

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. M000416 OF 2002**

**GRACE LILLIAN CYRUS – HARPER**

**PETITIONER**

**AND**

**MICHAEL HARPER**

**RESPONDENT**

**BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES**

**Appearances:**

**Mr. Louis Noel for the Petitioner / Wife**

**Mr. Evans Maundy for the Respondent / Husband**

**JUDGMENT**

Before the Court are cross applications by the parties. The Respondent/Husband (hereinafter called “the Husband”) seeks an order for the sale of premises situate at No.13, 8<sup>th</sup> Street East Cane Farm Avenue Trincity (hereinafter called “the Matrimonial Home”) and for the proceeds of sale to be divided equally between the parties. The Petitioner/Wife (hereinafter called “the Wife”) seeks the following orders:

1. That the Husband transfer to her for the benefit of the child his half share in the Matrimonial Home;

2. Pursuant to section 26(1)(b) of the Act that the property situate at No 6. Surujbally Trace Marylands Gasparillo (hereinafter called “the Gasparillo property”) be valued and sold and that she be given one quarter of the proceeds of sale, or alternatively;
3. Pursuant to section 24(1)(c) of the Act that the Husband pay to the Wife a lump sum equal to one fourth of the value of the Gasparillo property; and
4. Pursuant to section 24(1)(c) of the Act a lump sum.

The parties were married in 1987 and separated in April 2002. The Wife’s petition was filed in the month of April 2002. A decree nisi based on the fact of the Husband’s unreasonable behaviour was granted on the 11th December 2002. There was no reservation by the Husband with respect to his contesting the allegations of behaviour made in the petition. No decree absolute has as yet been granted.

The Husband, 47 years old, is employed with the Government of Trinidad and Tobago as a Prisons Officer at a gross monthly salary of \$5,632.00. He now lives in rented premises and is the owner of a motor vehicle registration number HAS 6237 which he operates as a taxi. Throughout the marriage in addition to operating a taxi he freelanced as an electrician and a disc jockey.

The Wife 45 years old is employed with the Government of Trinidad and Tobago as a Clerk at a gross monthly salary of \$3,335.00.

There is one child of the family namely Kevon Harper who is now 16 years old. The child now lives with the Wife in the Matrimonial Home. There is in place an order whereby the Husband was ordered to pay the sum of \$800.00 a month for

the maintenance of the child as well as the sum of \$610.00 a month, representing one-half of the mortgage installment on the Matrimonial Home, towards the child's accommodation and the sum of \$75.00 towards the electricity bill.

Also living with the parties during the marriage was the Wife's child of another relationship. This child is now an adult.

The basic financial arrangement during the marriage was that the Husband paid the mortgage and the electricity bill while the Wife paid all the other household expenses including the telephone bill.

The Matrimonial Home, in their joint names, was purchased in the year 1991 and was valued in 2004 at the sum of \$ 325,000.00. There is the sum of approximately \$100,000.00 now outstanding on the mortgage. The equity in the Matrimonial Home is therefore some \$225,000.00. Over the years various improvements were done to the Matrimonial Home and both parties claim contribution to these improvements.

The Wife's case is that she was solely responsible for the day-to-day care of the family. With respect to the improvements to the Matrimonial Home she claims to have financed the majority of these improvements herself through various loans. According to her the Husband's only contribution to these improvements was to the installation of the burglar proofing on three windows, the purchase of a toilet set and face basin and the purchase of materials used in the construction of a small concrete platform for a porch that was never completed.

According to her not only has the Husband acquired sophisticated musical equipment during the marriage but also earned the sum of approximately \$260,000.00 from his disc jockeying over the years. According to the Wife from the year 1999, after the purchase of a car used as a taxi, the Husband would have earned a total of \$18,000.00 to \$19,000.00 a month.

She claims the Husband is the owner of an undivided one-half share in the Gasparillo property given him by his mother in July 2001 by way of a gift. According to her this gift was made for the benefit of the family.

The Wife claims that she suffers from a back problem for which she is required to have surgery. She has annexed medical certificates in support of this claim. This surgery if done privately will cost her some \$45,000.00 and would require her to be bedridden for a period of between 3 to 6 months. She estimates the cost of her after care to be in the vicinity of \$6,000.00 a month.

Her claim for a lump sum of \$217,200.00 is based on the following:

1. The sum of \$1,200.00 spent by her in the year 2003 in schoolbooks and equipment for the child of the family;
2. The sum of \$20,000.00 representing one half of the value of motor vehicle registration number HAS 6327;
3. The sum of \$10,000.00 representing approximately one half of the value of music equipment acquired during the currency of the marriage;
4. The sum of \$20,000.00 being one half of the minimum income earned from operating the said taxi;

5. The sum of \$130,000.00 being approximately one half of the income earned from the use of the said music equipment and
6. The sum of \$36,000.00 being the anticipated cost of medical needs, nursing care and domestic assistance after surgery.

She also claims to be entitled to a one-quarter share in the Gasparillo property and seeks to have it sold and one quarter share of the proceeds paid to her or an additional lump sum from the Husband equivalent to a one-quarter share.

The Husband's case is a simple one, he claims a half share in the Matrimonial Home. With respect to the allegations made by the Wife although admitting that he does electrical work he claims not to be a qualified electrician. He claims that the last job done by him was in the year 2001 for which he earned the sum of \$1,000.00. He denies that he earns a regular income from his disc jockeying. According to him he hardly charges for most of these jobs. He says that the income from the taxi was never as profitable as it was supposed to be and was used to maintain the taxi and assist in the payment of the mortgage installments. According to him the improvements made to the matrimonial home were financed by them both. He states that as a result of the constant improvements made to the home and in an attempt to finance these he became a "chronic borrower" and remains in debt. He says the strain of the financial burden has caused him to suffer from hypertension and annexes two certificates for sick leave in the month of June 2004 in that regard.

With respect to the Gasparillo property he denies that this property was given to him for the benefit of the family. According to him the property, originally purchased by his mother, was put into the names of his mother and his sister and occupied by them both with the intention that it would eventually be vested in his sister. He states that at some point in time his mother and his sister fell out and in order to ensure that she would be looked after up to her death his mother transferred to him her undivided share in the property. His mother and sister have now reconciled and his mother now requires that he transfer the property back to her name, which he says he intends to do once sufficient funds have been identified to do so.

It is trite law that it is only by way of an application made under Part IV of the Act that the Court has the power of sale. This power is only exercisable with respect to a matrimonial home and on an application made by either party before the decree of divorce in circumstances where the Court is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home. The term 'matrimonial home' used in Part IV of the Act is specifically defined. For the purpose of the instant case it is sufficient to state the definition as being any dwelling being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of divorce is or has been granted where either or both of the parties own an interest in the dwelling or the land upon which the dwelling stands.

Although in his summons before the Court the Husband did not specifically state that his application was pursuant to **Part IV Section 54 of the Act** Attorney for

the Husband submitted that it was. In the circumstances I am prepared to accept that the application was made pursuant to section 54 of the Act. The decree absolute not having been granted in these proceedings it is clear that on the Husband's application the Court has the jurisdiction to order of sale of the Matrimonial Home.

The Wife seeks an order pursuant to section 24(1)(b) of the Act that the Gasparillo property be sold. Section 24 of the Act does not give the Court a power of sale. In any event, the Gasparillo property does not fall within the definition of a Matrimonial Home under Part IV of the Act. The Court therefore does not have the jurisdiction to order the sale of the Gasparillo property.

With respect to her applications for a lump sum order representing her claim to a one- quarter entitlement in the Gasparillo property, there is no evidence of the value of the Husband's share in the Gasparillo property. In any event to my mind the Husband's interest, if any, in the Gasparillo property is only relevant in so far as it may be one of the assets to which the Court ought to have regard when considering the making a lump sum order in other words it is one of the circumstances that a court ought to consider pursuant to section 27 (1) (a) of the Act.

We are therefore left with the Husband's application for the sale of the Matrimonial Home and the Wife's application for the transfer to her of the Husband's share in the Matrimonial Home for the benefit of the child of the family and for a lump sum order.

Although I am satisfied that both parties have made contributions to the Matrimonial Home sufficient to allow the Court to exercise its powers pursuant to section 54 of the Act I am of the opinion that an order for the sale of the Matrimonial Home will not meet the justice of the case before me.

By section 26(1)(a) of the Act the Court is mandated to consider the provisions of section 27(2) of the Act, that is all the circumstances of the case and in particular those circumstances identified at sub sections (a) to (e) so as to place the child so far as is practicable and having regard to the considerations mentioned in subsection 1(a) and (b) 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. It must be noted here that with respect to this application no specific evidence has been led by the Wife with regard to the circumstances identified in sub-sections (a) to (e). Indeed the only information given by the Wife with respect to the son was in reference to her claim for the repayment of the sum of \$1,200.00 spent by her for schoolbooks for him for the year 2003 and with regard to the Husband's behaviour during the marriage. In any event whereas I am ever mindful of the need to house the child I am not of the view that where the Matrimonial Home is the principal capital asset and has been acquired by the efforts of both parties it ought as a general rule to be settled on a child or the children of the family, particularly where, as in this case, the child is almost an adult. In the circumstances despite the fact that a home for the minor child is of paramount importance I do not think that an order that the Husband's interest in

the Matrimonial Home be transferred to the Wife for the benefit of the child is appropriate in this case.

With respect to the Wife's application for a lump sum order the Court is mandated to have regard to all the circumstances of the case including those itemized at section 27 (1) (a) to (h) so as to place the parties so far as practicable and having regard to their conduct, just to do so, in the financial position in which they would have been had the marriage not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

Although neither Attorney addressed me on the question of conduct, on the affidavits much was made of the Husband's conduct during the marriage. No reservation of the Husband's rights with respect to the allegations of conduct made in the petition was made in the divorce proceedings. In the circumstances the Husband is estopped from denying these allegations. I find therefore that where the Wife's affidavit repeats or refers to incidents pleaded in her petition they had been proved as against the Husband. With respect to any other conduct, other than financial conduct, raised in affidavits there has been no cross-examination of either party on these allegations and I make no finding of fact with regard to the allegations. The question for the Court, however, is whether the conduct of the Husband, as proved by the Wife, is such that it would offend a reasonable person's sense of justice to disregard same when dealing with ancillary relief. I find that on the evidence the conduct of the Husband during the marriage is a factor to be taken into consideration and goes to increase the Wife's entitlement.

The Court is not required to embark on a mathematical calculation of each party's contributions to or earnings made during the marriage but rather to take all the circumstances into consideration including but not limited to the income, earning capacity, property and other financial resources which each party had or is likely to have in the foreseeable future and the contributions of each to the welfare of the family. The Wife's request that she be awarded sums equivalent to a mathematical calculation of a half share of what she alleges the Husband earned during the marriage is not to my mind within the contemplation of the section. With respect to her request for a half share in the value of the Husband's motor vehicle and the music equipment, whereas the Court will be entitled to take these assets into consideration when making an award there is no evidence before me as to the value of these assets nor is there any evidence before me of exactly what music equipment is owned by the Husband. On the evidence however I am prepared to accept that the Husband does own music equipment from which he can earn an income. I also accept that the Husband can earn income from his skill as an electrician.

It is trite law that no order for a lump sum should be made unless the Husband has capital assets out of which to pay it without crippling his earning power. Save for his interest in the Matrimonial Home, his one half undivided share in the Gasparillo property, the taxi and the music equipment there is no evidence that the Husband has any other assets. His credit union shares are less than what is outstanding on his loans from the credit union. The motor vehicle and the music equipment are income-earning assets the sale of which will cripple his earning

power. With respect to the Gasparillo property, this is not a property that the Husband is at liberty to sell. These premises are occupied by his aged mother and sister and in any event his interest is only that of his mother's who held the property as a joint tenant with his sister. The only asset of the Husband upon which the Court can attach a lump sum order is therefore the Husband's share in the Matrimonial Home. To my mind an order that the house be sold in order to pay to the Wife a lump sum will not meet the justice of the case. In the circumstances I am of the opinion that a lump sum order is not appropriate in this case.

In coming to my decision while I have accepted that both parties have made substantial contributions to the acquisition and improvement to the Matrimonial Home I accept the Wife's evidence that she was the moving force behind the decision to and the execution of the improvements and that all her time, energy and available resources were spent on the Matrimonial Home and the family. I have taken into consideration all the circumstances of the case including those as identified in section 27 of the Act and in particular

1. The conduct of the Husband during the marriage;
  2. The relative income of the parties and the ability of the Husband to earn sums of money over and above his salary;
  3. The fact that the Wife continues to have the responsibility for the minor child of the family and the need of the child for a roof over his head;
- and

4. The fact that the Wife and child have continued to reside in the matrimonial home and

5. The physical disability of the Wife.

In all the circumstances of the case therefore I order that the Husband transfer to the Wife his share and interest in the Matrimonial Home in full and final settlement of all her claims on or before the 15<sup>th</sup> December 2004 in default the Registrar of the Supreme Court is to execute the necessary conveyance on his behalf. There is already in place a final order for the maintenance of the child of the family which provides for the Husband to pay to the Wife a sum equal to one half of the mortgage installment for the avoidance of doubt I have taken this payment into account in coming to my decision, the effect of which will be to assist the Wife with the mortgage payments until the child attains the age of 18 years or until further order. The Husband is to pay the Wife's costs to be taxed in default of agreement.

Dated this 16<sup>th</sup> day of November 2004

.....  
Judith A. D. Jones  
Judge