

ST. VINCENT AND THE GRENADINES

**IN THE HIGH COURT OF JUSTICE
(DIVORCE)**

SUIT NO. 316 of 2000

BETWEEN

ALITHIA JOHN-VICTORY

Petitioner

AND

RAY ANTHONY VICTORY

Respondent

Appearances:

Mrs. A. Cato for the Petitioner

Ms. N. Sylvester for the Respondent

2002: February 04

2002: February 13

2002: March 21

2002: July 26

2003: January 31

DECISION

PEMBERTON J.

[1] The Parties were married on 25th June, 1983. They co-habited at Fountain in the island of St. Vincent. The union produced two children, now aged 18 years and 13 years. Both

parties were employed during the marriage, the arrangement being that the husband paid the mortgage on the property from his salary and the wife paid the other outgoings from the home. The husband assisted as well with the maintenance and upkeep of the children, though not to the extent of that of the wife. Unhappily, differences arose and on November 3rd 2000, this Court granted a Decree Nisi. To date no application has been made for the Decree Absolute. The Petitioner is at the time of this decision, aged 45 years and the Respondent 46 years. They are both gainfully employed. The Parties have agreed on all ancillary matters save the disposition of the matrimonial home. They have asked this Court to pronounce on this issue.

[2] The facts not in dispute in relation to the matrimonial home are that the Respondent purchased the land upon which construction of the matrimonial home had started, before the marriage. The purchase price of the land was \$7,509.00. The Respondent financed this purchase by way of a loan from a financial institution. Further, the parties entered in to an arrangement with the St. Vincent Building and Loan Association to assist with the construction of the matrimonial home. They were both signatories to the transaction and the Respondent has borne and continues to bear the sole responsibility for the liquidation of this mortgage debt. A site visit by the Court to the premises revealed that the building remains unfinished, with the Petitioner and the children of the marriage and another child adopted by the Petitioner occupying the second level and the Respondent occupying the first level. The third level houses a utility area, shared by both parties. Both parties share the garage area. The unfinished structure has been valued in the sum of \$225,000.00 by an independent licenced Valuer. The parties have agreed to accept this valuation. The property is subject to an outstanding mortgage debt in the region of \$27,000.00. There is no dispute as well that both parties are entitled to share in the ownership and title to the matrimonial home.

[3] The issue which this Court is asked to decide, is how are the shares in the matrimonial home to be apportioned between the Parties? The questions raised are, what are the statutory provisions; what is the essence of the duty imposed on the Court by the

legislature; what factors must be taken into account and what is the objective to be attained?

[4] **STATUTORY PROVISIONS – MATRIMONIAL CAUSES ACT Cap. 176**

The starting point must be an examination of the law on the area. The legislative provisions are contained in the **MATRIMONIAL CAUSES ACT Cap. 176** of the **REVISED LAWS OF ST. VINCENT AND THE GRENADINES**. Sections 32 and 33 enable the Court on the dissolution of a marriage to make such orders as it thinks fit for the disposition of matrimonial property. Section 34 outlines the matters that the Court must take into account in deciding how to exercise the powers conferred upon it by the Legislature.

[5] **ESSENCE OF THE DUTY IMPOSED BY THE COURT AND FACTORS THAT MAY BE TAKEN INTO ACCOUNT.**

For the purposes of this case the Court will concentrate on the sub-section (1) of Section 34 which provides as follows:

It shall be the duty of the Court in deciding whether to exercise its powers under Section 31 ... ,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) the 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 ..., the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution ... of the marriage, that party will lose the chance of acquiring; ...

The Court mentions *en passant* that there is no statutory force given to the “clean break” principle as in the United Kingdom. Despite that, this Court is of the view that the telos upon which the principle is based is one to be commended to like cases in the region. It must be recognized as well that the principle is not applicable in this case, since there is no application for periodical payments.

[6] **EXAMINATION OF “ALL CIRCUMSTANCES” INCLUDING STATUTORY FACTORS**

1. STATUTORY FACTORS:

(a) INCOME, EARNING CAPACITY, PROPERTY AND OTHER FINANCIAL RESOURCES

The matrimonial home is the main resource in this matter. The Petitioner earns less than the Respondent, but not so much less so as to create a wide gulf between the parties. The Petitioner has alleged that the Respondent carries on a plumbing business from which he makes about \$2,000.00 per month but no proof of this was forthcoming. The Respondent has stated that the "business" is carried on occasionally. This Court thinks that in all the circumstances, the Parties herein are equally placed. No one party enjoys a significantly greater income, or earning capacity or other property or financial resources over the other.

(b) FINANCIAL NEEDS, OBLIGATIONS AND RESPONSIBILITIES

There are two children of the family which are supported and maintained by both parties. The Parties to their credit had arrived at a consent position with respect to this. The Court thinks it fair to say that they are evenly placed in this regard. It must be remembered that although living separate and apart, the children are in the daily presence of their parents since they both occupy the same building. While the petitioner has custody, there is regular contact between the Respondent and his sons.

(c) STANDARD OF LIVING ENJOYED BY THE PARTIES BEFORE THE BREAKDOWN OF THE MARRIAGE

There was no evidence led as to what extent either party's standard of living has been affected by the breakdown of the marriage.

(d) AGE OF THE PARTIES AND DURATION OF THE MARRIAGE

The Parties are in their mid forty's. The marriage lasted for nineteen years. To my mind, the evidence has not revealed anything significant in this, in that no one party is at a serious disadvantage as against the other.

(e) PHYSICAL OR MENTAL DISABILITY

There was no evidence of this in the matter and so it does not fall for consideration.

(f) CONTRIBUTION TO WELFARE OF THE FAMILY

There is no need for this Court to do more than to state that when matrimonial property is placed in the name of the husband alone, the wife is still entitled to a beneficial share or interest in the property as long as there is evidence of non tangible contribution in the form of looking after the home and caring for the family. In this case, it was agreed by both parties that the facts are that the land was bought in the name of the Respondent only, the Petitioner's name appears on the mortgage, during the marriage, the Respondent alone was responsible for liquidation of the mortgage debt (and this continues) and the Petitioner saw to the other needs of the house and the children. As of the breakdown of the marriage, the needs of the children are met by the Petitioner and the Respondent jointly, the other factors remaining constant. There is agreement between the parties herein that the Petitioner is entitled to a share of the matrimonial property, the question for determination as stated above is how much. The Petitioner deposed that she paid for the furniture, furnishings and appliances for the matrimonial home and made other contributions in terms of providing food for workmen during construction. These allegations were countered by the Respondent, but the Court recognizes that both parties by their joint efforts furnished the matrimonial home and have made almost equal contributions to the welfare of the home and the family.

(g) VALUE OF ANY BENEFIT WHICH THE PARTIES MAY STAND TO LOSE

As stated, the parties are both employed persons and both will be entitled to a pension at determination of their employment. No evidence was led with respect to this head and nothing turns on this.

[7] **2. OTHER CIRCUMSTANCES**

DIRECT CONTRIBUTIONS

What is the evidence before the Court in the case at Bar? By the Petitioner's account, by the date of the marriage, the land had not been fully paid for and the Petitioner assisted in the completion of the purchase by advancing the sum of \$3,000.00. This sum was borrowed from the Government Employees' Credit Union for the purpose of repaying the loan which the Respondent had taken from CIBC (Caribbean) Limited. The Petitioner produced an uncertified copy of loan application form dated 23rd July, 1984, as approved on 21st August 1984, the purpose of which was stated to be "to complete payment on land". Proof of liquidation of the loan from CIBC (Caribbean) Limited was not produced. The Respondent countered that he had completed the land transaction before marriage with a loan from the St. Vincent Building and Loan Association and not from CIBC (Caribbean) Limited. Since the Petitioner could not provide the documentary evidence to support her contention that the sum of money borrowed from the Credit Union did in fact liquidate the loan for the land, whether in favour of CIBC(Caribbean) Limited or the St. Vincent Building and Loan Association, the Court is therefore constrained to accept the Respondent's assertion that he had been solely responsible for the acquisition of the land upon which the matrimonial home was built.

[8] The Petitioner asserts as well that she contributed approximately \$10,000.00 for continued construction and improvements to the matrimonial home. This money was obtained from a settlement she received as result of injuries sustained from a motor vehicle accident. The Respondent has denied this. He claims to know of the fat of settlement but disclaims knowledge of the amount or of the contribution made from the sum received by the Petitioner. Although there is no documentary proof of the assertion made by the Petitioner, the Court reiterates that it accepts that the Petitioner made some direct contribution to the acquisition of the matrimonial home in its present state. The difficulty faced is that there is no evidence of the proportion of the direct contribution to the accepted value of the property.

[9] **THE OBJECTIVE TO BE ATTAINED**

The objective behind the duty to be exercised by the Court in St. Vincent and the Grenadines is expressed in the legislation as follows:

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 would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to each other.

There is a wealth of case law both of this Honourable Court and the Courts of the Commonwealth on what attitude and approach the court should adopt when dealing with this subject.

[10] **THE EQUALITY PRINCIPLE**

The Court reiterates that the case at bar is to deal with the determination of the shares of the parties in the matrimonial property. In **GISSING v GISSING [1971] A.C. 886** Lord Diplock at page 908 letters F - G said:

...the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. **It is only if no such inference can be**

drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim “equality is equity” and to hold that the beneficial interest belongs to the spouses in equal shares. The same result however may often be reached as an inference of fact.

[11] Earlier in the same decision, Lord Reid had this to say at page 897 Letters A – B:

It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half-share. I think that the high-sounding brocard “equality is equity” has been misused. There will be cases where a half-share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half.

[12] The learning in the United Kingdom has culminated with the landmark decision of the House of Lords in **WHITE v WHITE [2000] 3 W.L.R. 1571**. It should be noted that unlike the United Kingdom, our legislation contains what Lord Nicholls of Birkenhead refers to as “the tailpiece”, which as was stated above, gives the purpose or objective of the Courts in matters coming before them. His Lordship in **WHITE v WHITE (supra)**, gave what this Court opines is a lucid explanation of the practical application of this principle. His Lordship stated at page 1578 Letter H and continuing at page 1579 Letters A – C and Letters G - H:

A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge’s

conclusion involves a more or less equal division of all available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. **As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination. This is not to introduce the presumption of equal division under another guise. ... (The) wide powers enable the court to make financial provision orders in tune with current perceptions of fairness. Today there is greater awareness of the value of non-financial contributions to the welfare of the family. A presumption of equal division would be an impermissible judicial gloss on a statutory provision. It is largely for this reason that I do not accept (Counsel's) invitation to enunciate a principle that in every case the "starting point" in relation to a division of the assets of the husband and wife should be equality. ... it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division.**

- [13] **WHITE v WHITE (supra)** has been described as a “big money” case. That in itself distinguishes it from the case at bar. Some of the other features which distinguish the case at bar from **WHITE v WHITE (supra)** are that the parties here have more or less made significant contributions to the marriage and upkeep of the family. There is no evidence of external resources or assistance having contributed to the acquisition of the matrimonial property, the children of the family are still dependent on their parents, the Parties and the available assets do not exceed at all the amounts required by the Parties for their financial needs in terms of a home and income for each of them. Having said that, this Court hastens to add that while it is not bound by the decision and approaches adopted by the House of Lords in **WHITE v WHITE (supra)**, the principles enunciated in that case can, where relevant inform the reasoning and decision in this matter.
- [14] How has this decision been treated with in other jurisdictions? This Court’s research has produced an interesting decision form the High Court of Hong Kong **F v F HCMC 000004/2001** per Hartmann J. The facts in that case are similar to those of **WHITE v WHITE (supra)** and that case is regarded also as a “big money” case. Hartmann J, had this to say on the application of the equality principle to Hong Kong:

I would observe, however, that while **White v White** may not have laid down a presumption of equality, clearly equality of division is now a starting point. That in my view, does not represent the law in Hong Kong. There is for example, no requirement for our judges to give reasons for departing from equality. **Indeed, in marriages where there are few assets, studies have demonstrated that equality may act to the real detriment of the spouse who is left with the responsibility of raising the children: see Figgins v Figgins**, a decision of the Family Court of Australia [2002] Fam CA 688.

[15] **CONCEPT OF “FAIRNESS”**

The legislation in St. Vincent and the Grenadines is largely similar to that of Section 25 of the **MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984 (U.K.)**, save as was stated above for the “tailpiece”. In **WHITE v WHITE**, Lord Nicholls of Birkenhead used the concept of “fairness” as the basis of interpretation of the sections in the United Kingdom legislation conferring a discretion in the court in determination of disputes over matrimonial property. His Lordship put the issue at page 1573 Letters A – E as follows:

... divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided... Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as possible in all the circumstances. But everyone’s life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. The fairness, like beauty, lies in the eye of the beholder.

His Lordship then posed the question:

So, what is the best method of seeking to achieve a generally accepted standard of fairness? Different countries have adopted different solutions. Each solution has its advantages and disadvantages. One approach is for the ...legislature to leave it all to the judges. The Courts are given a wide discretion, largely unrestricted by statutory provisions. This is the route followed in this

country. The Matrimonial Causes Act 1973 confers wide discretionary powers on the courts over all property of the husband and wife. ...

Lord Nicholls of Birkenhead at page 1578, said that in striving to be fair, the Court must take into account “all the circumstances of the case”. The learned Law Lord adverted to Butler-Sloss L.J. in **DART v DART [1996] 2 F.L.R. 286, 303** when she said that the law provides for consideration of applications for ancillary relief for all classes of persons. However, the underlying principle is that there ought to be no discrimination between husband and wife in the performance of their respective roles. His Lordship’s dicta at page 1578 is worth reproducing. He said at Letters E – G:

Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is not longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife or forced upon them by circumstances, **fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to parties contributions...**

If in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

(Emphasis mine).

[16] Counsel for the Petitioner opined that based on the Petitioner's contributions that she is entitled to 75% of the ownership of the matrimonial home. This conclusion is based on the following factors:

- That the Petitioner does not wish the present living arrangements to continue, that is that she and the children continue to share the matrimonial home with the Respondent;
- That being so that the Respondent will be relieved from having to meet the monthly utility bills which he now has to meet;
- That the Petitioner will now be responsible for meeting these bills;
- That the Respondent has a private asset, his plumbing business from which he can derive an extra income;
- That the Respondent has other assets – another piece of land and proceeds from a Jeep which he sold;
- If the matrimonial home is vested in the Respondent solely that he can have an additional source of income from rentals.
- Contributions made by the Petitioner both in terms of cash payments and the non-tangible contributions.

[17] Counsel for the Respondent submitted that the matrimonial home ought to be divided 80% to the Respondent and 20% to the Petitioner and placed reliance on much of the facts and evidence as outlined above. In fact, Counsel for the Respondent severely doubted the accuracy of the monetary contributions and even the non-tangible contributions made by the Petitioner. Counsel placed reliance for her suggested allocation on the following:

- That the Respondent alone was responsible for the liquidation of the mortgage debt;
- That the land was acquired before the marriage;
- That he does odd jobs at plumbing and that it was not a thriving business or a golden business opportunity;
- That the Respondent has nothing save his equity in the matrimonial home.

Counsel for the Respondent discounts the ownership of other land and assets which were or may have been converted to cash. This Court is of the opinion that it too cannot take cognizance of these without proof of ownership of same, and in the case of the Jeep, proof of disposal. The reality of the rental income from the said house was also speculative. The Court agrees with this position.

[18] This Court has examined the evidence and has considered the submissions and evaluations of both Counsel. The Court is of the view that based on the law and the evidence as presented by the Parties, it must move away from the application of the “equality is equity” principle. To further the objective of the duty placed on this Court by the Legislature, it is determined that the matrimonial property situated at Fountain be divided between the Petitioner and the Respondent in the shares of 40% to the Petitioner and 60% to the Respondent.

IT IS HEREBY ORDERED AND DIRECTED AS FOLLOWS:

- 1. That the matrimonial home situate at Fountain in the island of St. Vincent now in the name of the Respondent herein be divided in the following shares – 40% to the Petitioner and 60% to the Respondent.**
- 2. That the Parties do bear their own costs of this Application.**

The Court gratefully acknowledges the assistance of both Counsel.

Charmaine Pemberton

**Charmaine Pemberton
High Court Judge.**