

IN HIGH COURT OF BELIZE, A.D. 2023

Action No. 7 of 2022

BETWEEN

ROSALVA LUPITA GUTIERREZ

APPLICANT

AND

ANTONIO GUTIERREZ

RESPONDENT

BEFORE The Honourable Madam Justice Patricia Farnese

TRIAL DATE: March 17, 2023

APPEARANCES

Natasha N. Espat for the Applicant

Emmerson L. Banner for the Respondent

DECISION DIVISION OF MATRIMONIAL PROPERTY

Introduction

[1] Mr. and Mrs. Gutierrez divorced after 40 years of marriage. Mrs. Gutierrez has asked for this Court to award her an equal share of three properties she says were acquired during the marriage. Mr. Gutierrez disputes that all the properties were acquired during the marriage and only agrees that Mrs. Gutierrez is entitled to an equal share of the property where the family home is located.

[2] While the presumption of an equal share of family property does not operate in Belize, I nonetheless find that an equal share is justified in this case. Prior to the filing of the divorce petition, the family operated as a joint enterprise. The properties in question were acquired as a result of a decision by the Gutierrezes early in their marriage to pool their financial and nonfinancial resources for the benefit of the family. While Mr. Gutierrez contributed financial resources, Mrs. Gutierrez' emotional and physical labour offered essential support to his efforts as he largely worked away from the home during the marriage. To deny Mrs. Gutierrez' request for an alteration order would unjustly result in a disproportionate risk of financial insecurity in her retirement.

Issue

[3] The central issue in this case is:

- What is the value, if any, of the beneficial interest Mrs. Gutierrez holds in three parcels of land in which title is exclusively held by Mr. Gutierrez?

Legal Framework

[4] Mrs. Gutierrez asks that she be awarded a share or interest in three properties pursuant to section 16 of the *Married Woman's Property Act*¹ or section 148A of the *Supreme Court of Judicature Act*:²

1. The Matrimonial Property – Lot/Parcel No. 200 situated at No. 4-10th Watermelon Street, Santa Rita Layout, Corozal Town, Corozal District, Belize.
2. The Consejo Property – Block 1, Parcel 418 in Consejo Registration Section
3. The Ramonal Zapote Property – Block 1, Parcel 45 in Ramonal Zapote SW.

[5] Both sections empower the court to decide this claim. Section 16 of the *Married Woman's Property Act* provides:

16(1) In any question between a husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company,

¹ Cap. 176, The Substantive Laws of Belize. Rev. Ed. 2020.

² Cap. 91, The Substantive Laws of Belize. Rev. Ed. 2020.

public body or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons in a summary way to a judge of the court who may make such order with respect to the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he thinks fit.

(2) Any such order shall be subject to appeal in the same way as an order made by the judge in a civil action in the court.

(3) Any such bank, corporation, company, public body or society shall, in the matter of any such application, for the purposes of cost or otherwise, be treated as a stakeholder only. [emphasis added]

Section 16 is often ignored in favour of Section 148A of the *Supreme Court of Judicature Act* when determining rights to matrimonial property because section 148A provides a framework for the court's analysis.³ Section 148A provides:

148A(1) Notwithstanding anything contained in this Part or in any other interests in law, a husband or wife may during divorce proceedings make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

(2) In any proceedings under sub-section (1), the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) In addition to making a declaration under sub-section (2), the court may also in such proceedings make such order as it thinks fit altering the interests and rights of either the husband or the wife in the property, including—

(a) an order for a settlement of some other property in substitution for any interest or right in the property; and

(b) an order requiring either the husband or the wife or both of them to make, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The Court shall not make an order under sub-section (3), unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

³ *Vidrine v. Vidrine*, Civ. App. No. 2 of 2010. [*Vidrine*]

(5) In considering whether it is just and equitable to make an order under sub-section (3), the court shall take into account the following—

(a) the financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the non-financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, including any contribution made in the capacity of housewife, homemaker or parent;

(c) the effect of any proposed order against the earning capacity of either the husband or the wife;

(d) the age and state of health of both the husband and the wife, and the children born from the marriage, if any;

(e) the non-financial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage, if any;

(f) the eligibility of either the husband or the wife to a pension, allowance, gratuity or some other benefit under any law, or under any superannuation scheme, and where applicable, the rate of such pension, allowance, gratuity or benefit as aforesaid;

(g) the period when the parties were married and the extent to which such marriage has affected the education, training and development of either of them in whose favour the order will be made;

(h) the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother; or

(i) any other fact or circumstances that in the opinion of the court, the Justice of the case requires to be taken into account.

(6) Where the court makes an order under sub-section (3), it may also make such consequential orders in respect thereto, including orders as to sale or partition, and interim or permanent orders as to possession, and may further order that any necessary deed or instrument be executed, and that such documents of title to the property be produced or such other things be done as are necessary to enable the court's order to be carried out effectively, or that security be provided for the due performance of an order.

(7) Any order made by the court under this section shall be binding on the husband and the wife, but not on any other person. [emphasis added]

I will, likewise, decide this claim based on section 148A alone.

[6] Because Mrs. Gutierrez seeks both a property declaration order and a property alteration order, the analysis engages a 3-part test:⁴

1. Identify and value property acquired during the marriage;
2. Determine Mrs. Gutierrez' beneficial interest, if any; and,
3. Consider and evaluate the matters listed in subsection (5) to determine if it is just and equitable to make the alteration order.

Analysis

Step One – Identify and value marriage property.

[7] The Parties do not dispute that the Matrimonial and Consejo Properties were acquired during the marriage. Mr. Gutierrez argues that the Ramonal Zapote Property is not property of the marriage because he obtained it as leased property before he was married. I have not been provided with any evidence or submissions to suggest that the Parties dispute the value of the properties. Therefore, whether the Ramonal Zapote Property is part of the marriage property is the only issue I must decide at this step.

[8] I find that the Ramonal Zapote Property is property of the marriage. Mr. Gutierrez has not proven on a balance of probabilities that the property was acquired prior to the marriage. His affidavit evidence asserts that he first acquired the property in 1978 from his uncle through a lease. He claims they agreed that title would transfer after he paid off his uncle's loan. Mr. Gutierrez says title was transferred in 2011 as was agreed. At trial, Mr. Gutierrez corrected the date he first acquired the land saying that the arrangement began before 1978. His uncle made the arrangement with his father because he was not yet an adult, but the land was always to be transferred to Mr. Gutierrez. Mrs. Gutierrez agreed that her father-in-law was in possession of the land prior to her husband.

⁴ *Vidrine* at para 70.

[9] In the absence of any corroborating evidence that the lease was granted pending the registration or transfer of title in Mr. Gutierrez' name (such as when one acquires national lands), the acquisition of title during the marriage is significant to the question of whether the property is property of the marriage. Mr. Gutierrez has not proven that the lease interest is one that is capable of being subject to a matrimonial property claim. If the interest cannot be subject to the claim, the date of the interest's acquisition is irrelevant.

[10] Section 148A gives the court the authority to deal with title, rights, and interests in property, but subsection (7) holds that the court's actions pursuant to section 148A cannot affect third parties. I have no reason to conclude that this lease is not of the kind where the landowner had the right to recover possession at anytime upon sufficient notice. Defining that kind of interest as property of the marriage is inappropriate because any alteration of Mr. Gutierrez' interest will impact the rights of the third-party landlord. The court is only permitted to alter the rights as between the former spouses.

[11] I also have no evidence before me that supports a finding that if the uncle chose to terminate the lease and assume possession of the property, Mr. Gutierrez would be able to enforce his right to a future transfer of title or to recover the sums allegedly paid in anticipation of the transfer. I note that a lease for a term greater than 2 years is required to be in writing by section 49 of the *Registered Land Act*.⁵ There is no evidence that this lease was in writing thereby raising further questions about its enforceability. Recognizing a lease as property of the marriage may be appropriate where ownership is an intended outcome of the agreement to lease, but proof that the agreement is enforceable is required. The transfer of title in this case, therefore, determines when Mr. Gutierrez acquired the Ramonal Zapote property for the purpose of the matrimonial claim.

Step Two – Identify any beneficial interests.

[12] That Mrs. Gutierrez has a beneficial interest in the Matrimonial Property is not disputed. I find that Mrs. Gutierrez also has beneficial interests in the Consejo and Ramonal Zapote Properties. As in *Alcoser v Alcoser*, I am unable to distinguish, on any legal or factual basis, the contributions Mrs. Gutierrez made to the acquisition

⁵ Cap. 194, The Substantive Laws of Belize, Rev. Ed. 2020.

of those properties over the long period from those of Mr. Gutierrez.⁶ Consequently, Mrs. Gutierrez is awarded a 50% beneficial interest in the subject properties.

[13] The Gutierrezes met in 1980 when Mrs. Gutierrez was 17 and Mr. Gutierrez was 21. She was working as a maid and he, as a police officer. They married two years later after the first of their 4 children were born. The petition for divorce was filed in 2019 and was granted in 2022. Each of the children were adults when the petition was filed.

[14] In 1989, Mr. Gutierrez transferred from the Police Department to the Immigration Department. For most of the marriage until his retirement in 2015, Mr. Gutierrez testified that his work required him to live apart from his family. His income primarily provided for the family during the marriage. All property and any debt that was undertaken to acquire those properties have been in Mr. Gutierrez' name alone.

[15] Mrs. Gutierrez was occupied principally as a homemaker and mother. She supplemented the family's income with intermittent part-time work and endeavours, such as selling tamales, pastries, and used clothing. She testified that her income mainly went towards things the children needed such as music lessons and clothing or improvements to the matrimonial home.

[16] The Parties' evidence supports a finding that, until their divorce, the family unit operated as a joint enterprise with Mr. Gutierrez mainly working away from home to financially support the family and Mrs. Gutierrez remaining at home taking care of the household and raising the children largely by herself. The resources of the family were pooled to support the family unit. While Mr. Gutierrez contributed financial resources, Mrs. Gutierrez' emotional and physical labour offered essential support to his efforts.

[17] I find that prior to their separation, the Consejo and Ramonal Zapote Properties were purchased for the family's benefit. I accept Mrs. Gutierrez evidence that she grew vegetables on the Ramonal Zapote Property for the family's use. Mr. Gutierrez testified that the contribution was insignificant. I do not find that Mr. Gutierrez was in a good position to assess the contribution that vegetables from that property made to the household. By his own admission, Mr. Gutierrez was not

⁶ Sup. Ct. Action no. 33 of 2013 at para 20.

engaged in the day-to-day operation of the household. Mrs. Gutierrez did all the cooking and grocery shopping.

[18] I also find that the Consejo Property was purchased as future building site for the Gutierrez' retirement home. In the meantime, it was used by the family for recreation, and some planting of corn and coconuts was done. Prior to the divorce, the Parties intended and treated the Consejo Property as Property of the marriage. The Property is also currently benefitting a child of the marriage as it has been offered to the Atlantic Bank as collateral for a loan the child has with the Bank. As previously stated, Mrs. Gutierrez' emotional and physical labour was essential to Mr. Gutierrez being able to earn the income to purchase the Consejo Property. That his brother-in-law may have assisted with some planting on that property does not erode Mr. Gutierrez' interest in the Consejo Property. I see no justification for Mrs. Gutierrez' interest to be treated any differently.

[19] Mrs. Gutierrez requests that she be given more than a 50% share in the Matrimonial Property because she has not benefitted from the outstanding mortgage held by the Belize Bank. She argues that the value of her interest in the property is diminished by the outstanding mortgage amount. She has not proven, however, that mortgage was for Mr. Gutierrez' sole benefit. I have no evidence as to when the property was mortgaged. Mr. Gutierrez testified that he used the money for the education of their children and for household expenses. Without evidence that this mortgage was obtained after the breakdown of the marriage, I have no reason not to accept Mr. Gutierrez' evidence as truthful. The balance of the evidence indicates that Mr. Gutierrez used all of his financial resources to support his family. The finding that the family operated as a joint enterprise means that liabilities as well as the assets are shared. I do not find, however, Mrs. Gutierrez ought to be held liable for any penalties or interest owing due to arrears. I accept that she was unaware of the mortgage, so was not in a position to ensure that mortgage payments were made on time.

Step Three – Is an alteration order just and equitable?

[20] A review of the factors in subsection 148A(5) of the *Supreme Court of Judicature Act* supports a finding that an alteration order to reflect Mrs. Gutierrez' 50% beneficial interest in the three properties is just and equitable. As I engaged in the review exercise, it quickly became apparent that the factors listed are not discreet categories but contain substantial overlap. Out of an abundance of caution, I wish to

state at the outset that I considered all of the factors in subsection 148A(5) in reaching my decision.

[21] My finding that the Gutierrezes treated their marriage as a joint enterprise speaks to many of the factors considered under subsection (5). As Barrow JA stated in *Vidrine*:⁷

In performing its evaluation it is helpful for the court to remember that care must be taken not to allow the measurable and obvious financial contributions to the acquisition of the properties made by the husband, precisely because they are obvious and mathematically certain, to overshadow the non-financial contributions made by the wife which, even when obvious, are not arithmetically certain.

[22] Mrs. Gutierrez' constant nonfinancial and intermittent financial support to the household expenses during their 40-year marriage was essential to Mr. Gutierrez' career advancement, pension accumulation, and the conservation, improvement, and acquisition of the three properties. That she maintained the Matrimonial Property is undisputed. I also accept that Mrs. Gutierrez planted and tended to vegetables on the Ramonal Zapote Property.

[23] The importance of Mrs. Gutierrez' role as a mother and a homemaker is undeniable when considering that Mr. Gutierrez worked out-district and away from his family. I find that the decision for Mrs. Gutierrez to forgo career advancement and further education was a decision the couple made together. The consequence of that decision denied Mrs. Gutierrez the opportunity to have a pension like Mr. Gutierrez. Although she is passed retirement age, Mrs. Gutierrez testified that she is working as a domestic. Her limited work experience, and limited education also restrict her earning capacity going forward.

[24] I have not been provided any evidence of health conditions of either the Parties or their children which would affect my decision to issue an alteration order. The children of the marriage are adults and I have also not been provided with evidence that any of the children live with an illness or disability that make them dependent adults. Mrs. Gutierrez' position as a mother is no longer in need of protection as a result.

⁷ *Vidrine* at para 78.

[25] Mrs. Gutierrez argues that the fact that the marriage was dissolved on the grounds of adultery is a fact or circumstance I should consider when deciding whether an alteration order is appropriate. I disagree. These proceedings were initiated under the *Supreme Court of Judicature Act*. Besides as a ground for divorce⁸ and claims for damages,⁹ the *Supreme Court of Judicature Act* only names the conduct of the parties as a consideration for alimony awards.¹⁰ Had the legislature intended adultery to be a relevant consideration in the division of family property, it would have, likewise, expressly included the conduct of the parties in subsection 148A(5). Therefore, to recognize fault as a relevant circumstance under (h) would go against the legislature's intent to limit the relevance of fault to the question of alimony.

[26] While I recognize that the presumption of equal division of property of the marriage does not operate in Belize, the justice of this case supports equal division when I consider the stage of life the Gutierrezes were in when they divorced. Mr. and Mrs. Gutierrez were of retirement age and Mr. Gutierrez had retired when the divorce petition was filed. It is reasonable to find that, but for the divorce, Mrs. Gutierrez would have also been relying on Mr. Gutierrez' pension to fund her retirement. She has lost that source of retirement income despite having contributed to Mr. Gutierrez' ability to earn it. She has made no claim for maintenance.

[27] An alteration order recognizes that families that have invested in property also have those properties available to liquidate to fund retirement. The court cannot overlook that where families, like the Gutierrezes, do not have a lot of disposable income, sacrifices would have been made to purchase those properties. Those sacrifices are nonfinancial contributions equally shared by the spouses. While divorce undoubtedly negatively impacts the financial security of both spouses, the spouse who stays home to raise the family runs a real risk of bearing a disproportionate share of those negative impacts. The risk of financial insecurity in retirement is compounded, the closer the marriage breakdown occurs to retirement because the spouse has less time and capacity (due to forgone employment and education) to replace those retirement savings.

⁸ Section 129.

⁹ Section 151.

¹⁰ Section 152.

Disposition

[28] I hereby declare and order that:

1. Mrs. Gutierrez is beneficially entitled to one half share of the Matrimonial Property, the Consejo Property, and the Ramonal Zapote Property pursuant to subsection 148A of the *Supreme Court of Judicature Act*.
2. Mr. Gutierrez holds title in the Matrimonial Property, the Consejo Property, and the Ramonal Zapote Property on trust for himself and Mrs. Gutierrez in equal shares until the Properties are settled or the interests altered to reflect Mrs. Gutierrez' 50% share.
3. Mr. Gutierrez shall not sell, transfer, lease, charge, or in any way deal with the Matrimonial Property, the Consejo Property, and the Ramonal Zapote Property without the written consent of Mrs. Gutierrez or a further court order.
4. Mr. Gutierrez shall continue to pay the mortgage on the Matrimonial Property and is liable for any interest or penalty charged due to arrears until the Matrimonial Property is settled or the interests altered to reflect Mrs. Gutierrez' 50% interest.
5. If by November 30, 2023, Mr. Gutierrez and Mrs. Gutierrez have failed to agree to the Matrimonial Property, the Consejo Property, and the Ramonal Zapote Property being divided or the interests altered to reflect their equal interests, Mrs. Gutierrez must vacate the Matrimonial Property, the three Properties be sold, and any proceeds, after the mortgage on the Matrimonial Property is satisfied, be shared equally between the Parties.
6. Mr. Gutierrez shall pay Mrs. Gutierrez' costs for this application as agreed or taxed.

August 15, 2023

Patricia Farnese
Justice of the High Court