

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CIVIL SUIT NO. 607 OF 1999

BETWEEN:

WILMOTH DANIEL Petitioner

and

VIOLIAN DANIEL Respondent

Appearances:

Arthur Williams for the Petitioner
Paula E. David for the Respondent

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2001: June 26
September 26
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JUDGMENT

- [1] **WEBSTER, J. (*acting*).** This is an application by the Respondent for the following orders:
- (a) that the Petitioner pay to her such periodical payments as the Court thinks reasonable
 - (b) that the Petitioner pay to her such lump sum as the Court thinks reasonable
 - (c) that one of the two properties owned by the parties to the marriage be transferred to her free of encumbrances.

FACTS

- [2] The parties were married on April 12, 1980. The marriage produced one child, Crystal Daniel who is now 19 years old. She lives with her mother.
- [3] During the first year of the marriage the parties built a small house at Campden Park on land owned by the Government. The Respondent contributed \$800.00 to the cost of

construction and the remainder of the cost was met by the Petitioner. The Petitioner was then working as a carpenter with the Land Development Corporation for \$125.00 per week. The land was conveyed to the both parties in 1987. The Petitioner paid the purchase price of \$2,478.45.

[4] In 1989 the parties purchased the adjoining lot at Campden Park for \$2,546.10. The Respondent paid \$800.00 and the Petitioner paid the balance of the purchase money. The land was conveyed to the Respondent.

[5] In 1983 the Petitioner set up his own business as a builder. From 1993 to 1997 he worked from time to time in St. Lucia where he built three houses. He used the earnings from these projects to build a house on the second lot at Campden Park. This is not disputed by the Respondent. The parties moved into the second house and rented the first house.

[6] Unhappy differences developed between the parties and in August 1998 the Respondent moved out of the matrimonial home and went to live in a partially constructed house at Buccament Bay owned by her older daughter, Cindy Candice. She does not pay rent to her daughter.

[7] Prior to the separation the parties had joint certificates of deposit at Bank of Nova Scotia and at the Saint Vincent Co-operative Bank Limited for \$25,571.76 and \$21,000.00 respectively. After the separation the Petitioner withdrew the funds from both certificates of deposit. He used the proceeds of the Bank of Nova Scotia deposit to pay bills, and transferred the Co-operative Bank deposit to another account at the said bank in the joint names of himself and his daughter, Crystal Daniel. The Petitioner testified that he withdrew the funds because he is the one who put all the monies into the deposits and he wanted to protect them from his wife once they had separated. While I accept that he put the monies into the accounts, I will treat the deposits as the joint property of the parties.

[8] The Respondent deposed in her affidavit that the first house was valued by St. Vincent Insurances in 2000 at \$110,000.00, and she estimates the value of the second house at

\$250,000.00, and the furnishings at \$20,000.00. In the absence of any other evidence of value I accept the Respondent's estimates, mindful that she is expressing her partial opinion and not acting as an expert.

[9] The starting point in resolving the issues between the parties is to determine what are the net assets of the marriage, or to use the expression coined by Lord Denning M.R. in **Wachtel v. Wachtel** [1973] 1 All E.R. 829, "the family assets." At page 836 of the report of the judgment Lord Denning described family assets as-

"...those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them or their children during their joint lives, and used for the benefit of the family as a whole."

Guided by this definition I find that the family assets are:

- (a) the first house with a net value of \$110,000.00
- (b) the second house with a net value of \$250,000.00 and furniture worth \$20,000.00
- (c) the two certificates of deposit with a combined value of \$46,571.36 and a present value of \$20,000.00

I do not find that the Petitioner's motor car is an asset of the family. The current value of the family assets is therefore approximately \$400,000.00.

[10] On December 6, 1999 the Petitioner petitioned this Court for a dissolution of the marriage. The Respondent cross-petitioned, and on September 21, 2000 the Court decreed that the marriage had broken down irretrievably on account of the Petitioner's behaviour towards the Respondent. The decree was made absolute on December 28, 2000.

THE LEGISLATION

[11] Applications in Saint Vincent and the Grenadines for financial provision and property adjustment orders are made under Part III of the Matrimonial Causes Act, Cap. 176 ("the Act"), and it is helpful to set out the relevant sections of Part III.

[12] Part 111 is headed "*Financial Relief for Parties to Marriage and Children of Family*". Part III starts with section 29 which sets out general provisions relating to the financial provision and property adjustment orders. The relevant portion of the section reads-

"29.(1) The financial provision orders for the purposes of this Act are orders for periodical or lump sum provision available (subject to the provisions of this Act) under section 31 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation ...that is to say-

- (a) any order for periodical payments in favour of a party to a marriage under section 31(1)(a) or 36 (7) (a) or in favour of a child of the family under section 31 (1) (d), (2) or (4) or 36 (7) (d);
- (b) any order for secured periodical payments in favour of a party to a marriage under section 31 (1) (e), (2) or (4) or 36 (7) (e); and
- (c) any order for lump sum provision in favour of a party to a marriage under section 31(1) (c) or 36(7) or in favour of a child of the family under section 31 (1) (f), (2) or (4) or 36 (7) (f);

and references in this Act to periodical payments orders, secured periodical payments orders, and orders for the payment of a lump sum are references to all or some of the financial provision orders requiring the sort of financial provision in question according as the context of each reference may require.

(2) The property adjustment orders for the purpose of this Act are the orders dealing with the property rights available (subject to the provisions of the Act) under section 32 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say-

- (a) any order under subsection (1)(a) of that section for a transfer of property;
- (b) any order under subsection (1)(b) of that section for a settlement of property; and
- (c) any order under subsection (1)(c) or (d) of that section for a variation of settlement"

[13] Applications for financial provision orders are made under section 31(1), the relevant portion of which reads:-

"31(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter, the Court may make any one or more of the following orders, that is to say-

- (a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
- (b) an order that either party to the marriage shall secure to the other, to the satisfaction of the Court, such periodical payments, for such term, as may be specified;
- (c) an order that either party to the marriage shall pay to the other such lump sum or lump sums as may be so specified;"

[14] Finally, applications for property adjustment orders are made under section 32(1) which reads-

"32(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the Court may make any one or more of the following orders, that is to say-

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child, such property as may be so specified, being property to which the first mentioned party is entitled, either in possession or reversion;"

In considering applications under sections 31 and 32 the Court is required to have regard to the matters set out in section 34(1) as follows-

"It shall be the duty of the Court in deciding whether to exercise its powers under section 31(1)(a), (b) or (c), 32 or 33 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has, or is likely to have, in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties 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) any physical or mental disability of either of the parties to the marriage;

- (f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a 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 parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

The factors listed in section 34(1) are not exhaustive and the Court should consider all the circumstances and adopt a flexible approach in dealing with each case. The learned editors of **Halsburys Laws of England** 4th ed. Volume 13 paragraph 1060 put the matter this way-

"In the end, however, the Court must view the situation broadly and see that the financial arrangements it proposes meet the justice of the case; the result may mean that both parties will have to cut down their standard of living, but it may be as much as can be done in the circumstances."

Guided by these principles I will now apply the facts of this case to the matters listed in section 34(1).

Income and Earning Capacity

[15] The Petitioner is a self-employed seamstress. In a good month she earns as much as \$350.00 and in a bad month she earns nothing. Her recent earnings have been low because she is living in a new neighbourhood and has lost her clients from her old neighbourhood at Campden Park. She also does relief work as a female attendant at the Milton Cato Hospital. In the year 2000, which she describes as a good year, she earned \$1,100.00 for her relief work. I find her average monthly income to be approximately \$300.00. She also receives the rent from the first house of \$500.00 per month. Her monthly expenses are approximately \$800.00.

[16] The Petitioner has provided the Court with very little evidence of his current income. He has worked for only six weeks during this year up to the end of June, and would have earned approximately \$3,000.00. His monthly expenses are approximately \$500.00 and he says that he has to use his savings frequently to pay his bills. He obviously has a good earning capacity but has not been doing well recently.

Financial Needs and Standard of Living

[17] The parties enjoyed a relatively good standard of living before the breakdown of the marriage, having built two homes without assistance from a bank. Their immediate financial needs are to have sufficient funds to at least pay their expenses.

Duration of Marriage and Age of Parties

[18] The marriage lasted 20 years and produced one child who is now 19 years old. She lives with the Petitioner. Both parties are 47 years old.

Contributions to the Welfare of the Family

[19] For the purposes of this case the contributions to the welfare of the family include financial and non-financial contributions to the acquisition of the family assets, and the parties efforts in looking after the home and caring for the family.

[20] The Petitioner made substantial financial contributions to the acquisition of the family assets. His income was always much larger than the Respondent's, and he paid most of the expenses related to the acquisition of the two properties. He also contributed a substantial amount of the labour. He helped with the running of the house, sharing the cooking and washing duties. I have already found that the monies in the certificates of deposit were contributed entirely by the Petitioner.

[21] The Respondent had a smaller income but made direct financial contributions to the purchase of the building materials for the first house and the land for the second house. She worked on the second house. Her money was used to run the house and look after the family. She looked after the welfare of the family when the Petitioner was working.

[22] In summary I find that the family assets were acquired by the joint efforts of the parties, with the intention that they would be used during their joint lives for their benefit. This is reflected by the fact that one of the properties, and the certificates of deposit, were in the joint names of the parties.

TAILPIECE TO SECTION 34(1)

[23] The matters listed in section 34(1) are followed by what has been described by Lord Nichols of Birkenhead in **White v. White** [2000] 1.All E.R.1 as a “tailpiece” which requires the Court in exercising its powers under the section to put the parties in the financial position that they would have been in if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other (supra paragraph 14). Two points arise with respect to the Tailpiece.

[24] Firstly, it introduces the element of the parties conduct into the exercise of the Court’s powers under section 34. However, it has been decided repeatedly, both in England (**Wachtel v. Wachtel** [1973] All E.R. 829 being a good example), and in St. Vincent (**Richardson v. Richardson** (SVG Civil Suit No. 204 of 1994 - unreported)), that unless the conduct of one of the parties is gross and obvious, and repugnant to ones sense of justice, it should not be taken into account. There is nothing in this case that would cause the Court to consider the conduct of the parties as a determining factor.

[25] Secondly, although the Tailpiece is not one of the “matters” listed in section 34, it must be considered by the Court. This was the conclusion of Davies L.J. in **Jones v. Jones** [1971] 3 All E.R. 1201 at p.1206 in response to a submission by Counsel for the husband that the Tailpiece was not one of the matters to be considered in applications under section 5 of the 1970 Act–

“I am quite unable to accept this submission. It is to be observed that by both subsections the court is directed to have regard to all the circumstances of the case; and it is clear that the considerations referred to in the concluding lines of s 5(1) form part of the circumstances of the case. Moreover, if counsel for the husband were right, the court would be precluded on an application to vary from considering the conduct of the parties, since that is not one of the ‘matters’ covered by s 5(1)(a) to (g), and that cannot be right.

In my judgment, therefore, the question before the court on the present application is simply what, in all the circumstances of the case and in the light of the financial position of the parties, is a fair and proper order to be made.”

Section 5(1) of the 1970 Act is equivalent to our section 34(1).

[26] The Tailpiece was accepted and applied by the Court of Appeal in this jurisdiction in **Wilson v Wilson** (SVG Civil Appeal No.6 of 1995 unreported)

[27] The High Court in St. Vincent must therefore have regard to all the circumstances of the case, including the matters listed in section 31(1)(a) to (g), and the requirement in the Tailpiece that the parties should be placed, so far as practicable, in the financial position in which they would have been in had the marriage not broken down and the parties had properly discharged their financial obligations towards each other. This is important because of the difference in the legislation between England and Saint Vincent, and the recent decision of the House of Lords in **White v. White** (supra). The case concerned the wife’s application for financial provision under section 25 of the 1973 Act in circumstances where both parties contributed to the acquisition of the family assets, and those assets far exceeded the financial needs of the parties. The House of Lords held that in financial and property dispute between spouses and former spouses there was no room for discrimination between husband and wife and as a general rule the assets should be divided equally unless there is good reason to do otherwise. The House also held that the claimant’s financial needs (paragraph (b)) should not be determinative, but only one of the matters considered under section 25 (our section 34).

[28] The case did not overrule, nor even mention the one-third rule in **Wachtel v. Wachtel** (supra), and emphasised that the equality principle was not a rule or even a starting point, but nonetheless should only be departed from “...if, and to the extent that, there is good reason for doing so.” (per Lord Nichols at page 8). It is difficult to appreciate how the equality principle is not to be treated as a starting point when a court is expected to follow it unless there is good reason not to.

[29] In any event a Court in St. Vincent should examine the decision in **White v. White** very carefully before deciding to follow it. The decision of the House of Lords was based on section 25 of the 1973 Act (as amended by section 3 of the 1984 Act), which is different from our section 34 in one significant way - the Tailpiece no longer forms a part of section 25. And since Lord Nichols also made the point at page 6 that *"the Court's powers to make financial provision on divorce derive from statute"*, the difference is important. In commenting on the difference Lord Nichols said at page 7-

"This tailpiece was later deleted from the legislation, and nothing inserted in its place. In consequence, the legislation does not state explicitly what is to be the aim of the Courts when exercising these wide powers. Implicitly, the objective must be to achieve a fair outcome."

[30] The position in England is therefore that the Court is not required to come to a result that conforms to the Tailpiece. However, the Court in St. Vincent is required to have regard to the Tailpiece, which was the position in England when cases such as **Wachtel v. Wachtel** and **P v P** [1978] 3 All ER 70 were decided. This Court would therefore be more inclined to follow the principles in cases such as **Wachtel v. Wachtel** and **P v P**. Having said that, it is worth remembering the words of Davies L. J. in **Jones v. Jones** at page 1206 when he said in relation to the Tailpiece that the question before the Court is *"..what, in all the circumstances of the case and in the light of the financial position of the parties, is a fair and proper order to make"*. This does not appear to be very different from what Lord Nichols suggested as the objective of the Court in England, that is, to achieve a fair outcome. However, in achieving this outcome the Court in Saint Vincent must do its best to put the parties in the position they would have been in had the marriage not broken down and each party had properly discharged his or her financial responsibilities to the other.

QUANTIFICATION OF SHARES

[31] In 1973 the Court of Appeal in England in **Wachtel v. Wachtel** established certain guidelines for the Courts to follow in determining the financial and property disputes that arise between spouses and former spouses under sections 2-5 of the Matrimonial

Proceedings and Property Act, 1970 (UK). The equivalent sections of our Act are sections 29 to 33. The Court of Appeal also suggested that a good starting point is to give the wife one-third of the capital assets and the parties joint earnings ("the one-third rule"). At page 840 Lord Denning, M.R. was careful to emphasize that the one-third rule was only a starting point-

"We would emphasize that this proposal is not a rule. It is only a starting point. It will serve in cases where the marriage has lasted for many years and the wife has been in the home bringing up the children. It may not be applicable when the marriage has lasted only a short time or where there are no children and she can go out to work."

[32] The case before this Court involves parties who were married for 20 years and acquired the family assets by their joint efforts. The Petitioner's financial contribution was significantly less than the Respondent's, but she worked whenever work was available, and she looked after the family when the Petitioner was busy plying his trade. This would have been particularly true when the Respondent was working in Saint Lucia. I therefore find that this is an appropriate case to follow the guidelines in **Wachtel v Wachtel** and use the one-third rule as a starting point. In coming to a final decision the Court is required to act in accordance with Part 111 and make financial provisions for the parties which, as far as practicable, will put them in the position they would have been in had the marriage not broken down. The Court is not required to determine their strict property rights. This is clear from a reading of Part 111 of the Act and the comment of the learned editors of **Halsbury's Laws of England** 4th ed. Volume 48 paragraph 612 that-

"Disputes between spouses now rarely require resolution of their strict property rights under trust law as the court has wide discretionary powers in proceedings for divorce, nullity or judicial separation to distribute property as it sees fit without having to ascertain the shares of the parties in the property"

[33] One further consideration is that the marriage has broken down, the child of the marriage is now an adult, and the Court should therefore, as far as possible, make orders that will lead to a clean break between the parties.

[34] Following these guidelines I will approach this case in a very broad way. The Respondent has asked for a property adjustment order whereby she is awarded one of the two houses. That seems sensible, and on the facts the first house should be transferred to her. The Petitioner is living in the second house, and having made the more substantial contribution to its acquisition, this house should go to him. I accept the Respondent's position that she cannot live in the first house next to the Petitioner, and so the Court's order should make it possible for her to make a fresh start. The Petitioner has already depleted the Bank of Nova Scotia deposit and so the other deposit that has a present value of about \$20,000 should be turned over to the Respondent. This will leave her with \$20,000 cash and an asset worth just over \$100,000. Using both, she should be able to make a fresh in the manner that is most suitable to her. In this way the Court will be doing the best it can to put the parties, as far as possible, in the financial position they would have been in if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

[35] The following are the orders of the Court:

- (a) The first house at Campden Park now occupied by tenants is to be vested in the Respondent forthwith free of all encumbrances and claims by the Petitioner.
- (b) The second house at Campden Park now occupied by the Petitioner is to be vested in the Petitioner forthwith free of all encumbrances and claims by the Respondent.
- (c) The proceeds of the certificate of deposit at the Saint Vincent Co-operative Bank is to be vested in the Respondent forthwith free of all claims by the Petitioner. In the event that the deposit is now less than \$20,000 the Petitioner must pay the difference to the Respondent forthwith.

(d) Each party will bear his or her own costs.

(e) The parties have liberty to apply.

Paul Webster
High Court Judge (*Ag.*)