA, which is in the following terms:

> **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 the 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.**

25. It is now accepted that the contribution of a homemaker to the acquisition of matrimonial assets is no less valuable than that of the breadwinner of the

family. (See **White v White** [2006] 2 FCR 555; **Miller v Miller, McFarlane v McFarlane** [2006] UKHL 24; **Charman v Charman** [2007] 1FCR 1246.

26. Counsel for the petitioner referred the court to **Lambert v Lambert** [2003] 1 FLR 139 where Thorpe LJ stated:

> **[27] First it is unacceptable to place greater value on the contributions of he bread winner than that of the home maker as a justification for dividing the product of the breadwinner's efforts unequally between them.**
>
> **[38] There must be an end to the sterile suggestion that the breadwinner's contribution weighed heavier than the homemaker's ... the nature of the contributions is intrinsically different and incommensurable. Each should be recognized as no less valuable that the other.**

27. He also referred to the statement of Lord Nicholls in **White v White** on the principle of equality at 564 where he said that in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles and that fairness required that the respective roles chosen by them should not prejudice either party when considering subsection (f), relating to the parties contribution.

28. Following **White v White** there was some question as to whether the overall objective of section 25 of the English Matrimonial Act (our section 29 of the MCA) of fairness equated with equality of division. Whilst Lord Nicholls in **White** referred to the yardstick of equality of division the objective it would seem was about fairness rather than equality. (See Thorpe LJ in **Cowan v Cowan** [2001] EWCA Civ 679 at [53].)

29. In **Charman v Charman** (Sir Mark Potter, P sitting with Lord Justice Thorpe and Lord Justice Wilson) the English Court of Appeal stated that the objective as follows at paragraph [64]

> **The yardstick reflected a modern, non discriminatory conclusion that the proper evaluative 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 a good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.**

and at [65]

> **"We should add that, since we take the 'sharing principle' to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not from the principle but takes place with the principle.**

30. The principle of equality applies not only to the property generated during the marriage otherwise then by external donation but to all the parties' property. To the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality (**Charman v Charman**).

31. The stating point of every enquiry in an application of ancillary relief is the financial posture of the parties:

> **67. Even if, however, a court elects to adopt the sharing principle as its "starting point", it is important to put that phrase in context. For it cannot, strictly, be its starting point at all. ... the staring point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in s. 25(2) other than in the order there set out, a court should first consider, with whatever degree of detail is apt to the case, the matters set out in s. 25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future. Irrespective of whether the assets are substantial, likely future income must always be appraised for, even in a clean break case, such appraisal may well be relevant to the division of property which best achieves the fair overall outcome.**

Discussion

32. Counsel for the petitioner laid over very detailed skeleton arguments, in which he carefully reviewed the relevant law, beginning with a review of the

provisions of section 29 of the Matrimonial Causes Act (the MCA) and their application to this case. I accept his analysis as being correct.

33. He submitted that the petitioner was entitled to:

a. One half of the sale proceeds of the matrimonial home;
b. One half of the value of the furniture of the matrimonial home;
c. One half of the value of all wedding gifts given to the couple;
d. An order that gifts given to her solely which the respondent still has in his possession be returned to her or the event these presents have been disposed of she be compensated for them;
e. One half of the value of all gifts given to the couple during their marriage; and
f. One half of he funds which were held in the bank accounts upon separation.

34. As regards the matrimonial assets other than the Condominium, counsel for the petitioner submitted that she was entitled to half of the value of the gifts to the two of them, which totaled $24,727.00 and the value of all of the gifts which were given to her solely, which were valued at $20,726.00. He submitted that the petitioner was also entitled to a share of the sale proceeds from the car that the respondent purchased for her use during the marriage and that amounted to $8,000. He said the petitioner was entitled to $33,120.50 in gifts and $8,000.00 in cash.

35. Counsel for the respondent informed the court that the respondent was willing to give to the petitioner all of the gifts in his possession save for the engagement ring. He submitted that the burden was on the petitioner to prove that the respondent had disposed of the missing gifts and that she had not discharged this burden. He submitted that in light of the respondent's willingness to part with all of the gifts in his possession save for the engagement ring he ought to be allowed to keep it.

36. As to the motor vehicle, counsel for the respondent submitted that the motor vehicle was not owned by the petitioner, and in any event, it had been sold for $4,000.00 four years previously.

37. Counsel for the respondent relied on two English cases: **de Dampierre v de Dampier** [1988] AC 92 and **Watchel v Watchel** [1973] 1 All ER 829. He submitted that **de Dampierre v de Dampier** was authority for the proposition that the common law test of justice as between plaintiff and defendant in commercial disputes corresponds to the statutory test of fairness as between husband and wife in matrimonial disputes.

38. He submitted that in **Watchel v Watchel** the court set out the guidelines which the court should take into consideration when making orders concerning property and other financial provisions but concluded that the respondent's affidavits set out the true and correct position regarding the issues before the court.

39. In this case, the matrimonial assets are very limited. As to the gifts the respondent has agreed to let the petitioner have all gifts still in his possession and pay half of the cost to have them shipped to Finland. The value of the gifts in his possession total only $7,119.60 and does not include any of the jewelry given to the petitioner and or the items listed under "furniture" in the petitioner's affidavit of means at paragraph 12.

40. The respondent's evidence as to what happened to the gifts after the petitioner moved out of the matrimonial home was inconsistent. At paragraph 8 of his affidavit evidence the respondent deposed that the petitioner was in possession of 75% of wedding gifts. At paragraph 17, however, he deposed that when the petitioner left she took only two suitcases with her and that he had to ship her other belongings to her. Then, in his cross-examination the respondent

stated that when the petitioner left the matrimonial home she packed four boxes and he did not know what was in the boxes. I do not accept this aspect of the respondent's evidence as being true.

41. The petitioner's evidence with regard to the gifts, on the other hand, was consistent: when she left the matrimonial home she left the gifts and furniture with the respondent. I accept the petitioner's evidence as being more probably true than that of the respondent.

42. Counsel for the petitioner submitted that the gifts given to the petitioner by the respondent and by his parents belong to the petitioner absolutely and do not form part of the matrimonial assets, and that she ought to be compensated for the full value of such gifts if they are not returned to the petitioner. I do not think he is correct. In **Charman**, the English Court of Appeal in answering the question to what property does the sharing principle apply had this to say:

> **...We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality.**

43. I am satisfied that the exceptions identified in **Miller** do not apply in this case, notwithstanding this was a marriage of short duration. In the result, I am satisfied that the parties are entitled to an equal share of all of the gifts received and furniture acquired during the marriage. It has been agreed that the gifts and furniture were valued at $49,075.20. The petitioner is entitled one half of that value, that is to say, the sum of $24,537.60. The respondent has in his possession gifts and 'furniture' valued at $7,119.60, which he has agreed to let the petitioner have and to pay one half of the cost to ship those items to the petitioner in Finland. He must, therefore, pay to the petitioner the sum of $17,418.00, being one half of the value of the gifts and furniture less the value of the gifts and furniture to be shipped to the petitioner.

44. As to the Condominium, having read the affidavit evidence and listened to the evidence of both parties and observed them in the witness box as they gave their evidence, I reject the respondent's evidence as to the ownership of the Condominium. I do not accept the respondent's evidence that the Condominium was purchased in his father's name. I find that the respondent purchase the Condominium in his sole name on 15 March 2001 for a consideration of $215,000.00 and that he sold the Condominium on 21 April 2006 to a third party for a consideration of $245,000.00. I am not satisfied on the evidence that the purchase money for the Condominium was provided by Mr Wieberg or that the respondent paid to Mr Weiberg any part of the sale proceeds in settlement of indebtedness to him in connection with the purchase of the Condominium.

45. The petitioner is entitled to one half of the sale proceeds after the expenses of the sale has been deducted. The respondent received the entirety of the proceeds of sale, therefore, he must pay to the petitioner a sum equal to one half of the sale proceeds of the Condominium after the expenses of the sale have been deducted.

46. I accept the submission by counsel for the petitioner ought to have received her share of the sale proceeds at closing. She must be paid interest on her money from the date of the closing of the sale of the Condominium to the date of payment at the rate of 5% per annum.

47. In summary I order:

(i) that the respondent pay to the petitioner the sum of $17,418.00, being one half of the value of the gifts and furniture less the value of the gifts and furniture to be shipped to the petitioner;

(ii) that the respondent pay to the petitioner a sum equal to one half of the sale proceeds of the Condominium after the expenses of the sale have been deducted with interest thereon at the rate of 5% per annum from 21 April 2006 until payment; and

(iii) the respondent must pay the petitioner her costs of this application, to be taxed if not agreed.

Dated: 18 of October 2010.

Claire Hepburn
JUSTICE