IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHMT 2006/0035

BETWEEN:

PATRICK ALEXIS

Petitioner

AND

MARY ANDRE ALEXIS

Respondent

Appearances:

Mr. Huggins Nicholas for Petitioner
Mrs. Petra Nelson for Respondent

.....

2007: July 23
September 27

.....

JUDGMENT

Mason J

[1] These parties lived together for a number of years before marriage. In fact the last of their three (3) children was seven (7) years old before the marriage was solemnised on 31st January 1986. They separated in 2000 and on 21st March 2006 the husband filed a petition for the dissolution of the marriage. It was not contested and a decree nisi was granted on 22nd September 2006 with leave being given by the court for either party to file a Notice of Application for Ancillary Relief.

[2] On 29th November 2006 the Petitioner filed such application seeking first, a declaration that there are

no children of the family to whom Section 41 of the Divorce Act 1973 applies, secondly an order that no maintenance be paid by or to either party, and thirdly that there be no order as to costs.

[3] This application was supported by a rather insubstantial affidavit in which the Petitioner merely deponed that he had been married to the Respondent, that a decree nisi had been granted, that he is a retired fisherman and the Respondent a Tourist Hostess of whose earnings he has no knowledge.

[4] On 16th February 2007 the Respondent filed an Affidavit in Response in which she sought to support a claim to a beneficial interest to a value of one half share in the matrimonial property as well as maintenance in the sum of $500.00 monthly.

[5] Before the matter came on for hearing on 23rd July 2007, it had been twice adjourned to facilitate the filing and serving by the parties of additional affidavits.

[6] In a preliminary submission Counsel for the Petitioner made the point that the reply of the Respondent amounted to a claim under Section 45 of the Divorce Act, an option which she could not invoke since in order to make a claim to a share in the separate property of the Petitioner, her application must be by originating summons pursuant to the Divorce Rules and the Rules of the Supreme Court. As a consequence the court has no jurisdiction to entertain her application.

[7] I am of the view that this contention cannot be supported because in the first place, the application for

ancillary relief was made by the Petitioner himself to which the Respondent is responding and therefore has a right in that reply to seek to justify any claim she feels she has and further that the Petitioner by neglecting and or refusing to make reference to or acknowledge the entitlement or non entitlement (as the case may be) of the Respondent to a share in the property cannot proscribe the Respondent's right of reply and thus to make her claim.

[8] In addition Article 1305 of the Civil Code of St. Lucia provides:

> *"A married woman ....may petition the Judge for the determination of any question affecting the rights, interests, obligations or liabilities of such married woman and the Judge may make such order, if any, or give such directions, if any, as he may consider just and proper in the circumstances".*

[9] What the evidence of the parties indisputably reveals is that the wooden house in which the parties lived with their children as well as the land on which the current matrimonial house stands were bought and paid for by the Petitioner with his own funds, that these purchases were made prior to the marriage while the parties were living together, and also prior to the marriage that the wooden house was converted to concrete.

[10] The Petitioner on these facts refutes the Respondent's claim to an entitlement to a share in the property because according to him her Affidavit discloses a claim for an interest allegedly acquired

prior to the marriage and not after it was solemnised. Her claim is based on cohabitational rights and not on the creation of community property and so it escapes the ambits set by the codified definition of "legal community". He queries whether a wife who is claiming ancillary relief purely on the basis of domestic management services rendered to the improvement and/or preservation of the husband's separate property can do so under Section 45(b) of the Divorce Act.

[11] The law as it relates to community of property is set out in Articles 1188 to 1307 of the Civil Code. In Article 1189 it is provided that community of property commences from the day the marriage is solemnised and in Article 1191 that legal community "may be established by the simple declaration which the parties make in the contract of their intention that it shall exist".

It continues:

> *It also takes place when no mention is made of it, when It is not expressly nor impliedly excluded, and also when there is no marriage contract……*

However by Article 1193, it is stated that:

> *"Property is deemed to be the joint acquisition <u>unless it is admitted or proved to</u> have been in the legal possession of one of the spouses previously to the marriage……."*

[12] In such circumstances the property is deemed to be the separate property of the party who had acquired it.

Under Article 1192:

> *"Separate property includes: the property, movable and immovable, which the spouses possess on the day when the marriage is solemnised".*

Now Section 45(b) of the Divorce Act states:

> *"The Court, on making a decree of divorce ....may, if it thinks fit, on the application of either party made before the decree of divorce .....is made, make an order"*
>
> ***a)*** *.....*
>
> ***b)*** *if any property of the parties or either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party has made a substantial contribution (whether in the form of money payments, or services, or prudent management, or otherwise howsoever) to the improvement or preservation of such property.....*

[13] The Respondent while accepting that she did not make an actual financial contribution to the construction of the house, stated that she did make a contribution, and that this contribution although prior to the marriage, by virtue of the parties intention with respect to the house being for the parties and the family together with her subsequent support to the marriage and the children, she is entitled to a share in its present value.

[14] The Respondent gave evidence that she began working in 1998 and once employed, she contributed to the maintenance of the household – she paid water and electricity bills and bought food for the family.

[15] In addition in her Affidavit she stated:

> ***18.*** *The intention over the many years of the marriage and our living together was to make a home for ourselves and our children.*
>
> ***19.*** *I was always the supportive wife who catered to my husband and children.*

[16] The Petitioner strove to eclipse all of the claims by the Respondent but merely succeeded in declaring his perfidy through his inconsistent statements. For example he could not state how long

the parties lived together. Although in his Affidavit he deponed to the paternity of three (3) sons, in cross examination he denied that he was the father of one although his name was on the child's birth certificate. He denied that the Respondent ever sold fish for him and when the contents of his Affidavit were put to him he stated:

> *"What I have in my Affidavit is untrue. She never sold fish for me. When my Lawyer asked me, I said that everything was true and correct. I cannot read properly. I don't know if the words in the Affidavit are mine ... I am not lying now. Maybe my Affidavit is a lie.*

[17] The Petitioner also disparaged the input of the Petitioner with respect to the rearing of the pigs and her services by saying that she catered more to her children and to other men than she did to him. He stated that he never "felt" the contribution made, if any, that she was basically doing her own thing, and he was doing his own.

[18] I should here note that despite the vehement denials of the Petitioner, I believe that, albeit prior to marriage, the Respondent did assist in the construction of the house by collecting stones from the river aback of the house, by drawing sand from Malgretoute, by cooking food for the men who helped to build the house, by selling the fish the Petitioner caught, by taking care of the pigs which the parties reached, by taking care of the Petitioner and the children and when she started working by paying bills and purchasing food. I also believe that her contributions to the household continued

after marriage.

[19] I am of the view that while the property could prima facie be declared the separate property of the Petitioner, the Respondent has duly satisfied the court that she has made that substantial contribution during the currency of the marriage as is required by s 45(b) of the Divorce Act so as to entitle her to a share through her services to the Petitioner and the family and through her evident management of the household.

[20] In any event it is the testimony of the Petitioner himself that the property was intended for the benefit of the family. Witness his statements in cross examination:

> *"When I built the house (the concrete house), it was with the intention that my family would enjoy the house. That was the family home.*

[21] It is clear that this is in keeping with Article 1191 of the Civil Code:

> *"Legal community may be established by the simple declaration which the parties make in the contract of their intention that it shall exist. It also takes place when no mention is made of it……*

[22] Added to this is the established law that in the absence of an express agreement between the parties

with respect to the beneficial interest in the matrimonial property, a common intention must be implied having regard to all the circumstances of the case. See the statement of Sir Nicholas Browne-Wilkinson VC in Grant v Edwards et al 1986 2 AER 426: ....

> *"……. where there has been no written declaration or agreement, nor any direct provision by the Plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the Defendant, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the Defendant to deny that Interest and will construct a trust to give effect to it.*
>
> *In most of these cases the fundamental, and invariably the most difficult question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively".*

Also in Lloyd's Bank plc v Rossett (1990) 1AER 1111 per Lord Bridge of Harwich:

> *"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of*

sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been".

"Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position reliance on the agreement in order give rise to a constructive trust or proprietary estoppel"

[23] It is my judgment that in light of the foregoing, whether or not it is decided that the property is separate property or community property, that the Respondent is entitled to a share. And I so find.

[24] The sections in the Divorce Act relating to matrimonial property are to be found in sections 24 (application for a transfer of property) and Section 45 (application for a property order).

Section 24 provides:

> *"On granting a decree of divorce, ……..or at any time thereafter, (whether, in the case of a decree of divorce ……..before or after the decree is made absolute), the Court may subject to the provision of sections 28 and 32 (1), 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…….such property to which the first-mentioned party is entitled, either in possession or, reversion:*
>
> ***(b)*** *an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the Court for the benefit of the party to the marriage.*
>
> ***(c)*** *…….*
>
> *(d)* *…….*

[25] Section 45 provides:

> *The Court, on making a decree of divorce (or of nullity of*

Marriage) may, if it thinks fit, on the application of either

Party made before the decree of divorce or nullity is made,

Make an order –

(a) *if any property of the parties is community property within the meaning of the Civil Code*

(i) *directing that either party shall, for such time as to the Court may seem fir, be entitled to the use or usufruct of a part or the whole of such property; or*

(ii) *declaring either party forfeit to the other of his or her share of a part or of the whole of such property; or*

(b) *if any property of the parties of either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party has made a substantial contribution (whether in the form of money payments, or services, or prudent management, or otherwise however) to the improvement or preservation of such property -*

(iii) *directing the sale of such property and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the Court thinks fit; or*

(iv) *directing that either party pay to the other such*

sum, either in one sum or installments and either with or without security as the Court thinks fair and reasonable return for the contributions made by the other party

[26] It would appear that the jurisdiction of the court under these provisions is separate, exercisable independently of the other and depends on the nature of the application made. It is to be recalled that in the instant case the application for ancillary relief by the Petitioner made no mention of there being any matrimonial property and that it was the Respondent in her reply who sought to be heard on the issue since she was of the opinion that she had a beneficial interest in the property.

[27] I have thus determined that the application by the Respondent is for a property order and can appropriately be determined under S.45 (b) of the Act, in which the court must have regard to the substantial contribution of the Respondent.

[28] If I am wrong to so determine and the application could be perceived to properly be one for a settlement or transfer of property under Section 24 then in any event, the court must take into account section 25 which allows for regard to be led to all circumstances including:

(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) *contributions 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 of 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 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.

[29] From a review of decided cases, both local and English, it is apparent that "the objective must be to achieve a fair outcome". And so the factors in Section 25 must be juxtaposed against the evidence in order to achieve that fair outcome.

[30] In the celebrated case of White v White (2001) 1 AC 596 Lord Nicholls of Birkenhead had this to say:

> *"In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. 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 no longer the order of the day. Frequently both parents work.*

[31] He continued:

> *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.

[32] Like in the case of White v White our case is a "clear "break" case where the children are grown up and independent. In the instant case, the parties both contributed to the upkeep of the home and fa0mily, the parties are both in their late 50's, the Respondent being almost two (2) years older than the Petitioner, there is no evidence of ill health of either party, the Respondent is employed with a monthly salary of $850.00 net with the assurance of NIS benefits when she retires, the Petitioner alleges that he is retired and unemployed. He admits to being beneficiary in the sale of family land that his share in that sale was $50,000.00 and that the family owns more land. In his Affidavit he denies owning a boat but in cross examination this was proved to be untrue. Under cross examination he stated:

"I am not working. I am just a fisherman. I am not fishing now.
My brother and sisters are taking care of me because I don't have
a wife or anything. From the beginning of the year I didn't catch
anything, so I didn't go back. It is not true that I did not go to fish
because I have enough money. It is because I cannot get a crew
to go with me. It is my occupation to go fishing. The boat is local
and fiberglass and you cannot get anyone to go out in the boat with
you."

[33] I am of the view that did he wish to, the Petitioner could continue to be gainfully employed.

[34] The Respondent is seeking a half share in the matrimonial property but I do not feel justified in making such an order. I am satisfied that a lump sum based on the value of the house would be more just and equitable.

[35] In the above cited case of White the House of Lords affirmed the Court of Appeal's award of a lump sum payment to reflect the wife's contribution on the grounds, inter alia, that there was no legal presumption of equal division, when awarding ancillary relief but a judge exercising his statutory discretion pursuant to section 25 of the Act, should before making his final decision, check his tentative views against the yardstick of equality of division and depart from equality only if and to the extent that there was good reason for doing so: per Lord Nicholls of Birkenhead at page 605G. It should be noted that s. 25 of the Matrimonial Causes Act UK is similar to our s. 25.

[36] Further in the case of Wachtel v Wachtel (1971) 1 AER 829, Lord Denning declared:

> "*In every case the court should consider whether to order a lump sum to be paid by her husband to her ....One thing is, however, obvious. No order should be made for a lump sum unless the husband has capital assets out of which to pay it without crippling his earning power".*

"Another thing is this: when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments or make them unnecessary. It will also help to remove the bitterness which is so often attendant .on periodical payments. Once made, the parties regard the book as closed. The third thing is that, if a lump sum is awarded, it should be made outright.

[37] In the present case, such lump could go towards assisting the Respondent in acquiring alternate accommodation. She gave evidence of having been forced to vacate the matrimonial home and now having to pay rent.

[38] The value of the matrimonial property was not led in evidence and in the circumstances in order for its valuation will be made prior to the determination of the award of a lump sum payment.

[39] The Respondent has also made a request for maintenance, a claim vigorously opposed by the Petitioner. He has in fact suggested that the order made by the Family Court for the payment of $100.00 by him to the Respondent should now be terminated.

[40] Section 22 of the Divorce Act provides for the maintenance of the party to a marriage. It states:

(1) On granting a decree of divorce or a decree of nullity of marriage or at any time thereafter (whether, before or after the decree is made absolute), the Court, may, subject to the provisions of section 32 (1), 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 and for such term as may be specified in the order:

(b) an order that either party to the marriage shall secure to the order, to the satisfaction of the Court, such Periodical payments and for such term as may be so specified

(c) an order that either party to the marriage shall pay to the other such lump sum as may be so Specified

(2) Without prejudice to the generality of subsection (1) (c), an order under this section that a party to a marriage shall pay a lump sum to the other party -

(a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the Family before making an application for an order under this section:

(b) may provide for the payment of the sum by installments of such amount as may be specified in the order and may require the payment of the Installments to be secured to the satisfaction of the Court

[41] In coming to a determination with respect to maintenance, the Court must be guided by the factors contained in Section 25 previously referred to at paragraph 28.

[42] The Petitioner tried to give the impression that he was totally impecunious, that he was dependent on his siblings for support, that it was they who renovated the house after the Respondent left, that it was his sister who paid the maintenance for him at the Family Court and had even had to give him bus fare that morning to come to Court. He even sought to suggest that the Petitioner was in a better position than he because she was living with two of her children who maintain her and that she contributed to the National Insurance Scheme.

[43] In light of the revelations regarding the Petitioner's family land and in light of the fact that he has voluntarily ceased working, also that he has full control and occupation of the matrimonial home, I find his evidence difficult to accept. I do not believe that the continuation of the maintenance order would pose specific hardship to the Petitioner. However applying the "clean break" principle referred to in the case of Wachtel (supra). I am minded to award a lump sum payment so that the parties can be completely separated from each other to go their different ways.

[44] In the circumstances I would consider an award of $5,000.00 to be just and equitable to satisfy the clean break principle.

ORDER

That the property registered as Block 0231B Parcel 158 be valued and after said valuation a lump sum payment to be determined by this court paid to the Respondent.

That the Petitioner pay to the Respondent the sum of $5,000.00 in full and final settlement for her maintenance.

That each party bears his own costs.

SANDRA MASON QC

High Court Judge