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

SAINT LUCIA

CLAIM NO. SLUHMT 2005/0104

BETWEEN:

CAREN LORNA JEAN nee AUGUSTIN

Petitioner

AND

JEAN LLOYD LINDSAY JEAN

Respondent

Appearances:

Mrs. Andra Gokool – Foster for the Petitioner
Mr. Gerard Williams for the Respondent

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2006: June 1
July 11, 24
2007: November 5, 26

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JUDGMENT

Mason J

[1] The relationship between this couple began in 1986. When they got married on 10th December 1995 they were both 28 years of age. Out of this union one child was born in 2003. During the course of the marriage serious problems emerged – the Petitioner

alleging abuse and refusal by the Respondent to maintain the child of the family. The latter resulted in an order being made by the Family Court.

[2] On 19th July 2005 the Petitioner filed for dissolution of marriage and was granted a decree nisi on 9th December 2005 with ancillary matters adjourned to Chambers for hearing on 10th February 2006.

[3] The application for ancillary relief now for hearing before this court was filed by the Petitioner on 25th January 2006 and in that application she sought a number of orders but principally that the matrimonial home be declared community property and that she be granted custody of and maintenance for the child of the family. The Respondent resists the application with respect to the matrimonial home and asks that it be declared his sole property.

Evidence

[4] Both parties filed affidavits for themselves and their witnesses and agreed that these affidavits would stand as their evidence in chief.

[5] The Petitioner deponed that she is an administrator/sales representative and earns a monthly salary of $1,400.00 plus commissions totaling approximately $2,000.00, that throughout her marriage to the Respondent he has failed and/or neglected to provide her with financial assistance whether for the child of the family or household expenses. She continued that she and the Respondent started having a relationship in 1986 and in view of

their commitment and plans to marry, they pooled their resources and started discussions with a view to building the matrimonial house. She stated that they did not have enough money to purchase land so they asked her mother for permission to build on her family land for which the mother had legal responsibility. She claimed to have used the majority of her salary and commissions to purchase materials and to pay labourers to build the house, that the Respondent was miserly and left her with responsibility for many of the expenses. She asserted that she contributed considerably more than the Respondent towards the construction costs, the furnishing, improvement and maintenance of the matrimonial home.

[6] Under cross examination she stated that the Respondent moved into the house a few days before the marriage, that she got assistance from her family and her church members during the construction of the house but she did not pay for this help.

[7] The Petitioner's mother's evidence was that the land on which the parties built their home is her family's land which she shares in undivided partnership with her siblings, that when the parties expressed their intention to marry, she obtained the permission of her sister in Barbados to allow the parties to build on the portion of land belonging to her sister who indicated that she was not interested in the land. The witness continued that she informed the parties that they could build on the land and when it was partitioned she would donate the spot to the Petitioner as her inheritance. She stated that the Respondent was made aware of this. She also stated that her family and some church members "pitched in" to help provide labour at every stage of construction and that the Petitioner's father painted the entire house, both inside and outside.

[8] The Petitioner's father in the main reiterated his wife's evidence but denied that the Respondent's witness utilized seven (7) workmen and also denied that the Respondent's witness was the sole builder for the construction of the house which that witness claimed in his affidavit to have done.

[9] There was no substantial cross examination of the Petitioner's parents. However in re-examination of the Petitioner's father it was elicited that it was his wife, the Petitioner's mother, and not he who had given permission to the parties to build their house on the land for he himself had only the right to live on the land by virtue of his marriage to the Petitioner's wife, it being her family's land.

[10] The Respondent's witness, a self employed contractor, stated that in February 1992, he was engaged by the Respondent to construct a dwelling house, that the project was divided into seven (7) phases, that the project took two (2) years and that he received money from the Respondent and never from the Petitioner. He stated that while the church members did assist him with the building of the foundation, it was he and his workers who did the brick work. He refuted the claim by the Petitioner's father that he had painted the house. He claimed to have been present when all of the work was done on the house.

[11] Under cross examination he could not recall all of the names of the workers who had assisted him. He admitted to not always keeping records of the projects he had undertaken. When an exhibited document purported to have been executed by him in

1993 with respect to the cost of the construction was put to him, he conceded that it had not been executed on that date. In all he received $85,000.00 for labour, he claimed.

[12] The Respondent for his part testified to being employed by the Ministry of Communications, Works, Transport and Public Utilities as a Clerk II, earning a salary of $1,495.00 after tax. He denied any payments by the Petitioner for electricity services, any contribution by her to the construction of the house. He asserted that it was he who "singlehandedly suffered the financial expense and physical effort in constructing my house…..at no time did I invite the Petitioner not did I accept any offer by the Petitioner to assist me with the construction of my house".

[13] He stated that during 1991 he met the Petitioner's parents when he was having difficulties with his own parents and he was required to leave their house. He stated that at that time he was attending church services with the Petitioner and her father permitted him to occupy a spot of land belonging to the Petitioner's mother, that there was a verbal agreement between him and the Petitioner's parents for him to purchase the land "at any convenient time in the future".

[14] According to the Respondent he contracted with his witness in 1992 to construct the house and in early 1993 he moved in while it was still under construction.

[15] He supplemented his affidavit at trial by stating that in addition to his substantive job in the Ministry, he also did some farming, sold the produce and used the proceeds for the construction of the house.

[16] Under cross examination he denied having a relationship with the Petitioner from 1986, saying instead they were only speaking. Although in his affidavit he deponed to attending church services with the Petitioner, he denied this, saying that they met at church, that he "happened" to go to that church on an invitation but he could not remember whose invitation.

[17] He stated that discussions with his witness about construction began in 1991, that the affidavits contained incorrect information. He stated that his witness gave him the exhibited document in 1993, that it was a projection and denied that it had been "manufactured" for the purpose of the case.

[18] He maintained that he constructed the house from his earnings and his income from farming and he paid the contractor in cash. He stated that he farmed on his father's land and this despite their bad relations.

[19] The Respondent under further cross examination was unable to say what his salary was, could not "detail in precise form from where he got money to finish the house". He contradicted his witness with respect to the phases of the construction i.e. that none of the phases of the construction continued into the marriage, stating that the witness was incorrect to say that he had been called back out to do further work. He admitted to being aware that the Petitioner made three (3) times his salary but denied that she made any contribution or that she gave him her commissions to purchase materials.

Submissions

[20] Both Counsel relied on the Articles of the Civil Code relating to community of property to reach their disparate conclusions with respect to the matrimonial home.

[21] Counsel for the Petitioner submitted that in the absence of a marriage contract, property owned from the date of the marriage falls into the community of property unless either party can clearly prove that the property is either separate property brought into the marriage or separate property acquired during the marriage. It is Counsel's further contention that Article 1193 is key to determining the lawful entitlement of the parties in this case and therefore the burden of proving that property acquired during the community is separate property is placed firmly on the person who is alleging that it is separate property. Counsel claimed that the Respondent did not provide the Court with clear and satisfactory documentary proof that he paid for labour and other related expenses for construction and that the Respondent was unable to refute the Petitioner's claim regarding their levels of salary.

[22] Counsel declared that since the Respondent was unable to satisfy the Article 1192 test of separate property, that all of the property in contention - the matrimonial home and its contents – whether acquired jointly in contemplation of marriage or during the subsistence of the marriage, is the joint acquisition of the community under Article 1193 entitling the Petitioner to an undivided half share thereof. In addition, Counsel asserted, that the matrimonial house, being located on the Petitioner's mother's undivided family lands over which neither the Petitioner nor the Respondent presently has a legal interest,

but which the Petitioner stands to inherit, that the more practical and reasonable proposal for the division would be to award ownership to the Petitioner on the payment to the Respondent of the value of his half share. Counsel suggested that this half share should be discounted by a lump sum maintenance order and a compensation order for the destruction by the Respondent of the personal property of the Petitioner and the child of the family.

[23] On the obverse Counsel for the Respondent submitted that the dwelling house having existed prior to the marriage cannot come within the definition of legal community but should rather be considered as the Respondent's separate property in accordance with Article 1192. Counsel also contended that the Petitioner, if she is able to so prove, could only be deemed a constructive trustee of the property. There is no evidence proferred in terms of amounts paid by the Petitioner to the Respondent or spent on building supplies, there is no evidence of withdrawals from savings; no evidence of commission income and their corresponding expenditure on construction, no evidence of receipts of items purchased for construction; no list of items purchased for the interior of the house; no evidence of any conduct on the part of the Respondent which evinces a common intention of the parties that the Petitioner should have a beneficial interest.

Law

[24] The law in relation to the determination and division of matrimonial property in Saint Lucia is governed by the Civil Code, Chapter 242 and the Divorce Act 1973 as amended. It is to be noted that by section 53 of the Act where a conflict exists between the Act and any other law e.g. the Code, the provisions of the Act shall prevail

[25] The pertinent articles of the Code (1188 to 1307) however prevail only where there is community of property or legal community. Such community commences from the date of solemnization of marriage (Article 1189).

Where there is property it is

> *" deemed to be the joint acquisition of the community unless it is admitted or proved to have belonged to, or to have been in the legal possession of one of the spouses previously to the marriage ……."*

[26] The property in such circumstances where it is admitted or proved is deemed to be the separate property of the spouse.

[27] Separate property is defined by Article 1192 as comprising:

> *(a) the property, movable and immovable, which the spouses possess on the day when the marriage is solemnized;*
>
> *(b) the income and earnings of either spouse, investments in the name of one spouse, and insurance policies taken out on the life and in the name of one spouse;*
>
> *(c) property, movable and immovable, acquired by succession, by donation of legacy made to either spouse particularly;*
>
> *(d) compensation payable to either spouse for damages resuting*

from delicts and quasi-delicts, and the property purchased with all funds thus derived; and

(e) fruits, revenues, and interest, of whatever nature they be, derived from separate property, the proceeds of separate property, and property acquired with separate funds or in exchange for separate property

[28] What Article 1193 clearly establishes is that where as in the present case, one spouse is claiming that the property is separate property and the other is claiming it to be community property, the burden of proof is on that spouse who is claiming the property to be separate property. It would therefore be incumbent on the Respondent to prove his ownership.

[29] The Divorce Act on the other hand by its sections 22 to 24 and 45 gives to the court a wide discretion (subject to the considerations in section 25) to divide up what property is owned by the spouses, whether separately or jointly or in community. It is instructive to here to reproduce those sections:

Section 22:

(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 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 that sum by installments of such amount as may be specified in the order and may require the payment of the installments to be secured of the satisfaction of the court.

Section 23:

(1) Subject to the provisions of section 28, in proceedings for divorce or nullity of marriage, the court may make any one or more of the orders mentioned in subsection (2) –

(a) before or on granting the decree of divorce, or of nullity of marriage, as the case may be, or at any time thereafter;

(b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal

(2) The orders referred to in subsection (1) are –

(a) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;

(b) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the Court, such periodical payments and for such term as may be so specified;

(c) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified

(3) Without prejudice to the generality of subsection (2) (c), an order under this section for the payment of a lump sum to any person for the benefit of a child of the family, or to such a child, may be made

for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section to be met.

(4) An order under this section for the payment of a lump sum may provide for the payment of the sum may provide for the payment of that sum by installments of such amount as may be specified in the order and may require the payment of the installments to be secured the satisfaction of the Court

(5) Where the court has power to make an order in any proceedings by virtue of subsection (1) (a), it may exercise that power from time to time; and where the court makes an order by virtue of subsection (1) (b) in relation to a child it may from time to time make a further order under this section in relation to him

Section 24:

On granting a decree of divorce, a decree of nullity of marriage or 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 subject to the provisions of section 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, to any child of the family or to such person as may be specified in 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;

(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 and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the marriage and of the children of the family or either or any of them any ante nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such contract or settlement;

and the Court may make an order under paragraph (c) notwithstanding that there are no children of the family.

(2) The fact that a settlement or transfer of property had to be made

in order to comply with an order of the court under this section shall not prevent that settlement or transfer from being a transfer of property to which section 578 of the Commercial Code applies.

Section 45:

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 fit, be entitled to the use of unsufruct 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 the 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 –

(i) 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

(ii) directing that either party pay to the other such sum, or in installments and either forthwith or at a future date and either with or without security as the Court thinks fair and reasonable in return for the contributions made by the other party.

Findings

[30] What is uncontroverted is that this property was constructed prior to the marriage. It stands to be determined therefore whether it was constructed as claimed by the Respondent solely by him or whether as claimed by the Petitioner by both of them in contemplation of their marriage.

[31] Counsel for the Respondent contends that the Petitioner produced no evidence to support her claim. However the documentation produced by the Respondent himself was found to be suspect e.g. the document exhibited by his witness relating to the agreement between himself and the Respondent and the cost of construction was proved not to have been prepared and or executed on the date it purported to have been done; the bank statements produced by the Respondent related to the years December 1994 to December 1997, dates after which according to the Respondent himself, construction had been completed; production of an electricity bill in arrears does not necessarily convince of ownership – it merely indicates that there was service to the dwelling. I found also very curious the invoice supplied by the building supplies stores dated 10th to 12th July 1993 especially when held against his affidavit. He states there that he moved into the house

in early 1993. It is stretching the imagination somewhat to accept that the nature of the materials listed on the invoice could have been utilized so swiftly in order to have brought the house to a stage where the Respondent could have moved in and especially when his witness testified that he was given money sporadically and there were times when no work was done. I was not convinced about this aspect of his evidence. His witness testified to having received $85,000.00 for labour, yet no receipts or invoices were produced. The Respondent spoke of having received large sums from hotels and supermarkets for his farm produce which sums he utilized in the construction but again he did not exhibit any receipts.

[32] Counsel for the Respondent quoted a statement to be found in Rayden on Divorce at paragraph 15 on page 745 and replicated by Hariprashad Charles J in Spooner v Spooner No. D 127 of 2001, which I happily endorse:

> *"It is significant to point out that in proceedings of this nature the law requires both husband and wife to give full and frank disclosure to the Court whether by affidavit of facts, by affidavit of documents or by evidence on oath. Any shortcomings from this standard can and normally will result in the Court drawing inferences adverse to that party".*

[33] It seems to me that neither party is capable of producing conclusive proof as to expenditure but the court recognizes that this is normal within the special relationship which exists between husband and wife especially when the relationship is thriving. It is

my view therefore that the court is left to reach its conclusion based on the balance of probability consequent on its views of the credibility of the witnesses.

[34] I shall state at the outset that while the Respondent is not being judged either on his display of palpable disrespect for the court or his similarly blatant contempt of the proceedings, I found him to be a less than truthful witness. He answered questions only when it befitted him and those answers when they came seemed dubious. He prevaricated about seemingly inconsequential matters e.g. he admitted to having been a police officer but denied that he had to leave the job for disciplinary reasons saying instead that he had been transferred and his services were "utilized within the Ministry". He denied having been suspended on half pay from his duties as a clerk with the Ministry but chose instead to say that he had just been given leave and when asked what kind of leave, he refused to answer. He stated that he was on full salary but that he was not getting paid. He denied that he was having problems with his parents, preferring to term it "misunderstandings" although he referred to it as "difficulties" in his affidavit. He tried to sidestep the issue of the land on which the house was built. He stated that he may have read his affidavit before he signed it but countered that if it contained incorrect information it was unknown to him

[35] In fact I found to be far more credible the version of events as related by the Petitioner and her witnesses. There is no doubt that the land on which the house was built belongs to the family of the Petitioner and that the parties were permitted to build on it because of their intention to marry. It would be a bit farfetched to believe that the Petitioner's parents would allow someone whom they had just met, and in the Respondent's words, by a

"strictly verbal agreement" to build his concrete house on their land with a mere promise "at some convenient time in the future" to sell to him the land on which he built his house. It is decidedly more reasonable to accept that construction was permitted because of a perceived permanent relationship e.g. marriage to their daughter who would in any event eventually inherit the land. Further I do not consider occupation of the house prior to marriage to be determinative of ownership but rather to be a matter of convenience for, by his own admission, the Respondent had to find somewhere to live owing to the "difficulties" he was experiencing with his parents.

[36] Additionally, as agreed by the Respondent's witness and vehemently denied by the Respondent, the Petitioner's family and church members "pitched in" and assisted with the construction. One would ask why would such assistance be given to a mere stranger?

[37] In the premises therefore being unable to accept that the property is the separate property of the Respondent or to determine the exact contribution by either party to construction of the house, I am of the view that the parties hold the house in equal shares. It is undeniable that the land on which it stands is still owned by the Petitioner's family.

[38] Before proceeding to consider the question of division I need to digress to state that I found quite persuasive the arguments of Counsel for the Respondent with respect to the issue of trusts. I would also wish to express my gratitude for his research and scholarship on this point. Counsel cited the following cases:

Lang v Lang Suit No. 30 of 1991 (St. Lucia)

Eves v Eves (1975) 1 WLR 1338

Grant v Edwards (1980) 1 ch 638

in the latter two (2) of which the Court of Appeal (UK) opined that in the absence of a written document or agreement, there must be evidence of a common intention between the parties acted upon by one in order for that party to have a beneficial interest in the property; that an inference demonstrated, by e.g. expenditure incurred, is usually enough to give effect to such intentions.

[39] I do not see the need to again repeat the evidence already fully set out above in order to support my view that even if this learning were applied to the present case where there is neither deed nor document attesting ownership, that the Petitioner would still be entitled to benefit and in the circumstances, the Respondent would be holding the property in trust for the Petitioner.

[40] As stated previously the Court is given a "panoply of wide discretionary powers" in determining financial provision and property adjustment. In exercising its powers under the aforementioned provisions of the Divorce Act (sections 22 to 24) the Court is under a duty by section 25 to have regard to the following circumstances:

> *(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 break down of the marriage;*

(d) *the age of each party to the marriage and the duration of 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 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 on 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 obligation and responsibilities towards the other.

(2)` *Without prejudice to subsection (3) it shall be the duty of the Court in deciding whether to exercise the power under section 23 or 24 in relation to a child of the family 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 financial needs of the child

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage

(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had property discharged his or her financial obligations and responsibilities towards him.

[41] It is to be noted that this section 25 of our Divorce is similar to section 25 of the UK Matrimonial Causes Act 1973. When this Act was amended by the Matrimonial and Family Proceedings Act 1984, the "tailpiece" was deleted. Such was the designation given by Lord Nicholls of Birkenhead in the celebrated case of White v White (2001) 1 AC 596 when referring to the duty of the Court to exercise its powers so as to place the parties in

the financial position in which they would have been if each had properly discharged his or her obligations and responsibilities towards the other.

"Lord Nicholls was of the view that the

> *"objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses…. The powers must always be exercised with this objective in view, <u>giving first consideration to the welfare of the children.</u> (my emphasis)".*

In reviewing the concept of equality he stated:

> *"Sometimes having carried out the statutory exercise, the Judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often having looked at all the circumstances, the judge's decision means that 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*

reason for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

[42] In seeking to achieve that "fair outcome" one must necessarily juxtapose the considerations enumerated in section 25 of the Act with the evidence adduced in this case while also taking into account the similar considerations to be applied with respect to the minor child.

[43] The parties marriage lasted almost ten (10) years. They are now both 40 years of age with a four (4) year old child the sole custody of whom the Respondent has agreed will repose in the Petitioner. Since the breakdown of the marriage there has been in effect an interim maintenance order of $200.00 per month for support of the minor child. None of the parties - child included - appears to suffer any physical or mental disability.

[43] At the date of hearing of the application, the Petitioner earned a basic salary of $1,400.00 and commissions of $2,000.00 per month, the Respondent approximately $1,500.00 but he is no longer engaged in farming. It is expected that they will both receive future increases in salary.

[44] Judging from these figures, it can be assumed that the parties enjoyed a reasonable standard of living before the breakdown of the marriage. The Petitioner having impressed me as a witness of truth, I do believe that she expended substantially more than the Respondent in the construction, furnishing, improvement and maintenance of the matrimonial home and I propose to have regard to this factor in the eventual disposition.

[45] It is difficult to definitively determine what would be the future financial needs, obligations and responsibilities of the parties and their child. According to Lord Nicholls in White (supra) who, after reviewing the authorities where "needs" was equated with "reasonable requirements" a concept with which he did not particularly agree, stated:

> "*Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources.....and the parties' contributions".*

[46] With all of this in mind I cannot but agree with the reasoning and the proposal put forward by Counsel for the Petitioner: since the house is located on the undivided family land of the Petitioner's mother for which she has no legal right of sale or division and since the said undivided family lands are occupied by the Petitioner's family, it would be the most practicable and reasonable solution for division if the Petitioner were allowed to become the sole owner on payment to the Respondent of the monetary value of his half share.

[47] In accepting this proposal for division I take into account the evident acrimony between the parties and the proximity of this house to that of the Petitioner's family. Payment of his share in the proceeds will permit the Respondent to begin a new life elsewhere.

[48] I have also taken into consideration the Respondent's delinquency in making maintenance payments as well as the Petitioner's evidence, which I believe, of his neglect and/or refusal

during the marriage to equally assist in maintaining the child, causing the Petitioner to have to seek the help of her family. This the Respondent denied but admitted that he was at least three (3) months in arrears with respect to the maintenance payments.

[49] The Respondent having sought to divest himself of the responsibility of the child, stating that he has no objection to the Petitioner's application for sole custody, I would therefore consider this an appropriate instance in which to apply sections 23 and 24 of the Divorce Act (see paragraph 29 above) which respectively provide for the financial provision for the child of the family and allow for a transfer of property from a party to the marriage for the benefit of the child.

[50] I hasten to add that the decision to order the transfer of property is not being employed as a punitive measure but as a means of ensuring in accordance with section 25 of the Divorce Act that the child achieves an adequate standard of living and is put in the same position as she would have been in if the marriage had not broken down and each of the parties had properly discharged his or her financial obligations towards her.

[51] I find support for this approach from the following footnote extracted from page 799 of Rayden on Divorce, 14th edition, (op cit) where that text had under consideration the premise that it could be appropriate to make a transfer of a husband's share where his capacity to make adequate periodical payments is limited.

> *"Bryant v Bryant (1973) 117 Sol Jo 911 (husband, in prison, had flouted court orders, was likely to make financial provision for wife and children*

on his release: wife declared to own half share of matrimonial home, other half transferred to her; she would continue to let part and obtain some income): upheld an appeal, (1976) 120 Sol Jo 165, CA, where Stephenson LJ said that "the order transferring the house to the wife absolutely was a strong one because it was his only capital asset, though the justification for it might be easier to find when it was a financial interest in the matrimonial home which housed a wife and young children. Although the husband had flouted court orders, those breaches were irrelevant when considering the prospect of his paying maintenance in future as the only financial order he had ever flouted was the maintenance order which he had obeyed by paying the arrears when threatened with committal. But the judge below had borne in mind s. 25 of the Matrimonial Causes Act 1973, as well as the possibility, indeed the desirability of providing for the wife and children by a less drastic order such as was made by the Court of Appeal in Mesher v Mesher and Hall (1973) {1980} All ER 126 i.e. that the house be held on trust for sale and rents and profits until sale in equal shares provided that it was not to be sold until the youngest child attain 18 or finished full time education. He came to the conclusion that the husband was never going to pay his wife and children any regular maintenance and therefore the only way in which he could be made to discharge his obligation to maintain them was by "stripping him" of his half interest in the house. The judge was not penalizing him but merely protecting the wife and children".

[52] In view of the foregoing my order is as follows:

1. That the matrimonial home be declared to be held in equal shares by the parties

2. That the Respondent's half share be reduced by one half and that one half be held by the Petitioner in trust for the benefit of the minor child of the family

3. That the matrimonial home be valued as soon as is practicable by a valuer agreed to by the parties and/or their Counsel

4. That the cost of this valuation be borne equally by the parties.

5. That the Petitioner as soon thereafter as is possible pay to the Respondent his share of the value

6. That immediately upon payment of his share, the Respondent vacate the property

7. That the sole custody of the minor be awarded to the Petitioner

8. That all arrears of maintenance be brought up to date (that date being the date of judgment) after which the interim order for maintenance is discharged

9. That the relevant declaration in accordance with section 41 of the Divorce Act is hereby made

10. That each party be allowed to take possession of such of the household items as claimed in the separate affidavits, the balance to be shared equally or sold and the proceeds thereof divided equally.

11. That each party bears his or her own costs

SANDRA MASON Q. C.

High Court Judge