



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G OF 2020

IN THE MATTER of Rule 11(6) of the Court of Appeal Rules (2014 Revision)  
AND IN THE MATTER of the Application for Leave to Appeal

BETWEEN: VIOLET JUANITA POWELL PLAINTIFF/APPLICANT

AND: WARREN GARTH POWELL DEFENDANT/RESPONDENT

**NOTICE OF ORIGINATING MOTION**

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on 2020 at am/pm or as soon thereafter as counsel can be heard, by counsel on behalf of the Applicant for leave to appeal the order of Honourable Justice Richards Q.C. dated 14<sup>th</sup> February 2020 (the Order), and for the following relief, namely for an order setting aside or varying the Order of the Honourable Judge dated 14<sup>th</sup> February 2020.

AND FURTHER TAKE NOTICE that the grounds of this application are:

**Ground 1 The Learned Judge failed to have regard to the fact that the Order was unworkable *ab initio* in that it fails to determine their rights and responsibilities, thereby lacking in certainty and finality.**

1.1 At Clause 2, The Learned Judge ordered:

*"The FMH located on the said property shall be divided equally in accordance with the DDL Report whereby the existing structure on the property shall be divided into 2 self-contained apartments...the associated cost for the proposed work is approximately CI\$72,000.00."*

1.2 At Clause 3, The Learned Judge ordered:

*"The Petitioner shall contribute CI\$1,303.00 on a monthly basis to the household which amount represents: 1/2 of the mortgage; 1/2 of the house insurance; 1/2 of the regular yard maintenance..."*

1.3 Clause 2, lacks functionality, thereby rendering its implementation unworkable (*ab initio*) for the following reasons:

- a) the wording does not make clear the party's respective rights and obligations.
- b) there is no provision stating whether one or both parties are required to pay the associated cost for the proposed work, apportionment of cost to each party, timeframe for commencement and/or completion, *inter alia*.
- c) the Order fails to finally and conclusively determined the rights of the parties, thereby making it impossible to for the parties to achieve a clean break.

1.4 We submit that the Order is frustrated, and it is therefore appropriate and within the jurisdiction of the court to vary it. We further submit that implementation of Clause 2, is a practical impossibility. The Appellant's, realistic prospects of being able to generate capital on her own to cover the associated cost for the proposed work is minute if not impossible, due to her advance age, ill-health, and lack of savings.

1.5 With respect to Clause 3, we submit that its implementation is unworkable as it is lacking in specificity and certainty. Pursuant to the order:

- a) the Respondent is required to contribute C\$1,303.00 monthly to the household which amount represents:  $\frac{1}{2}$  of the mortgage  $\frac{1}{2}$  of the house insurance;  $\frac{1}{2}$  of the regular yard maintenance..."
- b) the Respondent did not comply with clause 3 of the order and currently owes the Applicant C\$4,800.00.
- c) the Applicant cannot pursue the Respondent for his outstanding contributions as the wording fails to conclusively determine the duration of the rights and obligations of the parties.

In consideration of being awarded half of the equity in the FMH, the Respondent is required to financially contribute to the mortgage repayments and household expenses. In effect however, the Order serves to render a benefit on the Respondent whilst the Appellant receives nothing which is manifestly unjust and inequitable.

We submit that in the circumstances the Order should be set aside and/or eligible for variation because it has been rendered unworkable and/or frustrated by the respondent's failure to contribute to the mortgage repayments and it is therefore appropriate and within the jurisdiction of the court to set aside or vary it.

**Ground 2: The Learned Judge erred in the exercise of her discretion under Section .21 aiming for equality whilst failing to consider the exceptional circumstances allowing for its departure.**

The Learned innocently misdirected herself as to the appropriate criteria with respect to the "financial product" of the parties' common endeavour, in addition to her finding of an "absence of any exceptional circumstances" and "no good reason". The Learned Judge placed undue weight on the Respondent's verbal testimony regarding his financial contributions and failed to give effect to or sufficient weight to appropriate case law or authorities of the Grand Court and Court of Appeal and/or the facts of the case.

2.1 The Learned Judge also stated:

*"The husband said he gave her funds according to his earnings and seeks to shelter behind the variability of his earnings for the level of funds given to her. Even using the highest figure...this would have been just about one third of his income and there would be good reason to say this was a woefully inadequate amount in light of his earnings and the mortgage commitments and expenses of the household. This would mean that he would be left with disposable income of more than \$2,000.00 while the wife had none".<sup>1</sup>*

---

<sup>1</sup> Para 48 Judgment

2.2 We submit that the findings of the Learned Judge are entirely inconsistent, and her factual findings as set out above at paragraph 2.1 preclude the Judge from finding no good reason to depart from the yardstick of equality.

**Ground 3: The Learned Judge erred in in treating the FMH as Matrimonial asset**

3.1 The Learned Judged found as follows:

*“After the purchase of the land, the construction of the home took place over a period of years during which time the husband was contributing to the household. This must have been because the parties contemplated that this was their family home and that he was an equal partner in the building project. This is a significant factor in indicating the intention of the parties”. Given all the circumstances...it appears that the construction and maintenance of the home was the common endeavour of the parties, this property is a matrimonial asset.”<sup>2</sup>*

3.2 The Learned Judge failed to consider or give proper account to the following:

- a) the FMH was acquired by virtue of the wife’s personal industry from her meager earnings as a clerical officer and part-time janitor (in the absence of the Respondent) and should qualify as non-matrimonial property. The preceding was approved by the Judge in the decision of *Rossi v. Rossi*<sup>3</sup> whereby the Court stated:

*“Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share.”*

- b) the Respondent is an Electrician by trade, however, despite being the “money-earner” in the marriage, the Court found that throughout the marriage his financial contributions decreased in amount and consistency.
- c) it is not disputed that the Appellant was solely responsible for the mortgage repayments throughout the marriage.
- d) following the dissolution, the Appellant continues to make the mortgage repayments every month and in full.
- e) notwithstanding the inadequacy of his financial contributions, the Respondent admittedly expended sums to maintain his family home in Jamaica, including taking out loans to cover the costs of repairs.
- f) the Respondent expects payment for non-financial contribution to the FMH such as repairs, maintenance, etc. The preceding would raise the perception that the Respondent accepted that he had no interest in the FMH.

3.3 The Learned Judge also stated in her judgment:

*“The husband said he gave her funds according to his earnings and seeks to shelter behind the variability of his earnings for the level of funds given to her. Even using the highest figure...this would have been just about one third of his income and there would be good reason*

---

<sup>2</sup> Para 89 Judgment

<sup>3</sup> [2006] 3 F.C.R. 271,

*to say this was a woefully inadequate amount in light of his earnings and the mortgage commitments and expenses of the household. This would mean that he would be left with disposable income of more than \$2,000.00 while the wife had none".<sup>4</sup> [emphasis added]*

3.4 The marriage therefore could not be said to be a partnership of "equals", and we respectfully submit that in applying the equal sharing principle, the Learned Judge erred and the Respondent is not entitled to an equal share of the FMH's equity. We further submit that it is manifestly unjust that the Appellant, being the major financial contributor to the household during a 34 year marriage, is awarded the same proportion of the assets as the Respondent whose financial contributions were inconsistent, inadequate and non-existing for in excess of ten years of the marriage.

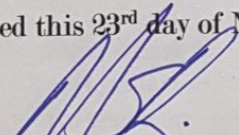
**Ground 4: The Learned Judge inappropriately exercised her discretion in a manner that is not recognized by the rules.**

4.1 The Learned Judge erred in law in disregarding a legally binding deed of waiver signed by the husband, (*with the benefit of legal advice*) agreeing to forego any interest he may have in the FMH. The Learned Judge found as follows:

*"I believe and accept his evidence that when he signed the document, he did so because of the plea of the wife and to assist her to get the loan...and not because he was genuinely wishing to forego any interest which he may have in the house".<sup>5</sup>*

4.2 The Learned Judge inappropriately exercised her discretion in a manner that is not recognized by the rules. The Learned Judge agreed with and based her findings on the basis of the Respondent's submissions without any supporting documentary evidence or regard to due process as outlined by the rules, specifically provisions for discovery or cross examination in order to test such evidence before her. These procedural irregularities make the decision incorrect in law.

Dated this 23<sup>rd</sup> day of November 2020.

  
-----  
**MSR ATTORNEYS-AT-LAW**  
Attorneys for the Applicant

**TO:** The Clerk of the Court

**AND TO:** The Respondent  
Warren Garth Powell  
2717 Shamrock Road

<sup>4</sup> Para 48 Judgment

<sup>5</sup> Para 61 Judgment