BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/006

BETWEEN

LAWRENCE WHEATLEY

Appellant

and

RAISHAUNA WHEATLEY

Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mde. Ola Mae Edwards — Justice of Appeal [Ag.]
The Hon. Mr. Errol L. Thomas — Justice of Appeal (Ag.]

Appearances:

Mrs. Tana'ania Small for the Appellant
Mrs. Susan V. Demers for the Respondent

2008: January 29;
October 13.

Civil Appeal – Family Law – Divorce – Ancillary Relief – whether the judge took into account all relevant considerations – whether the judge gave due weight to all relevant considerations - whether the court could take judicial notice of the law governing work permits – weight to be attached to an agreement on income - lump sum payment – whether inherited property is part of the matrimonial assets and ought to be included in the calculation of the lump sum – meaning of "secured to the satisfaction of the Court" - Child Custody – Matrimonial Proceedings and Property Act No. 6 of 1995 – Guardianship of Infants Act Cap 270.

The appellant, a citizen of the British Virgin Islands, is the co-manager and co-owner of a family run hotel in Anegada. He met the respondent, a citizen of the United States of America, whilst he was studying in Florida. They were married in 2002 and have two young sons. The respondent was a housewife and the children's primary caretaker during the four year marriage, except for a brief

period when she managed the hotel's gift shop. She filed a divorce petition in March 2006 and claimed custody of the two children and ancillary relief. A decree absolute was granted and ancillary relief ordered in the following terms: (i) a lump sum payment to the respondent of US$253, 657.60 comprising the appellant's (the respondent on the petition in the court below) inherited property and other assets; (ii) the lump sum payment to be secured by a charge over the shares of the (hotel) company held jointly by the appellant and his sister; (iii) the appellant and his sister to be treated as tenants in common and not as joint tenants in relation to all real property and shares of the company; (iv) monthly maintenance sums to be paid to the respondent and the two children; and (v) the periodical payments to be secured by a charge over all property identified as being jointly held by the appellant and his sister. The respondent was granted custody of the children with liberal access being granted to the appellant. The appellant appealed against these awards and the grant of custody and challenged the learned judge's findings of fact.

Held: allowing two grounds of the appeal, disallowing all other grounds and making no order as to costs on the appeal:

(1) The learned judge had properly taken into account and given due weight to the statutory considerations and the relevant factual circumstances including the conduct of the parties during the marriage and at the trial (their credibility), the earning capacity of the parties, the respondent's employability both within and without the British Virgin Islands, the assets held by the appellant and the appellant's truthfulness regarding his financial position. The learned judge had also properly found that the parties enjoyed a good standard of living. In those circumstances, there was no basis upon which an appellate court could interfere with these findings and the conclusions reached in making the order for ancillary relief.

(2) As a matter of law, the law governing immigration work permits and related matters was a question of which the court could take judicial notice.

(3) The learned judge had due regard to the welfare of the children having considered all relevant factors and attached appropriate weight to them. The learned judge's discretion to award custody to the appellant was accordingly properly exercised.

(4) In making the maintenance award, the learned judge was mandated under sections 23 and 25 of the Matrimonial Proceedings and Property Act ("the Act") to consider a number of variables, including the income of the parties. The question of an agreement on income by the parties did not arise or was otherwise implicitly rejected by the learned judge.

(5) The learned judge paid due regard to the appellant's job prospects in determining the maintenance award; and, in terms of quantification of the award, considered all the relevant evidence and had appropriate regard to the submissions of counsel. There was therefore no basis for interfering with the learned judge's maintenance award.

(6) As a general rule, inherited property or non-matrimonial assets ought not to be shared by the other party to the marriage. In determining whether inherited property should be included in the calculation of the lump sum award as an exception to the general rule, the court may take into account the duration of the marriage, whether a petitioner would have directly or indirectly benefited from the inheritance had the marriage subsisted and whether a petitioner's financial needs could be met without recourse to the property. In the

circumstances of the case, having regard to the respondent's financial needs and to the fact that she would have benefited from the inheritance had the marriage continued, the learned judge properly exercised her discretion to include the inherited portion of the appellant's assets in calculating the lump sum award.

Dicta of Lord Nicholls in White v White [2001] 1 All ER 1; dicta of Munby J in P v P [2004] EWHC 1364; Dicta of Lord Nicholls and Baroness Hale in Miller v Miller [2006] 2 WLR 1283; dicta of Edwards J (as she then was) in Darcheville v Darcheville Claim No. SLUHMT 2003/0034; dicta of Lord Denning M.R. in Trippas v Trippas [1973] Fam 134 considered and applied.

(7) Each party is entitled to a fair share of the available property and, as far as is reasonably practicable, is to enjoy the same standard of living as would have pertained had the marriage subsisted. Having regard to all the circumstances of the case including the situation of the respondent and the duration of the marriage, the awards in relation to the family assets and the gift shop were fair and adequate.

(8) As to the sale and ownership of the gift shop, the learned judge made findings of fact which were duly explained so that there were no grounds upon which the appellate court could intervene. In terms of the value of the gift shop, the appellant was under a duty to secure a current valuation. Having failed to do so, the learned judge was entitled to estimate its value, which discretion was reasonably exercised.

Dicta of Saunders JA (as he then was) in Stonich v Stonich British Virgin Islands Civil Appeal No. 17 of 2002 followed.

(9) The power in section 23 of the Act to order payment of a lump sum to be "secured to the satisfaction of the Court" does not empower the court to order the charging of property of any kind, simpliciter. The learned judge was not, in the circumstances, entitled to order that the lump sum payment or the periodic payments be secured by a charge over the company's shares.

(10) However, the court should, as a matter of approach and depending on the circumstances including what may have been said by the parties to the court, give the parties the opportunity to agree on the property to be charged as security. In the event the parties cannot agree, or if a party declares before there is any attempt at agreement that he will not charge any property, the court has the power to direct what property is to be charged, order the charging of that property and appoint a person to execute the charge, if a party refuses to do so. [per Barrow JA and Edwards JA [Ag.]; Thomas JA [Ag.] dissenting].

(11) Section 25(1) permits the court to, inter alia, make an order transferring the property specified in such an order to which one party to a marriage is entitled, whether in possession or reversion, or to make orders creating a settlement. Such a transfer or settlement is however confined to the parties to the marriage and children of the marriage. It was accordingly outside the court's competence to make an order which sort to bind the appellant's sister who was not a party to the marriage.

(12) The learned judge took all relevant considerations into account, and did not therefore err in awarding costs against the appellant in the court below.

JUDGMENT

[1] THOMAS, J.A. [AG.]: This appeal against the decision of Madam Justice Rita Joseph-Olivetti concerns in essence, what has been described, in a similar context, as "that most intractable of problems: how to achieve fairness in the division of property following a divorce".[1]

Background

[2] The appellant ("the appellant") is from Anegada, an island in the British Virgin Islands, and has lived there all his life except when he was away at college in Daytona Beach, Florida studying for his degree in Hotel Management. He is the co-manager and co-owner of the Anegada Reef Hotel which is a family run business started by his parents many years ago. The Wheatley family is well known and well established in Anegada as well as in the islands of Virgin Gorda and Tortola.

[3] The respondent ("the respondent") is a 29 year-old woman. She is a citizen of the United States of America and met the appellant when he was in college. When the appellant completed his studies in June 2002, the respondent decided to move back to Anegada with him. The parties decided to get married and did so in September 2002.

[4] The parties have two children, Lowell now 4 ½ years and Landon, now 3 years. They were married for a period approaching 4 years.

[5] In March 2006 a divorce petition was filed by the respondent. The decree nisi was granted on 4th July of the same year and the decree absolute was granted subsequently. In the petition the respondent sought custody and ancillary relief which gave rise to the judgment

[1] Per Lord Nicholls in Miller v Miller [2006] 2 W.L.R. 1283 at para.1

of Justice Olivetti on 16th April 2007.

The Orders

[6] In giving her judgment the learned judge made orders in these terms:

"1. The Respondent shall pay to the Petitioner a lump sum of US$253,657.60, comprising the following:
   (a) 10% of US$1,249,742.50 (the Respondent's inherited property) - US$124,974.25;
   (b) 15% of US$757,889.00 (the Respondent's share of property acquired from Susan Wheatley) – US$113,683.35;
   (c) 15% of US$100,000.00 (value of the gift shop) - US$15,000.00;

2. The lump sum award in the amount of US$253,657.60 shall be secured by a charge over the 95 shares of the company, Anegada Ventures Limited, currently held jointly by the Respondent and Lorraine Wheatley, said charge to be a second charge if the said shares are charged to Banco Popular and a first charge if the said shares are not so charged;

3. The lump sum award in the amount of US$253,657.60 shall be paid within six months of the date the judgment herein was pronounced;

4. All real property and the 95 shares of Anegada Ventures Limited which the Respondent holds jointly with Lorraine Wheatley shall henceforth be regarded as being as tenants in common and not as joint tenants;

5. The Petitioner is granted custody of the minor children of the marriage, Lowell Wheatley, born April 7, 2003, and Landon Wheatley, born December 13, 2004, with liberal access to the Respondent;

6. The Petitioner is granted leave to take the children out of the jurisdiction and to reside with them in Florida, United States of America;

7. The Respondent shall have access to the children of the marriage each year for two weeks at Easter, six weeks during the summer vacations and two weeks every alternate Christmas holidays. The Respondent shall take care of all the children's travel arrangements and shall ensure that the children are escorted by a family member known to them when they travel to be with the Respondent;

8. The Respondent shall have access to the children at such other times as the parties may agree during any visits the Respondent makes to Florida, such access to include overnight visits upon giving reasonable notice to the Petitioner;

9. The Respondent shall pay to the petitioner for her maintenance the sum of US$2,700.00 per month for the next 3 years, commencing from 15th April, 2007;

10. The Respondent shall pay to the Petitioner the sum of US$520.00 per month for the benefit of each child for his maintenance;

11. The maintenance for the children shall continue until each attains the age of 18 or complete his education, whichever is later;

12. The periodical payments for maintenance of the Petitioner and the children of the marriage shall be secured by a charge over all of the parcels of real property identified in the judgment as currently held in the joint names of the Respondent and Lorraine Wheatley, namely Parcel 9, Block 5670A, Anegada Registration Section; Parcel 69, Block 5344B, Virgin Gorda Central Registration Section and Parcel 12/1, Block 5971a, Anegada Registration Section;

13. The Respondent shall pay to the Petitioner the costs of these proceedings, to be assessed upon application if not agreed."

The Appeal

[7] The appellant has filed some twenty-seven grounds of appeal, numbering from (a) through to (aa), which cover a myriad of legal and factual issues. In this regard, the appellant contends that certain of the grounds are characterized by the fact that the learned trial judge took into account matters that should not have been taken into account while on other occasions she failed to take into account matters that she properly ought to have taken into account. Accordingly, certain of the grounds of appeal will be considered together if the circumstances so demand.

[8] At paragraph 14 of the written submissions filed by learned counsel for the appellant the following is stated:

> "Broadly, the husband…complains that the learned judge took wrong account of each of the relevant factors of income, earning capacity, property and financial resources, standard of living enjoyed by the parties before the breakdown of the marriage, their ages and the duration of the marriage."

[9] The grounds identified in this connection are grounds (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (q) and (x). These grounds will be analysed as appropriate.

Grounds (a), (b) & (f)

[10] With respect to these grounds the appellant, through his counsel, Mrs. Tana'ania Small, contends that the respondent's conduct was a "demonstrably relevant"[2] factor which the learned trial judge was entitled to take into account in order to determine the justice of placing the parties in the position they would have been if the marriage had not broken down.

[11] In this connection the appellant draws attention to the respondent's conduct in different circumstances. First, the matter of her attending the Daytona Beach Community College and the production of a transcript purporting to be an official transcript. Second, the removal of the children from this jurisdiction in breach of an existing order giving access to the appellant for which she was found to be in contempt of court. Third, the admission by the respondent that documents filed in Florida seeking to challenge the jurisdiction of the local courts in relation to her application for relief contained false statements. Fourth, actions of violence committed by the respondent against the appellant[3].

[12] In response learned counsel for the respondent submits that the learned trial judge took into account and gave proper consideration to the issue of the college transcript and related testimony and gave it the weight warranted, being an issue of "minor significance". It is also submitted that in so far as the question of the removal of the children from the jurisdiction is concerned learned counsel contends that the learned trial judge found in a separate judgment, that, the respondent's conduct was not the kind that it would be unjust to ignore. And as far as the acts of violence are concerned, learned counsel says that Justice Olivetti determined that they were mostly concerned with damage to property.

[13] The matter of the conduct of both parties featured large in these proceedings. And in respect of the respondent's conduct specifically, Mrs. Tana'ania Small, records the following at paragraph 16 of her written submissions:

"Although the judge stated that she found both parts to be economical with the

[2] Appellant's submissions at para.18
[3] ibid at paras. 18-30

> truth on occasions and credited this to their feelings of bitterness 'to colour' their versions of events, there is not a single occasion where it can be demonstrated that this impression affected how the Wife's evidence was viewed nor how it was weighed in coming to a conclusion as to what was the justice to be done between the parties".

[14] That submission cannot withstand careful or any scrutiny since in her judgment under the rubric "Credibility of the Parties", the learned trial judge did engage in that exercise. She began in this way:

> "I propose to consider the evidence in relation to each of these factors but before I do so I must make some general comments on the issue of credibility of the parties as the bulk of the evidence came from them".[4]

[15] Having examined various aspects of the conduct of the appellant, the respondent and some of the witnesses, Justice Olivetti then set out her approach at paragraphs 33 and 34 of the judgment:

> "Therefore, I find that both parties' credibility has been seriously undermined and in deciding the various factual issues here I will not automatically discredit one party in favour of the other for the reasons given but will consider all of the evidence and will look for such supporting evidence as there is to assist me in coming to my conclusion.
> The evidence of their witnesses will also be regarded with due care as I have the impression that each is seeking to promote the interests of the party on whose behalf she was called. In particular, I was not impressed by Lorraine who appeared truculent and bent on managing her brother's affairs having regard to her attempts to get Inspector Mc Sheene to swear an affidavit on behalf of her brother, a task which ought properly to have been left to her brother and his lawyers. I also noted that she admitted to assaulting her own stepmother on one occasion. This speaks volumes as to her character and lends credence to Mrs. Wheatley's testimony of the tendency to physical abuse in the Wheatley family as well as in the marriage. I also note clause 15 of the Meditation Agreement that is annexed to the agreement for the sale and purchase of their stepmother's share in Mr. Lowell Wheatley's estate. This enjoins the parties to it (Lorraine, Mr. Wheatley and their step mother) to only say positive things about each other. The need for such a clause speaks for itself."

[16] Therefore, it was the respondent's conduct in relation to the alleged college attendance and what purported to be a transcript that caused the learned trial judge to say, *inter alia*, that her credibility was 'seriously undermined'. In relation to the matter of the removal of

the children from the jurisdiction and the taking of provisions from the hotel, this is what Her Ladyship said at paragraph 73 of the judgment:

> "Much has been made of Mrs. Wheatley's conduct in unlawfully removing the children from the jurisdiction but as I said in my judgment on that issue her position was understandable and I do not think that it is conduct which it would be unjust to ignore. One must not forget that she returned the children to the jurisdiction forthwith once the order was made and without the full benefit of the payment of the monies ordered as interim maintenance. Likewise, her conduct in taking provisions from the hotel kitchen for herself and the children without following the guidelines that her husband,Vivian and Lorraine attempted to lay down do not amount to conduct such as would be unjust to disregard it."

[17] Having regard to extracts from Justice Olivetti's judgment, I cannot agree that Her Ladyship did not consider the respondent's conduct. She did so and came to certain findings of fact and determinations as to credibility.

[18] With respect to questions of fact, the role and function of an appellate court in that context is explained in Blackstone's Civil Practice, 2002 at paragraph 72.6 thus:

> "The trial judge sees the demeanour of witnesses, and can assess their intelligence and credibility in a way that an appeal court cannot, even with the benefit of a transcript. The appeal court's function is to review the decision of the court below. It is not to embark on making original findings of fact. A finding of fact can be upset on appeal if there was no evidence to support that finding, or if the finding was against the weight of the evidence as a whole".

[19] I cannot say that there was no evidence to support the learned judge's findings and therefore these grounds must fail.

Grounds (d), (e) & (i)

[20] Grounds (d) and (e) concern the failure of the learned trial judge to give equal consideration to the income, and the earning capacity of the respondent, having done so in relation to the appellant. On the other hand, ground (i) addresses the question of the finding by Justice Olivetti that the respondent did not have the wherewithal to seek employment.

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[4] At para. 25 of the judgment

[21] Learned counsel for the appellant makes the following submissions in relation to grounds (d) and (e) at paragraphs 43 and 44 of her written submissions:

> "Although the learned trial judge stated that each of the statutory considerations were heeded, whilst clearly considering the income, earning capacity, property and financial resources of the Husband it did not appear that equal consideration was given to the income and earning capacity of the Wife who is a young woman of 27 years.
> The learned judge erred in finding that the Wife "did not have the wherewithal to seek employment" and that "her chances of obtaining employment here would be negligible as she would need a work permit which is usually only given to person with skills which are not easily available here". [Para. 36 and 38]. There was no evidence upon which the learned judge could properly have made such a finding. The fact is that there are persons on work permit at all levels and types of employment in the BVI. In taking this into account, when she should not have, the learned judge erred in properly assessing the Wife's earning capacity within the BVI and this caused her to determine that the Wife had to return to the United States".

[22] As far as the matter of the family's standard of living is concerned, the appellant's contention is that the learned trial judge erred in making assessment thereof during the course of the marriage, for which there was no evidence in support or else must have taken into account matters that were not in evidence.

[23] On the other hand, Mrs. Susan Demers, for the respondent, responds by saying that Justice Olivetti took into account each of the statutory criteria and ascribed to them the appropriate weight given the fact that the Act does not set out any hierarchy or weight to be attributed to the various factors. Learned counsel contends further that the learned trial judge "recognized that she had a wide discretion and no factor was to automatically be given greater weight than the others"[5]. Continuing she also submits that: "Her Ladyship took into account the Respondent's age and earning capacity, her lack of employment skills, her need to care for the children and her lack of financial resources"[6].

[24] On the matter of the standard of living, learned counsel for the respondent submits that this is supported by the affidavit evidence, testimony and the documentary evidence

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5 Reference is made to Vol. 1, Tab 2, para. 84, page 30 of the judgment
6 Reference is made to Vol. 1, Tab 2, paras. 35-39, pages 18-19 of the judgment

submitted by the appellant himself in response to the court's discovery order. In this regard the point is made by that the appellant admitted that the bulk of his living expenses are paid for by the business and, in, having regard to the appellant's monthly expenses, his credit card receipts and the absence of expenses for rent, meals, laundry, utilities (except telephone), the learned judge was entitled to conclude that the parties enjoyed a good standard of living.

[25] In relation to ground (i) Mrs. Demers submits that Justice Olivetti's conclusion regarding the respondent's employability rests on the totality of the evidence before the court and that it was common ground that the respondent did not work except for a six month period in the gift shop. Further, that the question of the requirement for a non-belonger having to obtain a work permit was a matter of statute law of which the court could take judicial notice.

[26] Grounds (d) and (e) involve questions of fact with respect to the statutory considerations in relation to the respondent. Having regard to the analysis, the factual matrix and the statutory considerations at paragraphs 35 to 45 of the judgment, in relation to the respondent, I agree with learned counsel for the respondent that the learned judge did give equal consideration to the statutory considerations. These grounds therefore fail.

[27] Ground (i) also fails since I agree with Mrs. Demers that Justice Olivetti did examine the respondent's chances of employment in the BVI. I further agree that the law governing immigration work permits and related matters is a question of which the court can take judicial notice.

[28] I further agree with learned counsel for the respondent that there was evidence before the court upon which the learned judge could reasonably as a matter of fact conclude that the parties enjoyed a good standard of living. This is Her Ladyship's conclusion at paragraph 58 of her judgment:

> "The parties enjoyed a good standard of living during the period of marriage. They

> had the run of a well established hotel which provided them with valuable services, cost free. Mrs. Wheatley had baby sitters and a housekeeper at times, was able to take trips back to her mother's home in Florida and to reside there for several months and to give birth to the children there. They do not strike me as a family that had financial difficulties at all. I note that Mr. Wheatley expends $200.00 per month on toys etc. for the children. That alone speaks for itself."

[29] This ground also fails since as with grounds (d) and (e) there is no legal basis upon which this court can interfere with the findings of fact.[7]

Grounds (g), (h), (j) and (l)

[30] Essentially, these grounds relate to certain findings by the learned trial judge to the effect that the respondent had difficulty in obtaining information regarding the appellant's financial position, he did not volunteer information or his information was suspicious. One ground also speaks to the appellant's truthfulness.

[31] With respect to these grounds learned counsel for the appellant submits that the findings were not fair because the appellant volunteered his financial information including the setting out of the benefits obtained from the hotel and further that upon application for discovery by the respondent seeking eight items, only two were pursued. Insofar as the learned judge's criticism of the appellant in relation to the five year lease of Crown land, learned counsel contends that no evidence was necessary since the lease was executed in November 2001 and in fact a copy of the Land Register tendered in evidence revealed that the lease was in fact not renewed.

[32] On behalf of the respondent it is submitted in the context of an application for ancillary relief that parties have an obligation to fully, frankly and clearly disclose their income, resources and assets to the court. Learned counsel then highlights the fact that the respondent was forced to seek discovery. Also mentioned is the fact the appellant stated[8] that with his sister he had secured a loan "in excess of 1.4 million dollars", that the only property in his name was the shares of Anegada Ventures Limited and that all of the

[7] See also: Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326
[8] Record Vol. 1 Tab 14 at page 9, para. 4

real property had been used to secure the loan.

[33] Learned counsel's submissions continue thus:[9]

> "In fact the loan was for US$1.2 million, and was secured against only one parcel of real property. There were also two other parcel of land registered in his and his sister's name which bore no charges. Her Ladyship was entitled to take a 'negative' view of the Appellant in light of his erroneous and less than truthful evidence on these matters."

[34] Questions relating to the extent of disclosure of information and the truthfulness of the appellant are patently questions of fact - the exclusive province of the judge. And I consider that on the evidence the learned judge was entitled to make the finding that she made with respect to the matters presently in issue. In particular, it is important to refer to the fact that in order to obtain financial information, the respondent had to make application for discovery. This alone speaks to the issue of the voluntariness of the information when in the legal circumstances the appellant owed a duty to the court to fully, frankly and clearly disclose such information. Then come the veracity of the information as to the extent of the money borrowed and the extent of the property charged for this purpose.

[35] Under ground (h) the appellant is contending that the learned judge erred in appearing to have formed an adverse view of one of the respondent's witnesses and used that view to impugn the respondent. The indication is that evidence in this regard is to be found at paragraph [34] of the judgment. This contention is denied by learned counsel for the respondent who argues that the learned judge was entitled to judge the credibility and demeanor of the witnesses before her. Learned counsel also addresses the issue of the witness, Lorraine Wheatley-Tomlinson, by saying that the learned judge did not use her view of this witness to impugn the appellant. But what does the learned judge say at paragraph [34] of her judgment?

[36] To begin with Justice Olivetti says that she will regard the evidence of witnesses with due care and goes on to make an assessment of Lorraine Wheatley, with whom she was not

[9] Respondent's submissions para. 29

impressed.

[37] There is no mention of any inference or finding of fact which was used to impugn the appellant. As such, the matter must end at this juncture.

[38] Therefore, based in what was said above, grounds (g), (h), (j) and (l) also address questions of fact and I see no basis upon which this court can intervene.

Ground (c)

[39] On this ground of appeal the appellant is saying that the learned trial judge erred in awarding custody to the respondent. The relevant law is section 3 of the Guardianship of Infants Act, Cap. 276 which says that:

> "3. Where in any proceedings before any Court the custody or upbringing of an infant…is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration, whether from any other point of view the claim of the father, or any other right at common law possessed by the father, in respect of such custody, upbringing…is superior to that of the mother, or the claim of the mother is superior to that of the father."

[40] Section 11 of the said Act goes on to provide that the court may make such order regarding the custody of the children and access to them as it may think fit having regard to the welfare of the infant, the conduct of the parents and to the wishes of both parties.

[41] In her written submissions, Mrs. Small, learned counsel for the appellant, contends that the learned judge failed to take into account the factors that would point to the best interests of the children remaining in Anegada in familiar surroundings where they would be cared for by family people. It is the further contention that the learned judge did not properly consider the appellant's strong family and support system or the respondent's conduct as revealed by the evidence. The submissions continue thus:[10] "More importantly, when each party's proposal for the care of the children is concerned, coupled with the report of the Social Welfare Department, the weight of the evidence strongly suggests that it is in the best interests of the children that they remain in Anegada."

[10] At para. 86

[42] At paragraphs 92 and 95 of her submissions learned counsel for the appellant refers to aspects of the evidence relating to the respondent's conduct as follows:

> "The Husband and his witnesses swore that there were more instances of the Wife leaving the children unattended at night-time. Mrs. Vivian Wheatley gave evidence of other instances that she was personally aware of the Wife leaving the children unattended or leaving them with babysitters and not returning home to relieve the sitter (who is a young girl and student) until well into the night [Vol. 1: Tab 20 pp 253-254 paras. 8-10]. Mrs. Wheatley's evidence was not challenged. There have been allegations of abuse on both sides and the Husband has admitted to ugly behaviour on his part. He also described some of the behaviour that the Wife would engage in including throwing things at him, destroying his property, including on two occasions damaging his motor vehicle (breaking the windshield and passenger door window) in the presence of the children and with potential harm to the children and her use of bad language in the presence of the children and unfortunate displays at the hotel [This was admitted by the Wife [Vol 2: Tab 36: p 823]. Her lack of concern for use of bad language in the presence of the children is also documented in the police report of 30 November 2006 when she ignored the police officer's plea to desist from such use in the presence of the children and was eventually warned for prosecution for indecent language [Vol 1: Tab 19: pp 248-249]. Neither party is blameless".

[43] To the contrary Mrs. Demers, learned counsel for the respondent, at paragraphs 62 and 63 of her written submissions argues as follows:

> "Her Ladyship's finding on the issue of custody took into account all of the relevant factors and evaluated them against the appropriate standard - the welfare of the children being the paramount concern, all decisions with respect to children must be made in their best interests. Her Ladyship found that the Respondent did not abandon or neglect her children and that she was the constant caretaker of the children since birth. She found that the Appellant loves his children, but was not in a position to take on their day to day care. Her Ladyship noted specifically that the Appellant made no claim for custody in the first instance (Vol. 1, Tab2, Paragraph 7, Page 11, Judgment). Her Ladyship's determinations on the issue of custody were supported by the report and testimony of Lorraine Williams of the Social Development Department one of the two independent witnesses to testify in the case (Vol.1. Tab 2, Paragraph 63-70, Pages 24-26; Paragraphs 95-105, Pages 33-35, Judgment; Vol. 2, Tab 37, Pages 1008-1030, Testimony of Lorraine Williams).
>
> Contrary to the assertions of the Appellant below and in this Court, Her Ladyship found that 'Having seen and heard the parties and Mr. Wheatley's witnesses and on reviewing all the evidence before me I have no difficulty in finding that the allegations of abuse and neglect against the Respondent are unfounded (emphasis supplied) (Vol. 1, Tab 2, Paragraph 63, Page 24, Judgment)."

[44] Learned counsel goes on to identify "trenchant" comments made by the learned judge with respect to "child abandonment allegations" and the respondent's performance as a caretaker.

[45] As noted before, the principles applicable to this court's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children are as those which apply generally in an appellate jurisdiction[11]. In this context it has been held that there are often no correct answers and the judge at first instance was faced with choosing the best of two or more imperfect solutions.[12]

[46] In this case the two solutions for custody were advanced by the appellant and the respondent. On the one hand, the appellant is a university educated person who managed the family hotel. He admitted to certain acts of violence against the appellant. At the same time the learned trial judge found as a fact that there were also acts of violence among members of the appellant's family and that life for the appellant's family centered on the hotel in Anegada.

[47] On the other hand, the respondent, an American citizen, does not have a university education and in fact is unskilled. She admitted to certain acts of violence against the appellant but these, for the most part were directed at property, rather than the person. She has every intention of returning to the United States to reside.

[48] Although learned counsel for the appellant mentioned factors such as the appellant's strong family ties and support system it is clear that the major emphasis is the failure of the learned trial judge to consider the respondent's conduct. But as submitted by learned counsel for the respondent, Justice Olivetti did consider all the relevant factors and came to a conclusion based on her assessment of the evidence and the demeanor of the witnesses. And on the specific issue of the respondent's conduct the learned trial judge must have come to the conclusion that the respondent's conduct did not reflect upon her

[11] G v G [1985] 2 All ER 225
[12] Ibid

fitness to take charge of the children.[13] This must be inferred from the following extract from Her Ladyship's judgment at paragraphs 63 and 64:

> "Having seen and heard the parties and Mr. Wheatley's witnesses and on reviewing all of the evidence before me I have no difficulty in finding that the allegations of abuse and neglect of the children against Mrs. Wheatley are unfounded. It is interesting that the evidence from Vivian and Lorraine of the children being sent to the hotel with soiled pampers and uncovered heads and unbathed comes very late in the day and only after Mr. Wheatley had filed for custody. If these allegations were true then they ought to have made them from the beginning, as there is nothing to suggest that they only recently came to light. With respect to the child abandonment allegations he made against Mrs. Wheatley, I do not find that she ever abandoned her children or put them in danger by leaving them unattended. The two occasions on which she left them alone at night do not amount to neglect as they were understandable in the circumstances and Anegada, as Mrs. Small-Davis correctly described it is a small, virtually crime free community. I accept Mrs. Wheatley's version of what transpired on those two occasions."

[49] Justice Olivetti, to some extent, even examined child abandonment as defined by section 191 of the Criminal Code 1997 and concluded that: "The section speaks for itself as to the gravity of the offence and its components."[14]

[50] At paragraph 65 of her judgment Her Ladyship went on to give her assessment of an aspect of the appellant's conduct in this manner:

> "Furthermore, I note that the event giving rise to his plea of guilty to assault in the Magistrate's Court was his suspicion that his wife had left the children unattended. He clearly did not check when he so arrogantly and cruelty assaulted her in public, unmindful of the consequence and of his standing in the community. And, he had to admit that when he went home the children were with the baby sitter after all. His actions were to say the least intemperate."

[51] It will also be recalled that earlier in this judgment I examined the learned judge's findings in relation to other aspects of the respondent's conduct. These were the issue of the college transcript and the removal of the children from the jurisdiction without the appellant's consent or that of the court. In one instance the learned judge concluded that the conduct was such that it would be unjust to ignore it.[15] And in the other instance, being

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[13] See Barnett v Barnett [1973] 2 ALR 19
[14] At paras. 66 and 67 of the judgment
[15] At para. 73

the context of the college transcript, both parties were characterized as being "economical with the truth on occasion."[16]

[52] In short then, in the face of conduct of varying degrees on both sides, the learned judge awarded custody to the respondent. And there can be no question, as learned counsel for the appellant contends, that the respondent's conduct was not fully analyzed by the learned judge.

[53] There exists a multitude of cases which reinforce the principle that an appellate court should only interfere if it is clear that the judge's discretion was wrongly exercised[17]. This is the appellant's onus. And the related principle established is that the trial judge would have seen the witnesses and assessed their demeanour before coming to a conclusion or making a finding, as the case may be.[18] Thus in such circumstances the point of intervention is where it is shown that the learned trial judge erred in the exercise of her discretion, failed to exercise the correct principles of law or was just plainly wrong.[19]

[54] But while one may disagree with Justice Olivetti's findings with respect to "child abandonment" in the virtually crime free Anegada,[20] I do not consider that the learned judge has exceeded the generous ambit within which judicial agreement is reasonably possible.[21]

[55] In the final analysis, it has not been shown that Justice Olivetti erred, for whatever reason, in awarding custody to the respondent. Accordingly, ground (c) fails.

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[16] At para. 29

[17] See G v G [1985] 2 All ER 225 (HL). Some of the authorities are reviewed in Jagan v Ganpat [1999] 60 WIR 270 (CA: Guy)

[18] See: Piglowska v Piglowska [1999] 3 All ER 632 (HL), Blackstone's Civil Practice, 2002 at para. 72.6, supra

[19] See: B v S [1999] 58 WIR 311; Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343

[20] In the context of this virtual basis crime is not the only factor to be considered, as there could be accidental electrical fire.

[21] Per Floissac CJ in Dufour and others v Helenair Corporation Ltd and others [1999] 58 WIR 147, 151

Ground (m)

[56] This ground calls into question the statement by Justice Olivetti that:

> "If she [the respondent] is awarded custody then any question of employment will have to be deferred until the children are older if she is to give them the care and security that they require."

[57] Given the fact that the order made by the learned trial judge did provide for the matters embraced by the ground appeal, I consider that it is purely obiter and also academic. As such it will not be examined further or at all.

Grounds (n), (o) and (p)

[58] These grounds raise a number of issues relative to maintenance. First, that in awarding maintenance to the respondent the learned judge gave no consideration to the respondent's job prospects. Second, that the award of the maintenance was contrary to an agreement between the parties on the level of the respondent's income. The third issue is that of the figures in the calculation of the maintenance and the method by which they were put before the learned judge.

The respondent's job prospects

[59] Learned counsel for the appellant in this regard submits that the learned judge completely disregarded the respondent's evidence that her chances of obtaining employment in Florida are good in general, and in Daytona in particular, at a rate of $10.00 to $12.00 per hour. In such circumstances, says Mrs. Small, the respondent would be in a position to contribute to the maintenance.

[60] Section 23 of the Matrimonial Proceedings and Property Act, 1995 ("the Act" or "the BVI Act") empowers the court on the grant of a decree of divorce to make a number of orders. One such order is "an order that either party to the marriage shall make to the other periodical payments for a term that may be specified in the order."

[61] A related statutory provision is section 26(1)(a) of the Act. This provision mandates the

court to have regard to certain matters in deciding whether to exercise its powers under section 23. One such matter is "(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…"

[62] In her judgment under the heading: "The income, earning capacity, property and other financial resources of the parties", Her Ladyship discusses the matters so identified. She begins with the respondent and in part says this at paragraphs 35 and 37- 39:

> "First, Mrs. Wheatley's financial position. There seems to be little or no issue with that. She has no separate property save I take it for her personal effects such as clothes…She hopes to return to Florida, U.S.A. with the children and make her home there where she has the support of her mother and other family members. She plans to obtain employment and to complete her college education on a part time basis. She said that her chances of obtaining employment in Florida are good and that she can obtain a job in the Daytona area almost immediately and that such employment would produce something like $10 to $12 an hour. If she were to do this immediately then the children will have to be put into what counsel for Mr. Wheatley correctly termed 'institutional daycare'.
> If she were to remain in the BVI her chances of obtaining employment here would be negligible as she would need a work permit which is usually only given to persons with skills which are not easily available here.
> Her prospects for the future are not good and they will only improve if she completes her education."

[63] In dealing with the narrower question of maintenance of wife and children, Her Ladyship reasoned as follows at paragraphs 110 and 111:

> "On the whole of the evidence it is apparent that the parties' intention was that Mrs. Wheatley would stay at home and care for the children of the marriage at least during their infancy, had the marriage subsisted. Mrs. Wheatley has indicated that it would take another 3 years to complete her education therefore I find it fair to allow her to complete her education and care for the children and that Mr. Wheatley pay maintenance to her for the next 3 years. This is permissible as it would enable her to meet the needs of the children whilst they are infants and to some degree meet the standard of living that was envisaged by the parents and it would also enable her to enter the workplace at a good level when they attend school full-time.
> Accordingly, having regard to all the circumstances of the case and based on the figures presented to the court by Mrs. Wheatley with some adjustments particularly for day care, the court will make an award for maintenance of Mrs. Wheatley in the amount of $2700.00 per month for the next three years commencing from 15th April 2007…"

[64] In sum, therefore, having looked at Mrs. Wheatley's evidence as to her employment prospects in Daytona and the future prospects, Her Ladyship concluded that the respondent's prospects were not good. As such, she determined that the respondent should complete her education. Thus, when the words "having regard to the circumstances of the case" are used by the learned judge this must be reasonably interpreted to include the respondent's immediate earning capacity in Daytona as discussed at paragraph 37 of her judgment.

[65] Accordingly, I hold that there is no merit in ground (n).

[66] Under ground (o) the appellant contends that the learned judge erred in awarding the respondent and the children maintenance of $3740 per month in circumstances where the appellant and respondent agreed on the level of the appellant's income.

[67] At paragraph 82 of her written submissions, learned counsel for the appellant advances the following:

> "The Wife accepted that the Appellant earned gross monthly of $2000 and accepted that the he received service charged benefits averaging $420 per month [Vol. 1: Tab 15: pp: 182-183]. Even though the learned judge found that the Husband obtained considerable benefits in kind from the Hotel there could be no expansion of actual cash received by the Husband."

[68] It will be recalled that Justice Olivetti speaking about both parties said:

> "Therefore I find that both parties' credibility has been seriously undermined and in deciding the various factual issues here I will not automatically discredit one party in favour of the other for the reasons given but will consider all of the evidence and will look for such supporting evidence as there is to assist me in coming to my conclusions.'[22] "

[69] In that vein Her Ladyship, in considering the appellant's income, noted the appellant's evidence in this regard, except for the figures relating to the service charge. The learned judge then went on to find that:

> "Mr. Wheatley did not disclose the full extent of his emoluments from the hotel. He made no attempt to assist the court by putting a monetary value on the substantial benefits in kind he received or even taking pains to set them out in

[22] Ibid

detail and the court was left to hunt for them here and there in the evidence."

[70] Implicitly, therefore, the learned trial judge did not accept the appellant's evidence as to his income even in the face of the respondent's partial acceptance thereof. This in turn would have removed the substratum of any agreement between both parties, as far as the trial judge was concerned. Ultimately the question of maintenance is governed by sections 23 and 25 of the Act and in particular under the latter section the trial judge is mandated to consider a number of variables, including the income of the parties.

[71] Therefore, the question of an agreement on income does not arise and even if it did exist, it was implicitly rejected by the learned trial judge. For these reasons, I am of the view that ground (o) lacks merit.

[72] Ground (p) questions certain aspects of the learned trial judge's approach to the submissions relating to the figures used in the calculation of an award for financial provision. In the final analysis the learned counsel contends that she did not have a fair chance or proper opportunity of dealing with these matters as they were entirely new and raised for the first time after submissions in reply had been made.

[73] My first observation in this regard is that learned counsel for the appellant has not directed the court to any particular aspect of the proceedings where the allegation may be substantiated. Nor is the ground seriously addressed.

[74] The same cannot be said of the respondent's counsel. This is the essence of her submission on the issue:

> "First, both parties' were asked by Her Ladyship to provide additional assistance with the calculation of a lump sum and maintenance and both parties[23] did so. Her Ladyship made it clear at the hearing on 19 March that she would base her award, if any, only on figures that were derived from the evidence and that she would be checking any figures against the evidence."

[75] At the hearing on 19th March 2007 the court was concerned mainly with figures and the following exchange between Justice Olivetti and Mrs. Shelly-Williams, holding for Mrs.

[23] Emphasis supplied by learned counsel in both instances

Small-Davis, greatly illuminates the issue:[24]

> "MRS. SHELLY-WILLIAMS: Again, My Lady, as I said I am at a disadvantage in relation to the matter. My understanding when we were coming here is that we were just going to be giving figures in relation to lump sums and submissions were already made, but you just needed actual figures to go with it.
>
> THE COURT: Counsel, the gist of what I said is that we will give an analysis of what was put before the Court. So what I expect, I don't expect certainly, and I think that was made clear as well, that we would be using the evidence. In the submissions Counsel actually assisted the Court as much as they could have done in relation to quantum, quantifying what kind of awards the Court can make and if the Court is looking for some assistance when it comes to the dollars and cents. So for that you always have to have what is the basis, this is the evidence, based on that evidence, you see.
>
> MRS. SHELLY-WILLIAMS: YES, My Lady, I see. However, I had in fact gone through the submissions and it seems as if submissions were made in relation to each category so I thought that figures were going to be made in relation to the lump sum submissions. I was not privy to the case. All I have is the affidavits and that's it.
>
> THE COURT: The affidavit is what really contains most of the figures relating to the maintenance and the assets.
>
> MRS. SHELLY-WILLIAMS: Very well, My Lady.
>
> THE COURT: So I did expect an analysis.
>
> MRS. SHELLY-WILLIAMS: Very well, As I said, if there are figures being given I expect them to correlate with the affidavit evidence."

[76] It is abundantly clear to me that whatever notions of a disadvantage may have been entertained by learned counsel were completely allayed by the learned judge after her methodology was explained. This is especially evident from the final statement from Mrs. Shelly-Williams.

[77] Indeed, any remaining doubt would have been removed when in her judgment the learned judge re-stated her methodology in this way[25]: "At the court's request on 7th March for further assistance on quantification of any awards for maintenance on lump sum orders, further oral submissions were heard on 19th March. The Court acknowledges the invaluable assistance given by both counsel."

[78] In all the circumstances I am of the view that this ground fails.

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[24] Vol. 2 of the Record at pages 1094-1095

[25] At para. 8

Ground (k)

[79] Ground (k) is in these terms: "The learned judge erred in making a finding that the respondent 'has a definite prospect that there are other assets in which he will have a one-third interest as well' [para.53] when there was no evidence to support this finding and the learned judge appeared to have relied upon a clause in the Meditation Agreement which could not have properly led to such a conclusion."

[80] In the written submissions on this ground learned counsel for the appellant, Mrs. Tana'ania Small, contends at paragraph 37 that:

> "No questions were asked of the Husband as to the meaning and import of this clause. Nothing in clause 16 could reasonably have led to a proper inference that there were other assets that would come to the Husband. Clause 16 provided that *'37.79% of any property without title or ownership …prepared by TRIAD - will be put in escrow and deducted from Sue's amount for one year, or until the asset can be liquidated'*. In the first place, the clause established that the property to which it referred was already valued 'herein' and secondly, the clause follows one dealing with the handover of the legal documentation of assets to the beneficiaries. It is clear that what the clause was dealing with was those assets that did not have any documentation to be handed over, and how they were to be dealt with.
> 38. The learned judge went outside the scope of her direction and in taking into account as significant as the prospects of future further assets that may have been discovered and took into account a matter that she ought not to have and allowed it to give her an adverse impression of the Husband and distort his financial resources."

[81] The counter submissions on behalf of the respondent at paragraph 28 of the submissions are as follows:

> "In making this finding, Her Ladyship relied on Clause 16 of the property Division Agreement entered into by the Appellant, his sister and his step-mother to settle their respective claims to his father's estate. (Vol.1, Tab 14, Page 94, Second Affidavit of Lawrence Wheatley, Exhibit LW2). The Clause refers to a Schedule of additional assets prepared by TRIAD and appears to indicate that there are additional assets to be divided. The Appellant disclosed this document only after refusing to do so (Respondent's Supplemental Bundle, Tab 1, Pages 12-13, Application for Directions and Discovery, Exhibit MAPF 2) and being ordered to do so by Her Ladyship (Vol. 1 Tab 11, Paragraph 23 (a), Page 9, Judgment). He offered no explanation of the document beyond what is contained in his Second Affidavit (Vol. 1 Tab 14). The Appellant had a duty to assist the Court to

understand his income assets and resources and cannot now complain when the Court takes a view regarding this information or draws inferences from his failure to assist the Court."

[82] As noted before, the challenge relates to the finding of the learned trial judge that there is a definite prospect that there are other assets in which the appellant will have a one-third interest as well. The question then becomes whether this finding can stand.

[83] In his second affidavit filed on 15th November 2006 the appellant, Lawrence Wheatley, makes reference to a "Division Agreement between the beneficiaries of my father's estate, being Susan Wheatley, his widow, Lorraine Wheatley, my sister and myself". At paragraph 3 of the said affidavit the appellant goes on to give the reasons for the negotiations between the parties and the agreement. According to him, it was because his father died "without leaving a will."

[84] Being the lawful son of the deceased there is no question as to his entitlement under the estate along with the other two parties to the agreement. The agreement itself speaks of all kinds of property and the manner in which they are to be dealt with. Then clause 16 speaks of property "without title or ownership papers, valued herein above and encapsulated in amended schedule prepared by TRIAD."

[85] Learned counsel for the appellant has submitted that the phrase "valued herein" means already valued. But the clause goes on to "encapsulate in amended Schedule prepared by TRIAD". This reference to the TRIAD schedule was not disclosed. In fact the two schedules to the agreement are called A and B, respectively so that the schedule prepared by TRIAD remains an unknown. In this regard Mrs. Tana'ania Small contends that her client was not asked about the schedule. On the other hand, Mrs. Demers submits the appellant was actually compelled to disclose the document when in law, in the circumstances, he has a duty to assist the court to understand his assets.

[86] Therefore, in the context of the intestacy, the initial non-disclosure of the agreement, the absence of an explanation of the schedule prepared by TRIAD, I cannot say that the finding by the learned trial judge went outside of her discretion and took into consideration matters which she ought not to have taken into account. Ground (k) therefore fails.

Grounds (r), (s), (v), (w) and (x)

[87] Under these grounds the appellant contends that the learned judge erred in various ways in making the lump sum award and the award of maintenance, to the respondent. The errors include a failure to consider the inherited property, the circumstances pertaining to the purchase of all property by the appellant from Susan Wheatley and a failure to consider the net position of the appellant's property in making the award.

Lump sum award

[88] Justice Olivetti made a lump sum award of $253,657.60 broken down into:

(i) 10% of $1,249,742.50 (inherited property)

(ii) 15% of $757,889.00 (his share of property acquired from Susan Wheatley) - $113,683.35

(iii) 15% of $100,000.00 gift shop - $15,000.00

[89] It is the submission of learned counsel for the appellant that the learned judge erred in making the above-mentioned awards in the following manner:

(i) In failing to give proper consideration to the fact that Lawrence Wheatley received the inherited property after the decree nisi was granted.

(ii) The property purchased from Susan Wheatley is the subject of a bank loan and there is no equity in the property.

(iii) The acquisition of the shares purchased from Susan Wheatley did not take place during the marriage.

[90] It is further submitted by learned counsel for the appellant that Justice Olivetti, in computing the value of the assets, did not consider the net position and also did not take into account the fact that the assets are leveraged.

[91] It has already been noted that by virtue of section 23(1)(c) of the Act the court is empowered to grant a lump sum payment to one party in the circumstances of the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation. The

Act goes further by prescribing certain matters that must be taken into account in the making of such an award. However, what is in issue here, broadly speaking, is not the quantum as such but the inclusion of a portion of the value of the appellant's inherited property as a constituent of the lump sum award.

Inherited property in context

[92] The Matrimonial Causes Act 1973 and the Matrimonial and Family Proceedings Act 1984 of England have as their statutory objective the determination by the court of a host of matrimonial causes, including the division of matrimonial property in the event of a divorce. To this extent, sections 23 and 26 of the BVI Act are in *pari materia* with the corresponding sections of the English analogues. As such, the decisions on these provisions are either persuasive or binding, depending on the jurisdiction involved.

[93] In these circumstances it is important to consider a leading dictum on the notion of "matrimonial property" and the approach thereto by the courts. The locus is White v White[26] where Lord Nicholls had this to say:

> "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 reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."[27]

[94] On the specific question of inherited property, Lord Nicholls, in the same case also said this in the context of an examination of property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust:

> "For convenience I will refer to such property as inherited property...This distinction is a recognition of the view, widely but not universally held, that property owned by

[26] [2001] 1 All ER 1
[27] Loc cit, at p. 9

> one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before the marriage and inherited properly acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property."[28]

[95] At this stage of the development of the law, it is fair and reasonable to say that while Lord Nicholls articulated the principle of equality with respect to matrimonial property, he also provided a reason for departure therefrom if "inherited property" is involved.

[96] In Vol. 1 of Rayden and Jackson on Divorce and Family Matters at paragraph 16.74 the position of the law on inherited property, *inter alia*, is summarized in this way:

> "Pre-marriage assets, inherited wealth, or gifts received, during the marriage represent assets that derive from sources external to the marriage; however they are not to be quarantined and set apart from the other assets in the case...In *White v White* Lord Nicholls observed: 'Inherited money and property …Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and the circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.' Such assets may, depending on the circumstances of the case, be treated differently from assets that were acquired during the marriage by the spouses' joint efforts, or they may not. In *P v P*, which concerned a farm inherited by the husband, Munby J considered the different forms that inherited wealth would take; he stated at [37]: 'There is inherited property and inherited property. Sometimes, as in *White v White* itself, the fact that certain property was inherited will count for little: see the observations of Lord Nicholls of Birkenhead at 611 and 995 respectively and of Lord Cooke of Thorndon at 615 and 998 respectively. On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations".

[28] Loc cit, at p. 13, paras. g-j

[97] Lord Nicholls spoke broadly of "inherited property" in 2000; but in 2004 Mr. Justice Munby in P v P[29] advanced new propositions by giving consideration to an inherited pecuniary legacy that accrues during the marriage compact and an inheritance of a landed estate that has been in the family of one spouse for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations. According to the learned judge, "fairness" may require different approaches in the two circumstances.

[98] In Miller v Miller[30] there were developments regarding inherited property. In this instance Lord Nicholls maintained his propositions enunciated previously in White by saying that in the case of non-matrimonial property the duration of the marriage would be highly relevant. This aspect of his Lordship's reasoning on the issue merits reproduction:

> "In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equity.
> With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not…
> Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case."[31]

[99] Baroness Hale, with whom the other Law Lords agreed, differed somewhat from Lord Nicholls on the matter of the treatment of inherited or non-matrimonial property. She advanced the following proposition:

> "This is simply to recognize that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the

[29] [2004] EWHC 1364
[30] [2006] 2 WLR 1283
[31] Loc cit at paras. 24, 25 & 27

> couple have run their lives may be taken into account in deciding how it should be shared."[32]

[100] To my mind, it is clear that both Lord Nicholls and Baroness Hare are ad idem in saying that generally inherited property or non-matrimonial property ought not to be shared by the other party. What differs is the route by which this conclusion was reached. For Lord Nicholls it is the duration of the marriage, in a specific sense, and the source of the assets (which may be a good reason for departing from equality) in a broader sense. On the other hand, Baroness Hale contends that there is scope for one party to acquire and retain separate property which is not to be automatically shared equally.

[101] As noted above, counsel on both sides refer to both White and Miller, either expressly or by necessary implication. Mrs. Small for the appellant submits at paragraphs 60 and 61 of her submissions that:

> "In the present case, the assets were partly inherited and partly generated by the Husband's sole efforts. In the circumstances, the court is entitled to depart from the yardstick of equality. The court is expressly required by statute to take into account the duration of the marriage. As stated in Miller v Miller duration of the marriage is a relevant factor."

[102] In conclusion, learned counsel for the appellant submitted that:

> "The learned judge ought not to have included the inherited portion of the Husband's assets. Separating the inherited assets out, leaves the portion of the assets the Husband acquired in September 2006 at roughly $700,000."[33]

[103] At paragraphs 49 and 50 of her written submissions Mrs. Demers, for the respondent tenders the following:

> "Pre-marriage assets, inherited wealth, or gifts received during the marriage represent assets that derive from sources external to the marriage; however they are not to be quantified and set apart from the other assets in the case. It has been suggested that pre-marriage assets could include, not only cash and property, but also a developed career, existing high earnings and an established earning capacity. There are no hard and fast rules: it is for the judge to decide how important assets that were owned by a spouse before the marriage, or acquired later by inheritance or gift, are in the particular case. In White v White Lord Nicholls observed:

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[32] Ibid, at para. 153

[33] Submissions at para. 66

'Inherited money and property…Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and the circumstances in which the property was acquired, are among the relevant matters to be considered. However in the ordinary course, this factor can be expected to carry little weight, if any, in case where the claimant's financial needs cannot be met without recourse to this property.'

Her Ladyship expressly found that this was a case where the Respondent's financial needs could not be met without recourse to all the property. (Vol. 1, Tab 2, Paragraph 86, Page 31, Judgment)."

[104] These submissions must be analysed in the context of what the learned judge ruled on the issue of the inherited property. She begins at paragraph 85 of her judgment[34] by saying that:

"Now, one of the foremost difficulties in this case is that there are no assets which can readily be identifiable as family assets or matrimonial assets as that term has been defined loosely as meaning property acquired by the joint efforts of the parties during the marriage."

[105] Her Ladyship continues at paragraphs 86 to 88 in these terms:

"Lord Nicholls in White made it clear that a distinction ought to be made between matrimonial assets and inherited property, that is, property acquired by one spouse before the marriage or during the marriage by gift or succession or as a beneficiary under a trust. He said that in fairness where the property still exist the spouse to whom it is given should be allowed to keep it and that conversely the other spouse has weaker claim to such property. However he confirmed that such property is a factor to be considered as it represents a contribution made to the welfare of the family by one of the parties and that the judge should decide how important it is having regard to when it was acquired and the circumstances. However, he opined that in the ordinary course that factor can be expected to carry little weight in a case where the claimant's financial needs cannot be met without recourse to that property. (See p. 13g-14b). This is indeed such a case.

The only asset which to my mind can be properly classed as family assets is Mr. Wheatley's half interest in Susan's share of the estate which I have estimated at $757,889.00 bearing in mind that this was what he paid for it and does not necessarily reflect its real market value. This share was bought during the subsistence of the marriage with the aid of a loan but it seems that AVL has primary obligation to repay it. In my judgment, the interest falls to be treated as property acquired by the parties by their joint efforts and so family property as Mrs. Wheatley can be said to have contributed equally to that purchase by remaining at home and

[34] Delivered on 16th April 2007

looking after the family and thus enabling Mr. Wheatley to earn the monies to use in the acquisition of it. Mr. Wheatley has not disclosed how much is outstanding on his share of the loan or the details of the loan and has not given the court any assistance in valuing the property. Accordingly, the court will treat the value as the purchase price.

I have valued the inheritance property as $1,249,742.50. This to my mind is clearly property that Mrs. Wheatley would have enjoyed some benefit from had the marriage subsisted."

[106] The unequivocal reason given by Justice Olivetti for including the inherited property in the lump sum equation is the fact that the respondent/petitioner's financial needs could not be met without recourse to this property. In so doing the learned judge applied one of the exceptions embodied in the principles discussed above which relate to the manner in which inherited property should be treated. This ruling therefore defeats the argument advanced by counsel for the appellant.

[107] The ruling has to face the learned judge's own finding that there was property that can be classified as a family asset with a value of $757,889.00. In the circumstances the question is whether this court should intervene having regard to the totality of the relevant law.

[108] In the case of Dufour and others v Helenair Corporation Ltd[35] this court laid down the following principles with respect to intervention by an appellate court. They are as follows:

> "An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied that (1) that in the exercise of the discretion of the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of error, in principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly the decision may be said to be clearly or blatantly wrong."

[109] The learned trial judge's reasoning on applying the exception in relation to inherited property is, in part, as follows at paragraph 89:

> "I have considered all the circumstances, in particular the factors specified by the Act and my findings thereon. It is abundantly apparent that Mrs. Wheatley has virtually no means of her own and would be in desperate straits if proper financial provision is

[35] [1996] 52 WIR 188 (CA:ECSC)

> not made for her and the fact that it was a short marriage does not militate against this. Recourse must therefore be made to both the matrimonial property and to the inherited property. Even then she will be subsisting at a level before the standard of living she enjoyed during the marriage whilst Mr. Wheatley's standard of living will not be adversely affected. However, one is required to be practicable and more cannot be done without effectively crippling Mr. Wheatley's current and future financial prospects."

[110] Having regard to the principles laid down in Dufour and to the reasoning of Justice Olivetti cited above I cannot say that there is reason for intervention by the court.

[111] But given the fact that the entire Act was before the court, consideration must also be given to section 26 thereof in order to determine its impact on the lump sum award and especially the inherited property portion.

[112] Section 26 of the Act prescribes a number of matters[36] which the court must consider in determining what orders to make under sections 23 and 25 of the said Act. In the case of parties to a marriage the matters are set out in subsection 26(1) and then the "tail piece"[37] or, more properly, the concluding words of that subsection are in these terms:

> "…and to so 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."

[113] In short then, section 26 of the Act qualifies the exercise of the court's powers to make orders with respect to parties to a marriage and children of a marriage. It is for this reason that the concluding words to section 26(1) of the Act assume such great importance in terms of the financial position of the parties.

[114] Section 25(1) of the Divorce Act[38] of St. Lucia corresponds in all respects with section 26(1) of the BVI Act. And in Darcheville v Darcheville[39] this is the manner in which Justice Ola Mae Edwards interpreted the St. Lucian provision in broad outline in relation to

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[36] These are set out in paras. (a) to (h)
[37] Per Lord Nicholls in White v White [2001] 1 All ER 1, 8
[38] Cap. 4.03

a wife, at paragraph 174 of her judgment:

> "The statutory objective in Section 25(1) of the Divorce Act, mentions only that the wife and husband are to be placed in the FINANCIAL POSITION that they would have been in, on the assumptions stated therein. It follows therefore that where it can be inferred from the circumstances of the case that the financial position of a wife in the hypothetically blissful marriage would be that she would probably receive in the future a benefit consisting of one half share or more of her husband's separate property, or less, in my opinion the Court should give effect to this benefit; and the lump sum award should reflect this benefit."

[115] Under English legislation, section 5(1) of the Matrimonial Proceedings and Property Act 1970 is in terms similar to section 26(1) of the BVI Act and section 25(1) of the Divorce Act of St. Lucia. And in Trippas v Trippas[40] the interpretation of the said section 5(1) of the English statute came up for interpretation in the context of a divorce, the making of financial arrangement for the parties and in particular, whether the wife should benefit from the sale of the husband's patrimonial family business.

[116] The headnote to the said case reads as follows:[41]

> "Held, dismissing the appeal, (1) that under the new legislative matrimonial code the award of a lump sum under section 2 (or section 4) of that Act of 1970 was to be made in accordance with the policy laid down in section 5(1) of the Act; that it was not equivalent to capitalized maintenance but came under the head of financial provision to be made for a party, having regard to all the circumstances, past, present and future; that the court was to exercise its powers so as to place the parties so far as it was 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 that in the present case conduct could be disregarded. (2) That in all the circumstances the wife was entitled to a lump sum award out of the husband's capital from the sale of the business, for it fell exactly within paragraph (g) of section 5(1) as a 'benefit' which but for the divorce the wife would have had a chance of acquiring".

[117] It is to be noted that the court's decision turned on paragraph (g) of section 5(1) of the English Act which is the equivalent to paragraph (h) of section 26(1) of the BVI Act. This paragraph, it will be recalled, requires the court, in the exercise of its powers under sections 23 and 25 of the Act to consider:

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[39] Claim No. SLUHMT 2003/0034
[40] [1973] Fam 134
[41] Ibid

> "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."

[118] In his reasoning in relation to the position of the wife in Trippas[42] and the question of the "benefit" under section 5(1) (g) of the English Act, upon the sale of a patrimonial family business, this is what Lord Denning M.R. said at page 3:

> "When the company was taken over, the husband did in fact give £5000 to each of the sons. The wife says that she too should have some part of the money. The wife cannot claim a share in the business as such. She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share."

[119] Continuing on the circumstances that would give rise to a benefit, Lord Denning M.R. concluded thus:[43]

> "Parliament gives the example [of a loss of] of a pension. It gives a case where, if there had been no divorce, the wife might have received a pension after her husband's death. If there is a divorce, this subsection says that the court can take it into account. It can award her compensation for the loss of the pension. So here, if this marriage had continued, it is plain that the wife had a good chance of receiving a financial benefit on the sale of the business. Just as the two sons received £5000 each, she might have received something. The husband might well have felt it proper to settle on his wife a substantial sum out of the very large sum which he was receiving. Now that there had been a divorce, she should be compensated for the loss of that chance."

[120] In this case had the marriage continued the respondent would have benefited from the inheritance either directly or indirectly. I therefore agree with learned counsel for the respondent that the inherited portion of the appellant's assets should be included in the calculation of the lump sum award. Accordingly this aspect of ground (s) and grounds (v) and (w) must fail.

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[42] Supra, 141
[43] Ibid

Property purchased from Susan Wheatley

[121] Under ground (s), the other aspects of appeal relate to the fact that the awards were made despite the fact that the property purchased from Susan Wheatley was subject to a bank loan and there is no equity in the property. The other aspect relates to the contention that shares purchased from Susan Wheatley did not take place during the marriage.

[122] As far as the property being subject to a loan, and the lack of equity in the same are concerned, this has but limited relevance to the issue. This rests on the fact that the learned trial judge indicated that she did not consider the loan obtained to buy Susan's share of the estate on account of the respondent's non-disclosure in this regard. This is what she said at paragraph 87 of the judgment:

> "Mr. Wheatley has not disclosed how much is outstanding on his share of the loan or the details of the loan and has not given the court any assistance in valuing the property. Accordingly, the court will treat the value as the purchase price."

[123] The matter of the time of the purchase of the shares is a question of pure fact and the learned judge had no difficulty in that regard in making her award. This ground fails.

[124] Ground (x) has only to be mentioned to be rejected. The fact of the matter is that section 26(1) of the Act mandates the court to have regard to a number of matters. Included in this regard is the "age of each party and duration of the marriage". It is clear from paragraph 57 of the judgment that Justice Olivetti did this in her consideration of the "statutory factors."[44]

Is the lump sum award fair?

[125] With the original award of US$253,637.60 sustained, the question is whether the award accords with section 26(1) of the Act.

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[44] Para. 34 of the judgment

Basis of the lump sum award

[126] The learned trial judge discussed extensively[45] the matters that must be considered in making a lump sum award pursuant to section 23 of the Act. Given the context, it becomes necessary to capture some of Justice Olivetti's reasoning.

[127] In this regard, of immediate relevance are paragraphs 83 and 84 which are in these terms:

> "I bear in mind that the aim of Section 26 of the Act is to ensure that any financial provision made for a spouse on divorce is fair in all the circumstances and that in seeking to achieve this the Court is specifically mandated to take into account all the circumstances of the case and to ensure that "as far as practicable" both parties maintain the same standard of living that they would have enjoyed had each carried out his obligations to the other and the court is to have regard to the conduct of the parties where it would be inequitable to ignore it. This, maintaining the same standard of living as far as practicable, can be said to be the main objective of the Act as enunciated in the tailpiece. See Lord Nicholls in White v White. As can be seen, the court is given a wide discretion in exercising its financial provision powers and no factor is automatically to be given greater weight than the other. This is readily understood from the express words used by Parliament in the relevant sections and the case law has re-confirmed this. Furthermore, it has been expressly held that a homemaker's contribution is to be weighed in the same scales as that of a breadwinner's as to do otherwise would be to introduce a gender bias in the law which the legislation does not countenance. See Saunders JA in Stonich v Stonich. Therefore, I cannot give the fact that Mr. Wheatley was the breadwinner more weight than Mrs. Wheatley's contributions to the home and I will treat them as having made equal contributions to the welfare of the family in their separate spheres had it not been for Mr. Wheatley's inheritance which I find was of significance benefit to the family and which they enjoyed from the time his father died in 2002."

[128] The conclusions on the lump sum award appear at paragraphs 90 and 91 as follows:

> "I consider it fair in all the circumstances to award a lump sum to Mrs. Wheatley. This sum is intended to represent a fair share of the wealth earned during the marriage and benefits she lost in relation to the husband's inheritance and the gift shop. She contributed indirectly to the obtaining of the acquired property by her significant contributions to the welfare of the family as homemaker and child-carer. She enjoyed the fruits of her husband's inheritance prior to the breakdown of the marriage and I have no doubt that she would have continued to do so had the marriage subsisted.
> Therefore, in my judgment I deem it fair to make her an award of a lump sum representing 15% of the value of the shares in Lowell's estate that Mr. Wheatley

[45] See paras. 19-83 of the judgment

> bought and 10% of the property he inherited. In addition, I will award her 15% of the value of the gift shop, that is $15,000.00 and not a one half share as she claimed as to my mind both must have contemplated that she would assist him in operating it. Accordingly, as she no longer gives any assistance in it, I will award her a 15% interest of the value as a fair share reflecting what she has lost the chance of acquiring as a result of the breakdown of the marriage."

[129] In her own words, Justice Olivetti exercised her "judgment" in arriving at the percentage award of the various properties in arriving at the lump sum award. This is after she had considered the matters prescribed by section 26 of the Act for consideration in this context.

[130] It has been said that each party is entitled to a fair share of the available property.[46] But at the same time it has been said that achieving fairness in the division of property following a divorce is that most intractable of problems.[47] The problem must be addressed nevertheless.

[131] The power of the court to order a party to a marriage to make a lump sum payment to the other is contained in section 23(1) (c) of the Act. It is in general terms thus giving a wide spectrum of purposes from which such an order may be made. And although section 23 (2) (a) of the Act does not prescribe a purpose for which a lump sum payment may be made, it does contain these qualifying words: "without prejudice to the generality of subsection (1) (c)…." However the purpose prescribed with respect to section 23(2) (a) is to enable a 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. This provision simply points to the depth of the court's power under the Act.

[132] The question of adequacy or otherwise of the lump sum award comes down to the awards in relation to the appellant's inherited property (10% of US$1,249,742.50), the family asset (15% of $759,889.00) and the gift shop (15% of 100,000.00). Justice Olivetti referred to the rule which says that the contributions of each party must be dealt with on an equal footing. But even so, there is no exact formula for arriving at the percentages to be awarded. It

[46] Per Lord Nicholls in White v White [2001] 1 All ER 1, supra
[47] Per Lord Nicholls in Miller v Miller [2006] 2 W.L.R. 1283 at para.1, supra

must be an exercise of a "judgment" based on the evidence. The learned judge had earlier noted:

> "When the marriage ends fairness requires that the assets of the parties should be divided so as to make provision for the parties' housing and financial needs taking into account the factors set out in the legislation."

[133] In Stonich v Stonich[48], Saunders JA's dictum in this regard greatly assists the cause. It is a case governed by the BVI Act and this is what the learned Justice said at paragraphs 27 and 29 of his judgment:

> "One of the useful features of the MPPA is that it gives the Court a broad discretion in apportioning assets built up over the course of the marriage. The ultimate and overriding objective that the Court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties. The wide discretion available permits the Court the ability to interpret fairness in light of prevailing societal standards…
> The Court should not pay too much regard to a contribution merely because it is easily quantifiable in hard currency and too little to a contribution that is less measurable but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman's role in the home."

[134] It is of some importance to note that in Stonich the two assets in issue on appeal were a luxury yacht, Rendezvous Cay, and a trust account which in 2002 had a balance of $2.2 million. The marriage lasted 13.5 years. In this case the respondent was the income earner while the appellant was the homemaker having ceased working shortly after the marriage.

[135] What is of significance is that the court did not disturb the award of the half share of the yacht to Mrs. Stonich but the award with respect to the trust account was increased from 30% to 40%.

[136] In increasing the award with respect to the trust account, this is how Justice of Appeal

[48] Civil Appeal No. 17 of 2002 (BVI) delivered on 29th September 2003

Saunders (as he then was) reasoned:[49]

> "In all these circumstances I agree with the learned judge that Mrs. Stonich should not receive 50% of the trust account. But equally, I find 30% to be somewhat on the low side. I believe not enough consideration was given to her role in the home. I would increase her award under this head to 40%. I believe that such an award to be more in line with the modern authorities of White v White and Lambert v Lambert [2002] EWCA Civ 1685 and I would respectfully rely upon them in support of this order."

[137] In Trippas, the Court of Appeal increased the lump sum award from £8000 to £10,000 and this is Lord Denning M.R.'s reasoning:[50]

> "On that scanty material, the court has to fix a lump sum. Seeing that the husband gave the two sons £5000 each, it seems to me that if the marriage had continued, he might well have provided £10,000 for the wife. The judge put it at £8000. That seems to me to be too low. Rather than go for further discovery and so forth, the wife has instructed her counsel to say that she would be content with £10,000. That seems fair to me. I would therefore increase the judge's award from £8000 to £10,000 without further inquiry."

[138] More need not be said as in all cases it is a matter of judgment having regard to the evidence and what strikes the court as being fair.

[139] To return to the case before the court, having regard to all the circumstances I hold the view that the awards are both fair and adequate having regard to the situation of the respondent[51] and the duration of the marriage. Furthermore, there is no basis advanced upon which this court can upset either of the awards.

Grounds (t) and (u)

[140] These grounds challenge the award to the respondent of a certain percentage of the value of the gift shop when the evidence points in a different direction. Also challenged is the value placed on this venture.

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[49] Loc cit at para. 32

[50] Supra, 142

[51] It is to be noted that in the High Court proceedings the respondent deposes at paragraphs 12-14 of an affidavit, sworn to on 14th July 2006, that she plans to return to University to complete her degree. She estimates that the tuition and books would cost US$20,000.00 for the two and a half year required. Another expense identified in the said affidavit is the purchase of a vehicle costing another US$20,000.00. Other expenses are also mentioned in the said affidavit but these are covered in the order for the respondent's maintenance.

[141] According to learned counsel for the appellant the learned trial judge made several findings of fact which are contrary to the respondent's own evidence not the least of which was that the gift shop is owned by the hotel. Further, says counsel, the judge appeared to have taken into account matters which were not properly to be taken into account including: (a) that the gift shop was not owned by AVL but by Susan, and (b) Lorraine had not claimed a share in the current gift shop.

[142] Mrs. Demers, for her part, does not address these submissions relating to the facts directly. She does so by pointing to the failure of the appellant to disclose information concerning his financial affairs with the likely consequence being that the court may draw inferences that are less favourable to the appellant.[52]

[143] There is little doubt that the respondent did nothing to advance her cause when she was cross-examined on her affidavits.[53] In this regard the learned trial judge noted that: "The fact that Mrs. Wheatley made a bit of a hash in running the shop does not entitle Mr. Wheatley to renege on his gift as it was not a gift conditional on her operating the shop efficiently."[54] However, the learned trial judge did make findings of fact which address the issue. These are her findings at paragraphs 76-79:

> "Mrs. Wheatley claims a half share in the gift shop on the basis that Mr. Wheatley had given a half share to her in or about September 2005 when he hired Mr. Tony Buettner to design and assist in stocking it. Mr. Wheatley denied that. He said that there has always been a gift shop on the hotel, implying no doubt that it was AVL's property.
>
> However, I find that the business of the gift shop which was operated on the hotel premises at the time of Lowell's death was not owned by AVL but by Susan. And, I am supported in this finding by clauses 6, 7, 8 and 14 of the Agreement which, inter alia, provided that Susan was to be paid $33,431.00 for it and in return had to deliver up $40,000.00 worth of stock. I note that the price was less than the actual value attributed to the stock.

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[52] For this proposition the dictum of Sachs J in J v J [1955] 2 All ER 85, 90 is cited.

[53] For instance after testifying about her involvement with the gift shop from the inception, she was unable to say how much money the business generated while she was employed during a six month period. See record Vol. 2 pages 464-488. Her actual response was: No, I don't. Lawrence told me once but I cannot remember

[55] At para. 81 of the judgment

> Furthermore, it appears that Susan was to continue to operate the gift shop until 20th June 2005 and that all the proceeds would be hers. This is hardly in keeping with it being owned by AVL. And, the gift shop had a separate account referred to as "AVL/Gift Shop Account" which she had to deliver up also. Finally, what is more, the gift shop is not listed in either Schedule A or B as one of the assets of Lowell or AVL. I might add too that this confirms with the common practice which obtains in this part of the world that these types of shops whilst located on hotel premises are invariably operated by the family of the owners or shareholders of the companies owning the hotel or by concessionaries and comprise a separate business from that of the hotel. The reasonable inference to be drawn from the Agreement is that Susan owned the gift shop business at the time of Lowell's death and that Mr. Wheatley and his sister bought out the stock and so the business. I take it that they paid the purchase price in equal shares as there is no indication in the Agreement as to how this was apportioned between them. Therefore, both had an equal interest in the stock purchased."

[144] At paragraph 80 the learned judge came to this conclusion:

> "I accept Mrs. Wheatley's evidence that in 2005 Mr. Wheatley indeed represented to her that she would be co-owner and manager of the gift shop and that she participated in the venture on that basis. True, she was paid a salary of $1,000.00 a month for the short time she operated the shop (November 2005 – June 2006). Her salary cheques were issued by the hotel accountant but it is easy to see that that could merely have been a way of managing the business finances properly rather than a reflection of its ownership. Again, I note from the Agreement that the gift shop had a separate account under the umbrella of the hotel. (See clause 6.) Furthermore, the fact that she also received a salary for the time she actually worked there is of no moment as many owners receive salaries from their business if they actually work in them".

[145] The simple answer to the appellant's contentions with respect to the ownership of the gift shop, is that the learned judge made findings of fact and duly explained her findings. In these circumstances an appellate court cannot intervene. Indeed, with respect to the case as a whole the learned judge made these preliminary remarks on the task she faced:

> "As can be seen, a wealth of disputed affidavit evidence was put before the court and even though deponents were cross examined it was still a daunting task to try to ascertain the truth on relevant issues having regard to the inherent intimate nature of the marriage and family life, the fact that there were no independent witnesses save Ms. Williams, and Inspector McSheene and very little documentary evidence."

[146] The gift shop also seemingly poses a problem insofar as the value is concerned. What faced the learned judge from the evidence is a sale price of $33,431.00 paid to Susan who

in turn had to deliver up $40,000.00 worth of stock. The other part of the equation is the proposal to stock the shop with goods valued at $100,000.00.

[147] Mrs. Demers in several of her submissions made reference to the line of authority in matrimonial matters which says that where a party fails to reveal financial information the court is entitled to draw inferences that are less favourable to the party on whom the duty to disclose rests. There is also authority for the proposition that in the same context it is the duty of a property owner to secure a current valuation thereon.[55]

[148] Implicitly, these principles, at paragraph 82 of the judgment, would have guided the learned judge in arriving at this conclusion:

> "Mr. Wheatley in whose power it lay to give a value for the gift shop omitted to do so. The only evidence we have is the $100,000.00 based on the Barefoot Trading Proposal to purchase stock in Bali. (See R.W.2 - R.W.12). The shop was opened and is in operation and presumably it was stocked whether from Bali or not. In the absence of any other evidence of value I will accept this estimate."

[149] Grounds (t) and (u) therefore fail.

Grounds (y) and (z)

[150] In the main these grounds relate to certain orders made by Justice Olivetti relating to the manner in which the financial awards were to be secured and the manner in which shares were to be held by the appellant and his sister.

[151] At paragraphs 76 to 79 of her written submissions, learned counsel for the appellant contends that the learned judge erred, in derogation of the rights of the third parties, in making a property adjustment order with respect to property that was already subject to a charge and which property was not solely owned by the appellant. It is also submitted that the learned judge exceeded her jurisdiction in making a declaration that the shares held by the appellant and his sister as joint tenants shall henceforth be held as tenants in common.

[152] In addressing these submissions learned counsel for the respondent contends that the property which can be subject to a property adjustment order is wide-ranging and extends to property of any description and any possible interest a party can have, whether in possession or not. Learned counsel further contends that in the face of no documentary evidence indicating how title to the various assets were held, the court "determined" that the property allegedly held as joint tenants was to be held as tenants in common.

[153] With respect to the charge to secure the lump sum award, learned counsel for the respondent contends that the fact that the Act does not specify a lump sum property award can be secured should not derogate from the power of the court so to do. According to learned counsel: "The court has wide-ranging power in this area and it is entitled to make whatever orders are necessary to give proper effect to the substantive order of the court."

[154] In the context of a statute with specific powers vested in the court the latter submission is deeply extravagant. But beyond that, learned counsel for the respondent relies on Rayden & Jackson[56] with respect to the matter of a property adjustment order. And at paragraph 16.143 the following is duly recorded:

> "The court cannot, however, exercise its power of transfer in derogation of the rights of third parties; it can only deal with property to the extent that one of the spouses is entitled to it, whether in possession or in reversion[57]. A claim for a transfer of property order may be registered as a lis pendens, or a pending land action, that will take priority over subsequent transactions in respect of property so charged. The power to order or transfer of property includes a power to order a sale and to obtain vacant possession."

[155] It is clear that the foregoing learning is premised on a power vested in the courts of competent jurisdiction in England to order a transfer of property. But what is the extent of any such power in the BVI?

[156] Part III of the Act is concerned with maintenance and related matters. In this context

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[55] See: Stonich v Stonich Civil Appeal No. 17 of 2002 (BVI) per Saunders JA at para 17

[56] Op. Cit

[57] The footnote attached to the foregoing reads: Crittenden v Crittenden [1990] 2 FLR 361 at 365, CA (the reference to property in s.37 of the MCA 1973 is a reference to property in s.24. Accordingly, 'property' cannot mean any property generally whoever it may belong to and it cannot attach itself (for example) to property belonging to a company).

sections 23 and 24 are of immediate relevance. In summary, it may be said that these two sections are concerned with the power of the court to order payments, of various types, to one party by the other party to a marriage at different stages of divorce proceedings or pending divorce proceedings.

[157] For present purposes it suffices to say that under subsections 23(1)(b) and 23(2)(b) of the Act, the court may order that either party shall secure to the other, "to the satisfaction of the Court" periodical payments or order a lump sum payment by way of instalments of such amounts and "may require the payment of the instalments to be secured to the satisfaction of the Court." Similarly, under section 24 of the Act, the court is empowered to make certain orders in proceedings for divorce, nullity of marriage or judicial separation. In particular subsection (4) specifies that an order under the section for a lump sum may provide for the payment of that sum by instalments of such amount as may be specified and "may require the payment of the instalments to be secured to the satisfaction of the Court."

[158] Therefore, the short point is that under sections 23 and 24 of the Act the use of the words "secured to the satisfaction of the Court" clearly does not empower the court to order the charging of property of any kind, simpliciter. Rather, it is merely empowered to satisfy itself as to the manner in which the payments ordered are to be secured. To say that the court may charge property raises the issue of the selection of a chargor by the court itself in the face of the clear words of a statute. What is reasonably incidental to the power is the authority of the court to impose a time limit within which the sum must be paid or secured, as the case requires, and report to the court in order that it may be "satisfied". It is only then that the order can be lawfully made. It would appear to me that the learning in Rayden and Jackson[58] assumes that the court would have been satisfied whereupon effect would have been given to the words of the statute. To say otherwise would render the requirement of "being satisfied" meaningless. And parliament never acts in vain.

[159] The grounds of appeal being considered render section 25 of the Act relevant. The

[58] Op. cit.

marginal or side note to the foregoing section gives, in general terms, the content as being: "Orders for transfer and settlement of property and for variation of settlements." What is of critical importance to the grounds of appeal in issue is the fact that section 25(1)(a) permits the court to make an order transferring the property specified in such an order to which one party to a marriage is entitled, whether in possession or reversion. But such a transfer is confined to the parties to the marriage; a child of the marriage or a specified person for the benefit of a child of the marriage. This is where the extract from Rayden & Jackson at paragraph 16.143 (quoted at paragraph 154 above) is even more relevant. The essence of which is that under the corresponding English statutory provisions, the court can only make an order with respect to property if one of the spouses is entitled to it. And by extension, it follows that a court of competent jurisdiction in the BVI cannot interfere with matters of tenure where "non-spouses" are involved.

[160] To complete the equation paragraphs (b), (c) and (d) of section 25(1) permit the court to make orders creating a settlement, varying a settlement or extinguishing or reducing the interest of either party to the marriage under a settlement. Again any such order is confined to the parties to the marriage and children of the marriage.

[161] Given the powers of the court under sections 23, 24 and 25 of the Act, it follows that grounds (y) and (z) succeed to the extent that paragraphs 2 and 4 of the order made by the court below are outside of the competence of that court and are accordingly set aside. On the other hand, the order numbered 12 is varied to read as follows: "The periodical payments for maintenance of the Petitioner and the children of the marriage shall be secured to the satisfaction of the court within thirty days of the date of this judgment."

Ground (q)

[162] This ground places focus on matters which the learned trial judge should not have taken into account and matters which she ought to have taken into account.

[163] The reality of this ground is that the matter of "irrelevant" and "relevant" considerations is mentioned in several grounds such as (b), (c), (d) and (f). For this reason, I do not

consider ground (q) to be an independent ground. In any event, these grounds have all been considered above and determinations made thereon.

Ground (aa)

[164] Under this ground the appellant challenges the award of costs against him. One contention by the appellant is that the respondent made no effort at arriving at an amicable settlement of the issues and further deliberately allowed the proceedings to be drawn out and exacerbated the situation by taking the children out of the jurisdiction without his knowledge.

[165] On the other hand, it is submitted on behalf of the respondent that she has no resources of her own and that the appellant had the opportunity to make an adequate financial settlement with the respondent and failed to do so.

[166] I agree that the appellant's conduct in terms of disclosing his financial information to the court would have contributed to the length of the hearing. Indeed, such information goes to the core of the application for ancillary relief. And in any event the basic principle is that costs follow the event. However in exercising her discretion the learned judge reasoned thus:

> "Mrs. Wheatley has no assets and if she were ordered to pay costs then in effect one would be reducing the financial provision made to her herein. That strikes me as inherently unfair." This clearly represents an exercise of the trial judge's discretion with respect to costs".[59]

[167] In the circumstances I cannot say that there was any error of principle in the exercise of the discretion by the learned judge to warrant an intervention by the court. This ground therefore fails.

Cost of the appeal

[168] The appellant has been partially successful but in all the circumstances of the case, especially the reasons stated by Justice Olivetti for the non-award of costs, I would order

[59] For the power of the High Court in this regard, see O'Hare & Hill, Civil Litigation (8th ed.) at p. 523

each party to bear his or her own costs.

Result

[170] The result[60] of this appeal is as follows:

1. Grounds (a), (b) & (f); (d), (e) & (i); (g), (h), (j) & (l); (c); (m); (n), (o) & (p); (k); (s), (v), (w) & x); (t) & (u); (q) and (aa) are disallowed.

2. Ground (y) and (z) are allowed to the extent that the orders numbered 2 and 4 are set aside and the order numbered 12 is varied to read: "The periodical payments for maintenance of the petitioner and the children of the marriage shall be secured to the satisfaction of the court within thirty days of the date of this judgment".

3. There is no order as to costs.

Errol L. Thomas
Justice of Appeal [Ag.]

[1] BARROW, J.A.: With one qualification, I agree with the orders that Thomas JA [Ag.] would make.

[2] Although it makes no difference to the outcome of the appeal, for the sake of future proceedings I would express my respectful disagreement with the view of my brother as to what the court can do in exercise of its powers under sections 23 and 24 of the Act. I agree with the statement in paragraph [158] above that the power in section 23 (2) (b) of the Act to order payment of a lump sum to be "secured to the satisfaction of the Court" does not "empower the court to order the charging of property of any kind, simpliciter", as my brother expressed it. A court cannot ignore third party rights in property in which a spouse holds an interest or to which the spouse holds title. But in my respectful view it overstates the proposition that the court is not empowered to order the charging of property of any kind, simpliciter, to say:

> "Rather, it is merely empowered to satisfy itself as to the manner in which the payments ordered are to be secured."

[60] The result in terms of the grounds of appeal are given in the order in which they were considered

The elaboration of this statement is that:

> "What is reasonably incidental to the power is the authority of the court to impose a time limit within which the sum must be paid or secured … and report to the court in order that it may be satisfied."

[3] In my view, the court should, as a matter of approach and depending on the circumstances including what may have been said by the parties to the court, give the parties the opportunity to agree on the property to be charged as security. However, in the event the parties cannot agree, or if a party declares before there is any attempt at agreement that he will not charge any property, I have not the slightest doubt that the court must have the power to direct what property is to be charged[61], order the charging of that property and appoint a person to execute the charge, if a party refuses to do so.[62]

[4] Therefore, I would adjust the variation of the order numbered 12 that my brother proposes so that it reads, "The periodical payments for maintenance of the petitioner and the children of the marriage shall be secured to the satisfaction of the court within thirty days of the date of this judgment and in default either party shall be at liberty to apply to the High Court for such order as may be necessary."

Denys Barrow, SC
Justice of Appeal

[1] EDWARDS, J.A. [AG.]: I agree with the judgment of my brother Thomas JA [Ag.] except for his conclusions at paragraph 158. My learned brother Barrow JA has dissented in terms which I endorse. I agree that the order numbered 12 should be varied in the manner stated by Barrow JA.

Ola Mae Edwards
Justice of Appeal [Ag.]

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[61] O'D v O'D [1976] Fam 83 at 92, [1975] 2 All ER 993 at 998, Rayden on Divorce, 10th ed., p 810 at para 14; Chichester v Chichester [1936] 1 ALL ER 271 at 273; Aggett v Aggett [1962] 1 ALL ER 190 at 193 paras e to i.
[62] Section 25 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Chapter 80; and see Howarth v Howarth (1886) 11 PD 68 at 95.