

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

AGATHA TURNBULL,

Plaintiff,

vs.

ELROY TURNBULL,

Defendant.

FAMILY NO. ST-13-DI-113

ACTION FOR DIVORCE

Cite as: 2019 VI SUPER 5U

MEMORANDUM OPINION

This matter came on for a trial and show cause hearing on May 26, 2016 before the Honorable Debra S. Watlington, Judge of the Superior Court of the Virgin Islands.¹ The Plaintiff/Wife Agatha Turnbull appeared personally and was represented by Clive Rivers, Esq. Defendant/Husband Elroy Turnbull appeared *pro se*.² The Court heard sworn testimony from the parties. After hearing all of the evidence, the Court reserved its decision on the outstanding issues.

The parties do not dispute the divorce herein and there are no minor children of the marriage.³ The Plaintiff seeks a division of real and personal property, spousal support, and attorney's fees. For the reasons below, the Plaintiff's requests for distribution of the parties' real and personal property and attorney fees are granted, and the request for spousal support is denied.

FACTUAL BACKGROUND

The parties were married on July 27, 2003 in St. Thomas, Virgin Islands.⁴ The Plaintiff contends that she improved the Defendant's life financially since their marriage, assisted with acquiring real and personal property during the marriage, and is entitled to spousal support. The Defendant maintains that he married the Plaintiff, a native of Dominica, to assist her in acquiring a green card and employment with the Government of the Virgin Islands.

¹ Defendant was ordered to show cause why he failed to mediate as ordered.

² The Defendant was previously advised to seek legal counsel.

³ The parties have one child of the marriage who has reached the age of majority, having been born April 15, 2000.

⁴ The Plaintiff's Divorce Complaint erroneously states that the parties were married on July 27, 2013, but at trial Plaintiff testified that the parties were married on July 27, 2003 and this was verified by the Court records.

The parties resided together in Paul M. Pearson Gardens ("PMP Gardens") Building 21 Apt. 165, St. Thomas, V.I., from 1998 to 2013. The parties separated after a domestic violence incident and the Plaintiff moved into her own apartment in 2013, pursuant to a Domestic Violence Restraining Order.⁵ On September 27, 2013, the Plaintiff filed an action for divorce, alleging the marriage was irretrievably broken. The Plaintiff seeks, *inter alia*, spousal support, distribution of the real property acquired during their marriage located at 21-48 Frenchman's Bay St. Thomas, V.I., and personal property acquired during the marriage, to wit: 1997 Ford F15 and 2001 Dodge Ram, used as a safari and taxicab, respectively, and Taxi Medallion #0977. The parties were ordered to mediation, but Defendant failed to cooperate with efforts to mediate.

SPOUSAL SUPPORT

The Plaintiff contends that she is entitled to and in need of spousal support due to her small income and debts incurred during the marriage. The Plaintiff asserts that the Defendant has the ability to pay spousal support. She seeks four hundred dollars (\$400) per month for two years and retroactive spousal support for 2013-2015 as a lump sum. The Defendant opposes the Plaintiff's request. He alleges that he cannot afford to pay spousal support.

Title 16 V.I.C. § 109(a)(3) prescribes spousal support, without consideration of fault, when "a party [is] determined to be in need of support."⁶ The Supreme Court of the Virgin Islands ("Supreme Court") reformulated the need-based test for a spousal support award in Berrios-Rodriguez v. Berrios. It requires the Court to determine whether "the parties [would] be similarly situated after their divorce."⁷ If yes, that ends the analysis and spousal support is denied. If no, then it suggests that... "the divorce cause[d] an economic disparity between the [parties],

⁵ The Plaintiff was granted a Domestic Violence Restraining Order on October 4, 2013, Case #ST-13-DV-157, which among other things ordered Plaintiff to remove her personal belongings from the Defendant's residence at P.M.P. Gardens, Bldg. 21, Apt 165, St. Thomas, U.S.V.I.

⁶ The spousal support provides assistance for "...all that is indispensable for maintenance, housing, clothing and medical attention according to the social and economic position of the family." Title 16 V.I.C. § 341(g).

⁷ Berrios-Rodriguez v. Berrios, 58 V.I. 477, 485 (2013).

[and] the Superior Court should [award] [spousal support].”⁸ The Court should balance one party’s need for support against the other’s ability to pay.⁹

The Plaintiff informs the Court that she has been employed full time by the V.I. Department of Sports, Parks and Recreation for ten (10) years as a custodian earning approximately \$20,000 annually. She provided the Court with a 2013 pay stub, which shows the Plaintiff’s gross income is significantly reduced by deductions such as FICA, taxes, retirement, health insurance, and loan repayment to GERS and the credit union.¹⁰ The Plaintiff also testified that she is 51 years old and suffers from diabetes and headaches due to stress and vision problems. The Plaintiff alleges that since obtaining her own apartment in the Paul M. Pearson Gardens housing community, the Defendant refused to assist her financially.

The Defendant testified that in March 2016, he accepted a position with the Virgin Islands Fire Service(VIFS) as a mechanic’s helper earning approximately \$26,000 annually. Defendant alleges that he earns less money driving taxi since obtaining employment with VIFS.¹¹ The Defendant contends that he cannot afford to pay spousal support, as his gross income is also reduced significantly by deductions such as FICA, taxes, retirement, health insurance, and repayment of loans.¹² He further testified that he financially supports his daughter. He is 50 years old and asserts that he suffers from foot pain.

Although the Defendant admitted that he paid the household bills while the parties were living together, there is no evidence about the amount of the expenses. Each party is employed, responsible for their own housing, utilities, and food. The parties neither testified nor provided evidence of housing, utility or personal expenses. Plaintiff has not demonstrated any particular or extraordinary expense. She has not proved an inability to support or care for her needs.

⁸ *Id.*

⁹ The Supreme Court requires the Superior Court to look beyond the parties’ current finances and consider “their potential for future earnings based on their educational background, employment history, and other relevant factors.” *Id.* at 486.

¹⁰ Plaintiff alleges she receives \$180.89 biweekly.

¹¹ Defendant testified that he earned approximately \$30,000 annually as a taxi-driver when he drove full-time.

¹² Although, the Defendant alleged that his net pay is less than two hundred dollars (\$200) and that one paycheck was only for fifty dollars (\$50), his paystubs were not submitted as evidence.

Based on the testimony and evidence entered into the record, there is insufficient evidence to show that the Defendant is in a better financial situation than Plaintiff and that the parties would not be similarly situated after their divorce. It does not appear that the divorce will cause any significant economic disparity between the parties.

Furthermore, there is no proof that the Defendant's income is more than what he admitted on the record to establish an ability to pay spousal support. "It is well established that as in ordinary civil litigation — the party that asserts a cause of action for spousal support bears the burden of proof."¹³ The Plaintiff failed to meet that burden. Therefore, her request for spousal support will be denied.

DISTRIBUTION OF MARITAL ASSETS

The Plaintiff alleges that the parties acquired real and personal property during their marriage and seeks equitable distribution of all the marital property: (1) real property located at 21-48 Frenchman's Bay St. Thomas, V.I.; (2) two vehicles; and (3) a taxi medallion. The Defendant denies that there is any jointly owned real or personal property requiring distribution by the Court.

MARITAL HOMESTEAD

The Plaintiff contends that the property located at 21-48 Frenchman's Bay St. Thomas, V.I. is the marital homestead, and that after the construction of the home, the parties resided in the home for three (3) months in 2007, then returned to their apartment in PMP Gardens. Defendant denies that the parties ever resided in the home and alleges the residence is used as a rental property only.

Pursuant to Title 33 V.I.C. § 2305(d), the Family Court has the jurisdiction to distribute the marital homestead.

Although the Virgin Islands Code does not expressly define a 'marital homestead,' both the United States Court of Appeals for the Third Circuit and the Appellate Division of the District Court correctly interpreted section 2305(a) in conjunction with section 2305(c) of title 33 to hold that a 'marital homestead' is any

¹³ *Berrios-Rodriguez* at 490.

‘homestead’ in which a husband and wife both reside during the marriage and that is owned by one or both of the spouses.¹⁴

The evidence show that the residence located at 21-48 Frenchman’s Bay is not the parties’ marital homestead. Although the Plaintiff alleges that the parties resided at the Frenchman’s Bay property, it was short lived as they returned to the PMP Gardens within three months. Plaintiff testified that PMP Garden management learned the parties were subleasing their apartment, while living in the Frenchman’s Bay house, and required that they either relinquish the apartment or occupy it personally.

The parties’ testimony reveals that they resided in PMP Garden Building 21 Apt 165, St. Thomas, V.I. prior to and during the marriage, from 1998 to 2013. The cooperative located at PMP Garden Building 21 Apt 165, St. Thomas, V.I. was the parties’ marital homestead, but there is no evidence that the parties own the marital homestead.

Title 33 V.I.C. § 2301 (c)(2) states “[r]esidential real property” means any real property on which a residence is located, including apartments, condominiums, cooperatives, but excluding timeshare real property.” However, the Plaintiff did not request distribution of the cooperative apartment. Therefore, there is no issue to resolve with respect to the PMP Gardens Building 21 Apt 165, St. Thomas, V.I.

MARITAL REAL PROPERTY

The Superior Court has jurisdiction, pursuant to Title 16 V.I.C. 109, to equitably distribute marital property.¹⁵ Marital Property is defined by this statute as “*all real and personal property acquired by either spouse subsequent to the marriage, except:*

- (A) *Property acquired by gift, bequest, devise, or descent;*
- (B) *Property acquired in exchange for property acquired prior to the marriage, or in exchange for property acquired by gift, bequest, devise, or descent;*
- (C) *Property acquired by a spouse after a decree of legal separation;*
- (D) *Any judgment or property obtained by judgment awarded to a spouse from the other spouse;*
- (E) *Property excluded by valid, written agreement of the parties; and*

¹⁴ *Garcia v. Garcia*, 59 V.I. 758, 767 (2013).

¹⁵ *Garcia v. Garcia*, 59 V.I. 758, 778 (V.I. 2013).

(F) Income from property acquired by a method listed in subparagraphs (A) through (E), if the income is not attributable to the personal effort of a spouse."¹⁶

Although the real property located at 21-48 Frenchman's Bay, St. Thomas, V.I. is not the marital homestead, it is potentially marital property pursuant to Title 16 V.I.C. § 109 (a)(7).¹⁷ This Court is vested with the authority to equitably divide joint personal and real property arising from an action for divorce.

The Plaintiff alleged that on November 17, 2003, the parties jointly purchased undeveloped real property located at 21-48 Frenchman's Bay St. Thomas, V.I.¹⁸ Based on the testimony, the real property was purchased, in part, from money that the Defendant received from the sale of property located in Tortola, B.V.I. The Plaintiff asserts that she too contributed to the purchase of the real property by obtaining a loan from GERS to pay the difference. The Plaintiff references multiple instances of monies being borrowed but did not connect the loans to the property.¹⁹ The Defendant denies that the Plaintiff contributed to the purchase of the real property.²⁰ Neither party provided any documentary evidence nor third party corroborations of their contributions to the purchase of the real property.

The parties also testified that they entered into a mortgage in 2007 to construct a home.²¹ Plaintiff alleged that Defendant could not obtain the loan on his own due to poor credit. The Plaintiff alleged she also contributed to the construction of the home, prior to acquiring the mortgage by purchasing building materials and incurring

¹⁶ Title 16 V.I.C. § 109 (a) (7)

¹⁷ In *Thompson v. Thompson*, 64 V.I. 71 (Sup. Ct. 2016) the Court found that Title 16 V.I.C. § 109(7) shall be applied retroactively to all divorce matters filed before December 19, 2014, as the statute is jurisdictional and remedial in nature without causing adverse retroactive effect upon the parties. Retroactive application of § 109(7) allows the Court to distribute non-homestead marital real property and exercise jurisdiction over all marital property owned by the parties.

¹⁸ Plaintiff's Exhibit 1 depicts a Warranty Deed for property acquired at parcel No. 21-48 Frenchman's Bay St. Thomas, V.I. on November 13, 2003 for \$30,000 by Elroy Turnbull.

¹⁹ Plaintiff's Exhibits 4 and 6 depict Plaintiff's loan application from the Government Employees Retirement System. However, the applications are for personal loans and is not indicative that the monies were used for the property located at 21-48 Frenchman's Bay, St. Thomas, U.S. Virgin Islands.

²⁰ The Court construes the Defendant's assertion as an argument for the exclusion of the property as marital property pursuant to Title 16 V.I.C. § 109 (a)(7)(A) exception, "property acquired by gift, bequest, devise, or descent," as the money used for the purchase of the real property was a gift.

²¹ Plaintiff's Exhibit 5 is the Mortgage between Banco Popular de Puerto Rico and Plaintiff and Defendant as borrowers for a mortgage loan in the amount of \$110,000.00 for property located at 21-48 Frenchman's Bay St. Thomas, V.I. Plaintiff's Exhibit 2 is a Release of First Priority Mortgage by The Bank of Nova Scotia (Scotiabank) for \$50,000 which Plaintiff testified that the entire \$50,000 was used by them to secure a greater loan amount of \$110,000 from Banco Popular in which Banco Popular later paid off Scotiabank.

credit card debt, which the Defendant denies.²² Plaintiff also contends that she acquired loans to pay the mortgage arrears until the parties separated in 2013.²³ The Defendant denies knowledge of the loans and denies Plaintiff's assertion that she paid any money towards the mortgage.²⁴ He contends that rental income paid most of the mortgage payments and he paid the balance.²⁵

Based on the preponderance of the evidence, this Court finds that the real property located at 21-48 Frenchman's Bay, St. Thomas, V.I. is marital property, subject to equitable distribution by the Court. "The doctrine of equitable distribution is applied to effectuate a fair and just division of the property between the parties. As its name suggests, **equitable distribution does not necessarily mean 'equal,' only 'equitable'.**"²⁶

It is more probable that the purchase of the real property was a result of the joint efforts of the both parties, i.e. money received by Defendant from the sale of real property in Tortola, and monies received from the Plaintiff. The Court finds that the parties jointly contributed to the purchase and construction of the house. Even though the Plaintiff did not produce receipts of purchases or bill statements, her testimony that she acquired a Home Depot credit card during the marriage to use to buy building materials for the house is credible and reasonable.²⁷ The receipts for building materials totaling less than \$500, with an attached check showing the expense was paid from the parties' joint bank account, evidences the likelihood that marital income was used to construct the home.²⁸

Additionally, the evidence showed that Defendant executed a lease in 2010 for rental of the property in both parties' names for an amount of \$1,025.00 per month. Although the Court cannot determine the amount of

²² Plaintiff's Exhibit 12 depicts two (2) receipts from Steel Plus Supplies, St. Thomas, V.I. for \$62.00 and \$47.95; a check payment to Steel Plus for nails totaling \$62.00; a receipt from T.M.T. Sand Co. St. Thomas, V.I. for various building materials totaling \$57.20; and a check payment to Scotiabank for a bill. The cumulative sum of this exhibit is \$429.15.

²³ Plaintiff did provide evidence of two GERS personal loan applications but did not provide evidence that the loans were used to pay mortgage arrears. Furthermore, the dates of loans did not coincide with any of the bank notices entered into evidence. The Plaintiff also alleged that the Defendant could not be trusted with money since she gave the Defendant money to pay the mortgage instead of paying it herself.

²⁴ Defendant also alleges that the Plaintiff obtained a loan to purchase a vehicle that was later sent to Dominica for her son.

²⁵ Plaintiff's Exhibit 13 depicts a lease agreement between Plaintiff, Defendant and a tenant effective November 30, 2010 for a term of 24 months at 21-48 Frenchman's Bay, St. Thomas, V.I.

²⁶ *Francis v. Wright-Francis*, 61 V.I. 13, 24 (Sup. Ct. 2014); *Fuentes v. Fuentes*, 38 V.I. 40 (V.I. Terr. Ct. 1997) (emphasis added).

²⁷ The Plaintiff submitted, as part of Plaintiff's Exhibit 12, the telephone number of Home Depot's Credit Center as the only evidence regarding the Home Depot Credit Card.

²⁸ See Plaintiff's Exhibit 12.

each party's contributions toward the purchase and construction of the house, a preponderance of evidence shows that Plaintiff contributed and Defendant acknowledged her contributions by virtue of the first priority mortgage and the lease agreement, despite his denials. The evidence showed that Defendant was riddled with debt and needed assistance.

The record reflects that the real property located at 21-48 Frenchman's Bay St. Thomas, V.I. is encumbered by the first priority mortgage of \$110,000 held by Banco Popular and executed by both parties on March 16, 2007.²⁹ The Defendant also acquired a second priority mortgage of \$50,000 held by EDA/Small Business Development Agency and executed on September 28, 2007. The Green Cay Property Owners Association has a lien for \$3,684.97 in outstanding annual dues. There is also an income tax lien for \$10,720.11 in the Defendant's name, attached to the real property.³⁰ The Court subsequently learned of a lien on the real property related to a judgment against the Defendant for \$5,120 for unpaid work on the home, as well as a second lien from Green Cay Property Owners Association for an unknown amount.³¹

The real property in question is laden with encumbrances primarily due to debts belonging to the Defendant, which corroborates Plaintiff's testimony that Defendant was burdened with debt. Specifically, the real property is burdened with two mortgages in the original amount of \$160,000.00 and at least three liens totaling \$19,525.08 at a minimum. As a result, it would be detrimental to Plaintiff's interest to acquire any ownership interest in the real property. It would be more beneficial to Plaintiff for the Defendant to refinance the real property in order that the Plaintiff's name can be removed from the Banco Popular mortgage.³² Plaintiff is entitled to an award of an equitable sum for her contributions to the property of \$12,300.00.

²⁹ See Exhibit 5.

³⁰ A public records search of the property located at 21-48 Frenchman's Bay St. Thomas, V.I. reveals three (3) liens and one (1) lis pendens (pending claim) on the property which are all in the Defendant's name.

³¹ See Banco Popular de Puerto Rico v. Turnbull et al (3:14-cv-00048), Virgin Islands District Court.

³² Defendant acknowledged a previous attempt to remove the Plaintiff from the mortgage but was unsuccessful as the Plaintiff refused to sign the requisite documents. The Defendant contends that he was attempting to refinance the home with the assistance of his sister.

MARITAL PERSONAL PROPERTY

The Plaintiff alleges that the parties have personal property requiring distribution by the Court, namely: two motor vehicles which included a 2001 White Dodge Ram and 1997 Ford F 15 (safari); and taxi medallion #0977. The Plaintiff seeks 100% ownership of one of the vehicles and the taxi medallion. The Plaintiff alleges that the parties purchased the two vehicles and tax medallion during the marriage. The Defendant admitted the vehicles were purchased during the marriage but asserts that he purchased the taxi medallion prior to the marriage.

The Plaintiff testified that she, with a third-party co-signor, obtained auto loans to purchase the vehicles in 2004. She alleges the vehicles were in both parties' names and provided the registration listing the parties as the owners.³³ The Plaintiff also contends that the Defendant used money from the construction mortgage from Banco Popular to obtain the loan from EDA/Small Business Development Agency to purchase the taxi medallion.³⁴

The Defendant confirms the Plaintiff's testimony regarding the purchase of the two vehicles during the marriage and his disposal of 1997 Ford F 15 (safari), but denies the taxi medallion was purchased during the marriage. The Defendant acknowledges he is still in possession of 2001 White Dodge Ram, but upon satisfying the auto loans, he admits he sold the 1997 Ford F 15 (safari) and purchased another safari in his name only, a 2003 Ford F 150. He testified that he does not recall what happened to the vehicle 1997 Ford F 15 (safari) and he alleges he cannot remember when he purchased the 2003 Ford F 150. However, he also contends that he signed over both vehicles to Hubert Turnbull, as well as attempted to sign over the taxi medallion, due to debts owed to various parties.^{35 36}

Pursuant to the parties' testimony, both vehicles were marital personal property; however, only the 2001 White Dodge Ram remains. Furthermore, the Court verified that the taxi medallion was purchased on October 2,

³³ See Plaintiff's Exhibit 9.

³⁴ The loan is in the Defendant's name only and secured by a second mortgage on the real property located at 21-48 Frenchman's Bay St. Thomas, V.I.

³⁵ Plaintiff's Exhibit 10 is an Affidavit by Defendant's dated May 9, 2012 transferring ownership of taxi medallion #0977 to his sister, brother, and daughter upon his death.

³⁶ Plaintiff's Exhibit 11 depicts a letter by Defendant dated October 11, 2013 transferring ownership of the 2001 White Dodge Ram taxi (Vin No. 3B7KCV23Z01G786997) and ownership in land and house at 21-48 Frenchman's Bay, St. Thomas, V.I.

2007 during the parties' marriage, and is currently in the name of the Defendant. Since the parties purchased all the personal property during the marriage, and there being no applicable exceptions, the Court finds that the 2001 White Dodge Ram, 1997 Ford F 15 (safari), and taxi medallion #0977 are marital property requiring distribution by the Court.

Accordingly, the parties are entitled to one vehicle each. Since the 2001 White Dodge Ram is the only remaining vehicle purchased by the parties during their marriage, equity dictates that the Plaintiff be awarded 100% ownership of the 2001 White Dodge Ram or its equivalent value as of September 2016 of \$5,300.³⁷

Based on the Defendant's improper disposal of marital property to third parties, which deprived the Plaintiff her equitable share of the parties' marital property, and her contributions toward the acquisition of the personal property, it is appropriate that 100% ownership of Taxi Medallion #0977 be awarded to the Plaintiff.

FAILURE TO MEDIATE

Furthermore, a review of the record reflects that the Court ordered the parties to mediate in its February 28, 2015 and November 17, 2015 Orders of the Court. This Court also advised the Defendant at the November 9, 2016 status conference of the available sanctions that this Court may impose, should he refuse to adhere to the Orders of this Court. Although diligent efforts were made to schedule the matter for mediation, the Defendant failed to cooperate. The Court even extended the mediation deadline, the American Mediation Institute reduced the mediation fee and even offered the Defendant a delayed payment plan, but he still refused to cooperate with efforts to arrange mediation and did not mediate. As such, the Court finds the Defendant in contempt of Court for failing to comply with the Order to mediate in good faith. As a result, Defendant shall pay Plaintiff's attorney's fees and costs upon submission of a sworn invoice from Plaintiff's attorney.³⁸ Further, the Defendant will be assessed court costs of \$75.00 for his contempt of court.

³⁷ To determine the value of the vehicle the Court considered the depreciation value and referenced the National Automobile Dealers Association (NADA) Guides, as well as considered all the facts and circumstances of the case.

³⁸ Pursuant to 14 V.I.C. § 581.


CONCLUSION

For the reasons stated in this Memorandum Opinion, the Plaintiff's request for spousal support is **DENIED** and Plaintiff's request for distribution of the parties' real and personal property and attorney's fees is **GRANTED**. The Plaintiff is entitled to a Decree of Divorce, an award of the 2001 Dodge Ram vehicle or its value as of September 2016 of \$5,300.00 and to 100% ownership of Taxi Medallion #0977. Moreover, the Defendant is found in contempt of court for failing to mediate pursuant to the Court's Order.

Findings of Facts and Conclusions of Law, a Decree of Divorce, and an Order shall enter as of even date. Accordingly, it is hereby

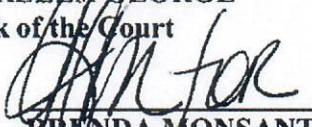
ORDERED that copies of this Memorandum Opinion shall be directed to Clive Rivers, Esq. and personally served upon Elroy Turnbull.

DATED: January 22, 2019


DEBRA S. WATLINGTON
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By:


BRENDA MONSANTO
Court Clerk Supervisor

1 / 22/2019