SAINT LUCIA

Comment [a1]: Final Copy. Issued to parties on June 18, 2001.

IN THE HIGH COURT OF JUSTICE
(Civil)

Civil Suit No. D80 of 1998
BETWEEN:

MARY AULINA JOSEPH

Plaintiff

and

THEOPHILAS GEORGE JOSEPH

Respondent

Appearances:

Ms Jennifer Remy for the Plaintiff
Mr. Richard Frederick for the Respondent

2001: February 21 and March 8.

JUDGMENT

[1] **BARROW J. (Ag.)** The following is the transcript of an oral judgment I delivered.

[2] This is an application for ancillary relief following the granting of a decree nisi of dissolution of marriage. The orders that the wife seeks relate to land at Castries, parcel 1045B 45 which the wife says is community property and she wants the Respondent to pay her for her one-half share. The parties are agreed that there is a value of $40,000 which I may attach to that property.

[3] The application also relates to land at Entrepot, Castries, parcel 1047C27. The Petitioner wants the Respondent to transfer to her his rights title and interest in this land and also his one-half share in the dwelling house thereon in which they both resided as at the date of the application and in which Counsel informed me they continue to reside. The Petitioner seeks in relation to that parcel of land, which she regards as comprising two lots, that Lot 17 should be given to the Respondent and she says she will transfer her one-half share in the building thereon to the Respondent.

[4] The Petitioner seeks in relation to vehicle No.488 that the Respondent should transfer to her this vehicle or the Respondent should pay to the Petitioner the value of the vehicle. And then there is a farm vehicle, FAR974, which the Petitioner is content to give to the Respondent. The Petitioner seeks, as well, a maintenance order that the Respondent be made to pay her $800.00 a month.

[5] The natural starting point is the income, the earning capacity, the property and the other financial resources possessed by each party. The Petitioner was born in 1949. The evidence before me, in the case of the wife, is that she makes a net income of $900.00 monthly. The testimony is that she is likely to lose her job when her employers down-size. She has of, course, the half share in the $40,000.00 property and she has her claim in the matrimonial house.

[6] The husband says that he makes a monthly income of $1,500.00. The wife says that he gets $500.00 rent from the property in addition to that. The wife says that the Respondent receives a pension from the Government in an undisclosed amount and that the husband receives as well an income from using the vehicle to transport guards and cash for his employers. The husband also own the one-half share of the Gesneau property and the husband has standing in his name the land at Entrepot which the wife says is valued at $120,000. The husband owns as well two and one-fifth acres of land at Laborie parcel 0824B51. He owns, according to the wife, a three-quarter share in 4.50 hectares of land at Derriereda, in Laborie, parcel No. 0825B38. He owns 5,000 sq.ft of land at Laborie, parcel 0825B 38. He owns 5,000sq.ft. at Laborie parcel 0820D 40, with a three bedroom house, a farm vehicle which the wife says is valued at $30,000.00; and he owns a vehicle No.488 which the wife says is valued at $85,000. The wife says that the husband cultivates and sells crops from the Laborie property and that he cultivates and sells crops from the Gesneau property.

[7] There was a significant failure on the part of the Respondent to make full disclosure of his property and income. I note that there was no challenge in cross examination to the property and to the income streams to which the wife testified. I put the Respondent's failure to disclose anything about his income and property, except in a defensive way, on a level of offensiveness almost as great as the Respondent's offer of a lump sum payment of $4,000 to the wife in full satisfaction of all her claims.

[8] The Petitioner claims on two bases. She claimed on the basis of community property and on the basis of family assets, grounded on section 25 of the Divorce Act. It is, of course, by now recognized that there are very wide powers given to the courts under section 25 and it will be useful to remind myself of these.

[9] Section 25 reads:

> It shall be the duty of the Court in deciding whether in exercising its powers under sections 22,23,24 in relation to a party to the marriage and if so in what manner to have regard to all the circumstances of the case including the following matters:
>
> (a) that is to say the income earning capacity, property and other financial resources which each of the party to the marriage has, or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each of the party to the marriage has, or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) ……
>
> (f) contributions made by the parties to the welfare of the family including any contributions made by looking after the home or caring for the family;
>
> (g) in the case of proceedings for divorce or nullity, the value of either of the party to the marriage of any benefit. e.g. pension, which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring;
>
> and so, to exercise those powers as to place the party as far as it is practical and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

[10] Counsel for the Petitioner presented full skeleton arguments with ample authorities in support of her contention and I am grateful for this assistance. I was not similarly favoured by Counsel for the

Respondent who sought to argue on the material provided by the Petitioner.

[11] Counsel for the Respondent focused on the term "family assets" and relied on the definition given in *Lang v Lang* (Saint Lucia), Suit 30 of 1991, at page 18: "The term [family assets] is defined at page 830 of *Wachtel"* to refer to things acquired by one or other or both parties with the intention that there should be continuing provision for them and their children during their joint lives and use for the benefit of the family as a whole". So, relying on that, Counsel for the Respondent said that whatever was acquired before marriage falls completely outside the scope of family assets; and for the wife or any party to have any claim to such an asset she must prove that she made substantial contributions to the improvement or preservation of such property. Absent that, said Counsel for the Respondent, as a matter of law the Court cannot exercise any jurisdiction in relation to such property.

[12] In my respectful view Counsel for the Respondent is distinctly wrong on this point. The reliance on the term "family asset" was actually brought about by the submission of Counsel for the Petitioner, who therefore began the misconception. What Lord Denning said in *Wachtel* has been taken too literally. Family asset is a term really which should not be used and there is a number of authorities which establish that proposition.

[13] In *Daubney v Daubney* in [1976] 2 AER at page 453 a husband and wife were married in 1953 when they were aged 23 and 20 respectively. In 1962 the matrimonial home was purchased in joint names. In 1964 the family were involved in a serious car accident. The husband lost the sight of one eye and suffered from arthritis; he was awarded damages of £4,000.00 and the wife received £3,625.00. The husband was unable to continue his previous employment. He invested and lost all his money. The wife bought a flat with her award. After they separated the question which came about was as to the wife's share in the matrimonial home which they had both purchased. The husband applied for an order that the matrimonial home be transferred to him. The court considered the relative position of both parties and the judge held that the husband and the wife had originally been entitled to equal shares in the house, but that the husband should not be required to make financial provision for the wife by disposing of the house until a later date. The judge took into

consideration improvements to the house and mortgage repayments made by the husband as well as his ill-health, but held that the value of the wife's separate flat should be excluded, since it was not a family asset. The husband appealed, contending that the wife's flat ought to have been taken into account. On appeal it was held that the court was not obliged, when considering the resources of the parties, under the equivalent of subsection 25, before making a lump sum payment or property adjustment order, to confine itself to family assets in the sense of those which had come to the parties as spouses.

[14] The judgment delivered by Cairns L.J. on page 458 is very helpful. He said:

> "What is said by counsel on behalf of the wife is that these damages are no part of the family assets. Speaking for myself, I do not in this context find it helpful to apply that phrase. It is one which was used by Lord Denning in *Wachtel v Wachtel*, but I am quite sure that Lord Denning cannot have intended in that reference to suggest that, in considering the resources of the parties at the time when a lump sum payment or a property adjustment order is being considered, the court should confine itself to family assets in the sense of that which came to the parties as spouses.

[15] Scarman L.J. on page 459, I think, was even more definitive in relation to the use of the term family assets. He said:

> "The judge came to the conclusion that he ought not to treat these damages as a family asset, and on that basis made the order that he did. In my judgment, he asked himself the wrong question. `Family assets' is not a term of art, nor is it used in the Legislation. It was his duty under s 25(1) of the 1973 Act to have regard to all the circumstances, including `(a) the income, earning capacity, property and other financial resources which each of the parties of the marriage has, or is likely to have in the foreseeable future'. It is plain that the damages when received became at that moment part of the financial resources of the wife. It is equally plain that when she used them to acquire the flat, the property thus acquired became the property of the wife. The Act speaks clearly on the point. It is the duty of the court to have regard to the property and other financial resources of the spouses. I think that the judge was misled by the case law into disregarding the plain words of the Act."

That was in 1976.

[16] In *P v P* [1978] 3 All E.R. at page 70, the report appears of a wife whose father bought a farm for the wife and the husband to live on and the father stocked the farm. The farm was run down and both parties worked hard to improve it, the husband putting in a great deal of effort to build up the stock and improve the land to turn the farm into a successful business which the couple ran as partners. About 7 years after the father conveyed the freehold of the farm by way of gift to the wife alone. The husband, who had no qualifications, depended on the farm for his livelihood and had no other property. The marriage broke down. This was in October 1976. The husband left the farm in January 1977. The wife and children continued to live there. The husband applied, under section 17 of the married Women's Property Act 1882, for a declaration of his interest in the farm, and under section 24 of the Matrimonial Causes Act 1973, for a lump sum order and for a transfer of property order in respect of the farm. The headnote reads: "The concept of equality had no place under section 25 of the Matrimonial Causes Act 1973, the division of assets between husband and wife depending in each case on the circumstances. Looking at the circumstances realistically and as a whole, and taking into account the factors to be considered under the legislation in making a transfer of property order, £15,000 was the right sum to award the husband because the wife would have to provide a home, maintenance and education for the children with little, if any, financial assistance from the husband."

[17] At page 73 *Ormrod L.J.,* I think, really gave the quietus to the family assets concept.

> "There is another point which I might mention at this stage. Counsel for the husband referred us to a passage in *Wachtel v Wachtel* which refers to family assets. The judgment in *Wachtel v Wachtel* quite rightly described that as a convenient shorthand phrase. Counsel for the husband tells us, however, that a great deal of energy is spent in the courts dealing with these matters debating whether or not a particular item is properly regarded as a family asset. I would only like to say once and for all that the phrase "family assets" does not occur in the 1973 Act and it has nothing to do at all with section 25 of that Act. Section 25 requires the court to have regard to the items set out in it and "family assets" is nothing to do with it. It is a convenient phrase that came into existence in the days before the courts had the

wide jurisdiction provided originally by the 1970 legislation. In my judgment, it is not now a phrase of any particular use."

[18] There are two other authorities to which I refer which I think demonstrate how far we have come from the notion of family assets and how property, that by no stretch of the imagination could earlier have been considered as family assets, is brought into the equation. There is firstly a 1991 case which is *Happe v Happe* [1991] 4 All E.R. at page 527 in which an army pension was treated as an available asset for the purpose of determining the financial provision which was to be made between the parties. Then there is *Wagstaff v Wagstaff* [1992] 1 All E.R. 275 in which damages in the form of a capital sum had been awarded to a spouse as compensation for loss of amenity and pain and suffering. The damages were treated as part of the spouse's financial resources for the purposes of determining an application by the other spouse for ancillary relief under section 25 of the 1973 Act.

[19] It seems to me that the proper approach, as set out in the case of *P v P* and other cases, is to apply the provisions of the Act. I remind myself that the objective is to place the parties in the financial position that they would have been in if the marriage had not broken down and treatment of this is given at page 74 of the report in *P v P***.** And it says it does not matter which way around and in whose favour the exercise is to be performed and some of the cases indicate that husbands have availed themselves of the benefit of the legislation.

[20] Applying these principles I must now try to do justice between the parties. Obviously I must take account of the significantly better financial and capital position in which the husband stands. My order is as follows:

i) In relation to the land at Gesneau, the parties are agreed that they do own this in equal shares. I therefore order that the husband is to pay $20,000.00 to the wife for her one-half share in this property and the wife is herby directed to complete all necessary documentation and to have the necessary documentation presented through her lawyer, to Counsel for the husband, for the transfer to be effective and the parties shall bear the cost of this transfer in equal share. It follows, of course, that the sum of $20,000.00 is to be paid upon presentation of the transfer.

ii) In relation to the land at Entrepot and the building situate thereon I find that as a matter of fairness, given the emotional attachment which the husband has for this property and given the family input from his brothers and, I guess, friends, into the construction of this property, it is fair, fitting and reasonable to allocate this to the husband as his separate property. This puts the wife out of doors. I therefore suspend this allocation for three months or until the wife finds other premises, whichever first occurs. To compensate for this I order that the husband shall pay to the wife the sum of $60,000.00 representing a notional one-half of the value of this property, using the wife's valuation, since the husband provided none. He shall do this on or before the 4th May 2001 and he shall bear the cost.

iii) The vehicles, both vehicles FAR974 and 488, are to be allocated to the husband.

iv) As to the contents of the matrimonial home, one half of these, or their value, is to be given to, or paid to the wife.

v) The Respondent shall pay monthly to the Petitioner the sum of $800.00 for her sole maintenance. The parties are, of course, free to adjust this and convert this into a lump sum as they choose.

vi) The Respondent shall pay the costs of the application for ancillary relief in the sum of $2,500 and the parties shall be at liberty to apply.

Denys A. Barrow
High Court Judge (Ag.)