

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS
IN DIVORCE

D 20/2003

BETWEEN:

LYDIA RUTHANN EWING

APPELLANT

AND

ERNEST BENJAMIN EWING

RESPONDENT

Mr. Carlos Simons Q.C. for the Appellant

Mr. Lloyd Rodney for the Respondent

RULING

1. This is an appeal by the Appellant Petitioner, Mrs. Lydia Ewing, from the decision of the Learned Registrar Ms Helen Ali. On the Petitioner's Application for ancillary relief the learned Registrar dismissed the Appellant's Application for the payment to her by the Respondent of a "gross" sum under Section 30 (1) of the Divorce Ordinance Cap 90; but increased the maintenance payable in respect of the children of the family from \$180.00 per month to \$220.00 per month. Having reached her decision the Learned Registrar made no order for costs. This appeal is directed against the Learned Registrar's dismissal of the application for a gross sum and against her decision to make no order for costs. There is no appeal against the Learned Registrar's order in respect of maintenance.

BACKGROUND

2. The parties were married in September 1985. There are four children of the family of whom the Appellant has care and control. The Appellant is some 39 years of age and the Respondent about 45 years of age. Both are in full time employment. The Appellant is a Public Servant and earns a net salary of \$2650.85 per month. She receives \$120.00 per month child allowance and the \$220.00 per month maintenance from the Respondent. She jointly owns the former matrimonial home with the Respondent although it is the latter who resides there on his own. In addition she is the beneficial owner of property in South Caicos, which produces rental income of \$350.00 per month, which is credited to an account in the name of the first son of the Appellant and Respondent. She has an interest in further property from which she derives no income. There is no evidence available to indicate the values of the Appellant's respective interests in those properties. Ignoring the \$350.00 per month, her total income including allowances and maintenance is close to \$3000.00 per month out of which she has to provide for herself and the four children.

3. The Respondent earns \$563.22 per week, which equates roughly to \$2500.00 a month. There is occasionally overtime available to the Respondent, which would increase that figure. Out of that sum the Respondent has to pay \$220.00 per month maintenance. He is therefore left with a little under \$2300.00 per month plus whatever else he earns when he works overtime for his day-to-day living

expenses. His only asset is his joint interest in the former matrimonial home, which as already indicated he resides in on his own.

4. A valuation for the former matrimonial home has indicated that it has a value in the region of \$88,000. On that basis the Petitioner sought a gross sum payment of \$44,000 from the Respondent.
5. In reaching the decision on the gross payment that she did the Learned Registrar approached the matter on two alternative bases:
 - a) that under the laws of the Turks and Caicos Islands the Supreme Court has no power to make a property transfer or adjustment order. Under Section 30 (1) of the Divorce Ordinance the Court can only have regard to the "fortune" of the wife, the 'ability' of the husband and the conduct of the parties. For the purposes of this case the latter was of no relevance. In those circumstances the Learned Registrar felt that the Court could not take into consideration the value of the former matrimonial home in assessing the amount, if any, of the lump sum payable by the Respondent in the context of his ability to pay;
 - b) that the Respondent did not in any event have the ability to pay a gross sum without realising his interest in the matrimonial home. That he could not do without the cooperation of the Appellant which the Learned Registrar was not prepared to speculate about.

6. So far as costs were concerned the Learned Registrar took the view that although the Appellant had partially succeeded in obtaining a modest increase in the payment of maintenance for the children, the Appellant had not succeeded in her principle claim for a gross sum. The divorce had proceeded upon the Appellant's Petition by agreement. In the circumstances and recognizing that the Respondent is a man of relatively modest means the Learned Registrar in the exercise of her discretion declined to make any order to costs.

SUBMISSIONS

7. Mr. Simons for the Appellant submits that the Learned Registrar erred in her construction of Section 30 (1) of the Divorce Ordinance. He submits that whether or not the Court has the power to make a property transfer or adjustment order is irrelevant. Under Section 30 (1) the Court must consider the husband's ability to make a gross payment; and in assessing that ability the Court must have regard to the entirety of the husband's assets including any interest that the husband has in the former matrimonial home. If having considered the totality of the assets the Court considers it reasonable to order the payment of a gross sum, then the Court should not shirk from making that order even if to pay the sum so ordered the husband has to charge or to sell the former matrimonial home. That this is a proper construction of Section 30 (1) is demonstrated, submits Mr. Simons by an historical comparison of Section 30 (1) with the equivalent 19th Century English Legislation. To that end I was referred to the Matrimonial Causes Act 1857, the Matrimonial Causes Act 1866, the Supreme Court of Judicature (Consolidation)

Act 1925, and the cases of Crampton v Crampton and Armstrong (1863) 32 LJP and M 142, Lister v. Lister [1886-90] ALLER Rep 176, and Wood v. Wood [1891-94] ALLER Rep 506. I was also referred to a decision of the Chief Justice of this Court in Hanchall v. Hanchall where the husband was ordered to pay a gross sum of \$45,000 and where in assessing that figure the value of the former matrimonial home was specifically taken into account. On that principle Mr. Simons submits that the Court should direct the Respondent to pay a gross sum of \$44,000 representing half of the value of the former matrimonial home and therefore also the Appellant's interest in the former matrimonial home. Mr. Simons acknowledges that as matters stand at present the Respondent might encounter difficulties in raising that amount on his own given the Appellant's joint interest in the former matrimonial home. However he made it plain that he was authorised by the Appellant to undertake on her behalf to transfer to the Respondent her interest in the former matrimonial home should the Respondent be ordered to pay a gross sum representing half its value. Given that undertaking, there was no reason, submits Mr. Simons to doubt the Respondent's ability to pay a gross sum. Furthermore submits Mr. Simons is eminently reasonable that the Respondent should be ordered so to do.

3. On costs Mr. Simons' submission were brief. The Appellant had succeeded on her Petition. On her claim for ancillary relief she had successfully obtained an increase in the order for maintenance in respect of children. She was therefore the

successful party and the Learned Registrar had no reason to depart from the normal rule that costs follow the event.

9. Mr. Rodney submitted that whether or not the Learned Registrar was right in refusing to take account of the value of the former matrimonial home, the Learned Registrar nevertheless arrived at the right decision. Under Section 30 (1) the Court has to consider the ability to pay. The stark reality in the present case is that the Respondent's interest in the former matrimonial home is his only asset. His disposable income is less than the Appellant's. If he were forced to obtain a loan or mortgage to pay a gross sum then he would be repaying it for the next 15 years or more which would be an intolerable hardship upon him. The Learned Registrar's decision therefore was correct submits Mr. Rodney and on the question of costs the Learned Registrar was perfectly entitled to make the order that she did given that the issue of costs is always a matter within the discretion of the Court. The Learned Registrar in the present case patently exercised that discretion. The Appellant's petition had effectively proceeded by consent and her claim for ancillary relief was largely unsuccessful.

RULING

10. I am satisfied that Mr. Simons is correct when he submits that in assessing a husband's ability under Section 30 (1) all the husband's assets must be taken into account, including any interest he may have in the former matrimonial home. Although the Supreme Court does not have the power to make a property transfer

order or property adjustment order, there is nothing in Section 30 (1), which precludes the Court from taking into account the asset as represented by the former matrimonial home. In fairness to the Learned Registrar however, she did not have as I have had the benefit of Mr. Simons' very carefully researched and extremely helpful historical analysis and comparison. The Learned Registrar was referred only to another decision of the Chief Justice of this Court in *Lightbourne v. Lightbourne* which was a case in which both parties consented to the Court assessing an appropriate gross sum on the basis of the wife's undertaking to transfer her interest in the former matrimonial home to the husband. No such consent is present in the instant case although as I have indicated, the Appellant, through Mr. Simons has undertaken to transfer her interest if an appropriate gross sum is awarded.

11. The fact that it is, as I find, appropriate to take into account the Respondent's interest in the former matrimonial home, is not however an end to the matter. The Respondent's ability to pay remains central to Section 30 (1). I have not found this an easy question to resolve. On the one hand the Respondent's only asset is his interest in the former matrimonial home. His income is relatively modest. On the other hand the Appellant not only has herself to care for but she has day-to-day care and control for four children. She has no home in the sense that the Respondent has although I do not lose sight of the fact that she has interests in property over and above her interest in the former matrimonial home. As matters stand however the former matrimonial home is an asset that is almost valueless to

her. The Respondent has sole use of the house. There is no provision under Turks and Caicos Islands law by which the Appellant can force a sale to realize her interest in the former matrimonial home (which by way of an aside seems to me to be a deficiency in the laws of the Turks and Caicos Islands). The Respondent indicated through his Counsel that the Respondent intended to transfer his interest in the former matrimonial home at some point to the sons of the family; but that is of no great consolation to the Appellant and the fact remains that the Respondent continues to live in the former matrimonial home. Under the present regime the Appellant is effectively subsidising his accommodation with no advantage to the Appellant herself.

12. I was pointed to no evidence to suggest that the Respondent could under no circumstances obtain a loan in a figure of \$40,000 - \$44,000, particularly if the Appellant's interest was to be transferred to him. Indeed it was accepted, at least implicitly that the Respondent could obtain a loan or form of mortgage albeit that it would take a considerable period to repay which would cause the Respondent hardship. That may be so but equally matters are very much in the Respondent's own hands. He is living on his own in the former matrimonial home, accommodation large enough to house six people - at least that was the size of the family before the Appellant and the Respondent separated. If he finds a loan of c\$40,000.00 too large comfortably to be able to service he can always sell the house and find somewhere more modest. As I have said, he is on his own. The choice is ultimately the Respondent's, but on any view he is able to pay. The

alternative if he pays the Appellant nothing, is that the Appellant is left with an asset, which is valueless to her for the present and also for the foreseeable future; an asset, which the Learned Registrar found, she had contributed to in equal measure to the Respondent. Given the Appellant's willingness to transfer her interest in the former matrimonial home to the Respondent, I find not only that the Respondent has the ability to pay a gross sum, but also that it is reasonable that he should do so.

13. The question next to arise as to the appropriate figure. On the basis that the Appellant is willing to transfer her interest in the matrimonial home to the Respondent, clearly the amount should reflect that interest. The matrimonial home has been the subject of one valuation, which as I have already indicated assesses its value at \$88,000. There is no other valuation before the Court although both parties acknowledge that property values in South Caicos are flat at best, depressed according to Mr. Rodney. In assessing the figure, I also have had regard to the Appellant's fortune and in this respect I note not only the fact that the Appellant has an interest in two further properties, but also that the Learned Registrar was satisfied that in respect of one those the Respondent has made a contribution if not in money, then in a supervisory capacity. In these circumstances and particular to allow to the fact that as both parties acknowledge property prices in South Caicos are flat I find that an appropriate gross sum payment would be \$40,000.

14. There next arises the question of costs. I have no doubt that had the Learned Registrar concluded that it was appropriate that the Respondent pay a gross sum, she would also have adopted the normal practice of ordering that costs should follow the event. The Appellant has succeeded on this appeal. There seems to me therefore to be no reason why the Respondent should not pay the costs both of the appeal and of the hearing below. I am conscious of the fact that he is not a wealthy man. An order for costs is inevitably an order, which impacts on his 'ability' to meet other commitments such as to pay a gross sum. To that very limited extent, my decision on costs has impacted also on the amount that I have decided should be paid by way of gross sum.
15. I have allowed the Respondent a period of three months in which to pay the gross sum. I have done so to allow time for the transfer of the Appellant's interest and to allow the Respondent sufficient time to raise the necessary funds. I am conscious of course that the Court has no power either to order the Appellant to transfer her interest or to order the Respondent to accept it. The order that I propose to make however is predicated upon the Petitioner's undertaking to transfer as given by her Counsel. If the Respondent refuses to accept the transfer, that on the other hand would not affect the operation of this order.
16. I have made the orders regarding the children sought by Mr. Simons. These orders were proposed by the Learned Registrar unless objection to the proposed orders

were raised. None were raised before me and none had been intimated to the Learned Registrar before the Notice of Appeal was lodged.

17. In all these circumstances the order that I propose to make reads as follows:

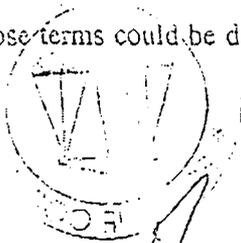
"Upon hearing Counsel for the Appellant and for the Respondent:

And upon the Appellant undertaking to transfer her interest in the former matrimonial home to the Respondent

It is hereby ordered that:

- 1) The appeal be allowed.
- 2) The Respondent shall pay to the Appellant the gross sum of \$40,000 within three months of the date of this order.
- 3) There be joint custody of the children of the family with care and control to the Appellant and reasonable excess to the Respondent.
- 4) The costs both of the appeal and the hearing below to be the Appellant's, to be taxed if not agreed.

I would be grateful if an order in those terms could be drawn up for sealing in the usual way.



Charles Ekins

CHARLES EKINS
ACTING CHIEF JUSTICE