

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHMT: 2006/0070

BETWEEN:

MARGARET PRICE FINDLAY

Petitioner

and

DONALD FINDLAY

Respondent

Appearances:

Lorna Shelly Williams of Farara Kerins for the Petitioner  
William Hare of Forbes Hare for the Respondent

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2009: 19, 20 January  
04 February  
13 November

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**JUDGMENT**

- [1] The Petitioner, the Wife, is a Barrister-at-Law and at the relevant time was a partner in a law firm in the British Virgin Islands. The Respondent, the Husband, is a Plumber by trade. The parties were married at Diego Martin, Trinidad and Tobago on the 12 November 1994. From all accounts, the Petitioner operated a law practice along with one partner and a Business Company providing company and directorship services. There is one child of the family, Jordan who was born on the 12 September 1997.

**BACKGROUND**

- [2] The Petitioner is originally from Trinidad & Tobago and the Respondent from the island of St. Vincent. They are both citizens of the British Virgin Islands. The parties' marriage broke down and a Petition for divorce was filed on the 21 November 2006. The Decree Nisi was granted on the 8<sup>th</sup> May 2007 and an Application for Ancillary Relief was filed by the Petitioner on the 5 November 2007.

In this Notice of Application the Petitioner applied to the Court for the following Orders:-

- (1) The Petitioner to be awarded sole custody of the child of the marriage born on the 7 September 1997
- (2) The Respondent to have liberal visitation with the child pursuant to the attached schedule
- (3) The joint account at Banco Popular be divided equally between the parties
- (4) The Petitioner be awarded eighty percent (80%) of the equity in the matrimonial home
- (5) The Petitioner be awarded ninety percent (90%) of the land situated in Vermont, St. Vincent.
- (6) The Petitioner to be awarded half of the time shares owned by the parties
- (7) The parties retain the vehicles they personally own
- (8) The Respondent to pay the Petitioner \$400.00 per month as maintenance for the child
- (9) The Respondent to pay half medical and half educational expenses for the child
- (10) The Respondent pay the Petitioner costs.

[3] The issues regarding the custody and access of and to the child have already been decided and will not be revisited here.

[4] I have noted that the Application for Ancillary Relief of the Petitioner was served on the Respondent's Solicitor on the 6 November 2007. In accordance with the Rules the Respondent was to have within twenty-eight (28) days after service of an Affidavit of Means by the Wife, file an Affidavit in Answer containing full particulars of his property and income. *Rule 56 (3) of the Matrimonial Proceedings Rules, 1997.*

[5] On the 14<sup>th</sup> January 2008, the Respondent filed an Application for Ancillary Relief and asked for the following orders:

- (1) An Order for maintenance and financial provision from the Petitioner

- (2) A Declaration that the Respondent is entitled to fifty percent (50%) of the interest in the real estate described in the Registry of Lands as Block 2936B Parcel 77, Road Town, Registration Section (the "matrimonial home")
- (3) A further Declaration that the Respondent is entitled to fifty percent (50%) of the interest in the real estate described in the schedule to the land conveyance document No. 1793/2007 (St. Vincent & The Grenadines) as Lot No. 3 measuring approximately eleven thousand square feet (11,000 sq. ft.)
- (4) To the extent necessary, a Property Adjustment Order to give effect to his equitable interest in the property described in paragraphs (2) and (3) above
- (5) A Property Adjustment Order in respect of the matrimonial home which is currently registered in the sole name of the Petitioner and that the name of the Applicant be recorded as a joint proprietor or in the alternative as a proprietor in common with the Petitioner in such shares as the Court may deem fit.
- (6) An Order that the Petitioner pay to the Respondent such reasonable and periodical payments as the Court deems fit
- (7) An Order that should the Petitioner pre-decease the Respondent that he be maintained out of income generated by any property and/or asset of the Petitioner, wheresoever situated
- (8) An Order that costs be provided for; and
- (9) Such further or other relief as may be fit.

[6] The only ancillary issues therefore before the Court relate to the assets listed in (a) and the maintenance issues listed in (b) below. They concern the following properties:-

- (a) (1) The matrimonial home registered as Block No. 2936B Parcel No. 77 which is a condominium known as #14 Waterfront, in Road Town Tortola, BVI;
- (2) Land situate at Vermont, St. Vincent.
- (3) Four Time share properties
- (4) Vehicles

- (b) (1) Maintenance and financial provision for the Respondent
- (2) Reasonable and periodic payments to be paid by the Petitioner to the Respondent as the Court deems fit, and
- (3) Should the Petitioner predecease the Respondent, whether the Respondent be maintained out of income generated by any property and or asset of the Petitioner wheresoever situated.

[7] These are the applications that are before the Court for its consideration. The rules pertaining to applications for Ancillary Relief are **the Matrimonial Proceedings Rules, 1997** ["Rules"]. Section 51 states:-

*(1) Any application by a Petitioner or by a Respondent who files an answer claiming relief for*

*(a) an order for maintenance pending suit,*

*(b) a financial provision order,*

*(c) a property adjustment order*

*shall be made in the petition or answer, as the case may be.*

*(2) Notwithstanding anything in sub-rule (1) an application for ancillary relief which should have been made in the petition or answer may be made subsequently*

*(a) by leave of the Court either by notice in Form 9 of Schedule 1 or at the trial or*

*(b) where the parties are agreed upon the terms of the proposed order without leave by notice in Form 9 of Schedule 1.*

*(3) An application by a petitioner or respondent for ancillary relief not being an application which is required to be made in the petition or answer shall be made by notice in Form 9 of Schedule 1.*

[8] The Respondent filed seven (7) affidavits in this matter which are to be treated as evidence in chief for this ancillary relief application. Much of the evidence contained in these affidavits speak to the Respondent's rights to or claim in the Petitioner's law practice and trust company. Indeed, Counsel for the Respondent Mr. William Hare argued that *"the Petitioner's interest in her law firm and half her shareholding in the ancillary services company are plainly matrimonial property."* Whether or not his submission is correct, the Respondent failed to make an application to the Court in the manner provided in Rule 53 of **the Rules**, and never sought the leave of the Court to present this application for "a financial provision

order" or "a property adjustment order." I agree with Counsel for the Petitioner Mrs. Lorna Shelley-Williams that the Respondent had not made a claim in either the trust company or the law firm, but is attempting to do so through his affidavits.

[9] This is an important issue concerning the Rules governing the conduct and trial of ancillary matters in a divorce. The Respondent did not file an application in his answer or otherwise within the time stipulated or the manner mandated in the Rules governing these ancillary matters. The Rules provide for the manner in which such an application can be heard in the absence of an application made in a petition or answer. Therefore, and without more, the Respondent failed to obtain the leave of the Court to present the claim pertaining to the law firm and the trust company and therefore his "claim in his affidavits" and claim in the closing submissions of Mr. Hare in this regard must fail.

[10] However, and in the event I am wrong in my finding in paragraph 9 above, I will consider the issues regarding the law firm and the trust company in the course of this judgment.

## THE ISSUES

### Maintenance for the Respondent

[11] The Respondent, a 45 year old seemingly fit and able bodied man, claims maintenance from his wife. He claims maintenance in his application filed on the 14 January 2008. In his affidavit dated and filed on the 4 December 2007, the Respondent did not make any "applications for maintenance" from the Petitioner. Section 23 of the **Matrimonial Proceedings and Property Act 1995** ["the Act"] states:-

*(1) On granting a decree of divorce a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute) the Court may subject to the provisions of Section 33(1) make any one or more of the following orders:-*

*(a) 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;*

It is noted that the Section is subject to the provisions of Section 33(1). Section 33(1) is made subject to subsection (2). Section 33(1) and (2) provides:-

*"(1) Where a petition for divorce, nullity of marriage or judicial separation has been presented then, subject to subsection (2) proceedings under Section 22, 23, 24 or 25 may be began,*

*subject to and in accordance with rules of court, at any time after the presentation of the petition save that*

*(a) no order under section 23 or 25 shall be made unless a decree nisi of divorce or nullity of marriage or a decree of judicial separation as the case may be, has been granted;*

*(2) Rules of Court may provide, in such cases as may be prescribed by the Rules,*

*(a) that application for ancillary relief shall be made in the petition or answer; and*

*(b) that applications for ancillary relief which are not so made or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed shall be made only with the leave of the Court."*

[12] The Respondent did not file an "Answer" and did not seek the leave of the Court to file his "Application for Ancillary Relief" in accordance with the mandatory provisions of Section 33(2) and **the Rules**. So, once again the application for the relief sought in the Application filed on the 14 January 2008 is improperly before the Court and I so find. However, if I am wrong in this finding I have considered the "application" in the course of this judgment.

[13] Unlike English Law, the provisions of **the Act** in the British Virgin Islands in essence discriminate against a husband, when it pertains to maintenance claimed from a wife. Section 27 of the Act states:

*(1) Either party to a marriage may apply to the Court for an order under this section on the ground that the other party to the marriage (in this section referred to as "The Respondent")*

*(a) Being the husband, has willfully neglected*

*(i) to provide reasonable maintenance for the applicant; or*

*(b) Being the wife, has willfully neglected to provide, or to make a proper contribution towards reasonable maintenance*

*(i) for the applicant in a case where, by reason of the impairment of the applicants earning capacity through age, illness or disability of mind or body and having regard to any resources of the applicant and the Respondent respectively which are, or should properly be made, available for the purpose, it is reasonable in all the*

*circumstances to expect the Respondent so to provide or contribute.*

Although it is my understanding that this section applies during a subsisting marriage, its effect on dealing with an application for maintenance in the case of a husband from his wife is of persuasive effect. The Respondent did not put forward any evidence to establish that he is in need of maintenance from his Wife *"by reason of the impairment of his earning capacity through age, illness or disability of body or mind"*. It is my finding, that having read the affidavit evidence, conducted the trial of this Ancillary Relief Application, observed the Respondent during his cross examination, that he has deliberately orchestrated his present stated social and economic standing to be in a position to claim maintenance from the Petitioner.

[14] Mr. Hare submitted that the Respondent *"has both chronic and acute financial needs. A substantial portion of his earnings are paid in child maintenance, all of which commitments bar Jordan (in the sense of court-mandated maintenance) subsisted during the marriage. These are not optional commitments. He also has no independent housing provision, but is entirely dependent on the generosity of his siblings to accommodate him while he tries to get back on his feet. This generosity from his siblings cannot be reasonably be expected to continue indefinitely."* Counsel for the Respondent went on to submit in his closing written submissions that *"the severe economic downturn in the construction industry, together with the fact that he is unable to handle the administrative aspects of his business due to his limited literacy, means that his earnings, and earnings capacity, have significantly reduced since the break-up of the marriage. He now operates as an itinerant sole trader on a cash basis, and has provided, it is submitted, a frank account to the court in this regard."* From my observation of the Respondent during his cross examination, I have found as a fact that contrary to the submissions made on his behalf, the Respondent did not and refused to provide sufficient and adequate disclosure of his earnings and earning capacity. I have discussed these issues in detail later in this judgment.

[15] The Respondent was not a credible witness in these proceedings. On many occasions I found him to be a stranger to the truth and not believable. He has feigned ignorance of his position and his supposed illiteracy as excuses for coming up short in the presentation of his evidence. In his affidavit evidence sworn to and filed on the 18 January 2008, at paragraph 4 the Respondent testifies that *"around the time or shortly before I left the matrimonial home, I was able to average approximately \$4,000.00 to \$5,000.00 per month in gross income as a self employed person..."*. However at paragraph 18 of a subsequent affidavit filed on 19 February 2008, the Respondent testifies *"my living arrangements are highly unsatisfactory. I am staying with my brother and his family, as I have no accommodation of my own and can afford none. I therefore disagree completely with the Petitioner when she says I am making a good living. The figure I gave in my previous Affidavit of earnings of between \$4,000.00 and \$5,000.00 per month was an estimate as I have no direct knowledge of what I used to earn. I think that*

*at one stage when I worked on Guava Island I did earn between \$4,000.00 and \$5,000.00 per month. The Petitioner has a better idea of my precise income as I used to give her all my pay cheques."*

[16] I say categorically that I do not believe this evidence. The Respondent knew and has known the extent of his earnings and his earning capacity. He is no fool; although he respectfully endeavoured to pass off these "inaccuracies" as attributable to his illiteracy. He is represented by a reputable law firm experienced in taking proper instructions and conveying these instructions in the form of written evidence. Excuses of a "lost in translation" cannot therefore be accepted as excuses. I find as a fact therefore that the Respondent shortly before he left the matrimonial home was earning in excess of \$4,000.00 to \$5,000.00 a month.

[17] The Respondent was cross examined at length on his earnings and in particular on his affidavit evidence filed on the 11 July 2008. He stated *"As regards my employment this year, I continue to work as an itinerant Plumber. My earnings this year have largely consisted of approximately US\$4,000.00 from the Scrub Island Project and US\$6,000.00 from Percy Roden. Aside from these pieces of work, there have been other minor jobs for which I have been paid between US\$50.00 and US\$200.00 per job. I estimate my total earnings for this year to have been approximately between US\$13,000.00 and US\$14,000.00."*

[18] In cross examination pertaining to his earnings after July 2008 the Respondent testified *"I don't want to lie, I can't tell you. I can't tell you if its \$200.00. I can't say..."*

[19] Again I do not believe the Respondent. I find as a fact that he has deliberately hidden from the Court his true earnings and his true earning capacity. He has deliberately and knowingly discontinued the use of a bank account and refused to deal with banks under the pretext of not being able to fill out bank forms, to keep himself and his financial status and standing from the scrutiny of the Court. Under this guise, he expects the Court to accept wholesale his testimony about his earnings, on the basis that there is nothing before the Court to prove otherwise. However, there is nothing before the Court to indicate that there was anything or any circumstances that prevented or obstructed him in continuing to earn that level of income.

[20] The Respondent has therefore failed to properly disclose his income, his earning capacity and has deliberately placed himself in the predicament he wishes the Court to believe - that is of a man who is now impoverished and whom now operates as an itinerant sole trader on a cash basis and can hardly afford to maintain any decent standard of living. The duty to make full disclosure to the Court is imperative. It is the only way the Court will be placed in a position to properly exercise its discretion as provided in Section 25 of **the Act**. The burden of proof could not be placed on the Petitioner to provide information about the Respondent's earnings, earning capacity, property and income, as this information is peculiarly in the possession of the Respondent. He was under a duty to make



full and frank disclosure. The power of the Court to draw inferences adverse to him in such circumstances was expressed in *Payne v Payne [1968] 1 ALL ER 1113 at page 1117 by Willmer L. J.* in this way:

*"It is well established that the Court is entitled to draw inferences adverse to a husband who has not made a proper disclosure of his available resources. That was held by Sachs J in J v J [1955] 2 ALL ER 85, a decision which was subsequently upheld, so far as that point at any rate was concerned, by this Court. It was also held by Lloyd Jones J in Ette v Ette [1965] 1 ALL ER 341, where again it was again decided that it was proper to draw inferences adverse to the husband from the fact of his failure to make a proper disclosure."*

- [21] When asked about the source of income used to pay the Social Security contribution in connection with his company Fino Flush, the Respondent stated that he borrowed the money and could not remember from whom he had borrowed it, whether from his brother or from his children's mother. In relation to the Chrysler vehicle he has 'use of' and which he says he uses four to five times a month, he gave evidence that this vehicle was purchased by Emril Findlay about two years ago. Emril Findlay at or about the same time of this purchase had left the island to study. He testifies that he gave her the money to license the vehicle; he can't remember who paid for or whether he paid for the insurance on the vehicle but that it is insured. It would seem that he has the exclusive use of this vehicle. I have no doubt, taking into consideration the evasive answers given by the Respondent in his cross examination, he is hiding evidence. I have no doubt and I so find that the Respondent paid for the vehicle, paid for the licensing and insurance and is the beneficial owner of the vehicle. He orchestrated this ownership to hide this asset from the court and the inference I therefore draw, adverse to the Respondent is that he earns an income sufficient and adequate enough to own and maintain one, possibly two vehicles, and that he has deliberately hidden his earnings and means from the Court. I am further fortified in my finding of the Respondent's less than honest dealings with the Court when he states in relation to his other children that he does not know exactly how much he pays in maintenance per child. For someone who has been ordered by the Magistrates' Court to make these payments under pain of imprisonment in the event of default, it is less than ingenious for him to have lied again to the Court.
- [22] In relation to the much touted \$1,000.00 payment for the rental of a dingy at Christmas in 2007. I failed to see the fuss made of this evidence. Of more concern is the new evidence the Respondent sought to introduce in its closing arguments; evidence which was not allowed by the Court during reexamination.
- [23] In his Closing Submission, Mr. Hare submitted *"The Respondent denies 'hiring boats for \$1,000.00.'* This evidence is simply founded on a bare assertion of the Petitioner for which no supporting evidence has never been produced. She simply said she was 'aware' of this fact. For some reason the particular allegation was

*not specifically traversed in a subsequent affidavit. This does not make it true, however, or admitted. The Petitioner has not proved that this is true on the balance of probabilities. The Court is invited to disregard 'evidence' which is simply on assertion of rumour". "the cost of \$1,000.00 was in fact in respect of damage to a boat, which was reduced after negotiation with the boat owner and was borne by the respondent's brother Felix, who has paid for the charter."*

[24] It is improper for Counsel to provide fresh evidence in closing written submissions (equivalent to giving evidence from the bar table); particularly when Counsel was not allowed to reexamine on the issue at the trial. I consider this an attempt to mislead the Court and find it extremely disappointing. I have further observed in relation to the financial status of the Respondent, his claims to have "borrowed" money repeatedly from his brother Felix. Yet he has produced no evidence in that regard and indeed his brother was not presented to the Court to establish the Respondent's indebtedness to him. This evidence is self serving and in the circumstances of this case, I have given little weight to it.

[25] The Respondent has unsuccessfully tried to present himself as a party in need of maintenance and a party who has no consistent or reliable source of income. In exercising the Courts powers under **Section 26 of the Act**, the Court shall have regard to all the circumstances of the case including the following matters:-

- (a) the income, earning capacity, property and other financial reserved which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future,*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage,*
- (d) the age of each party to the marriage and the duration of the marriage,*
- (e) any physical or mental disability of either of the parties to the marriage,*
- (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home under section 49,*
- (g) any order made under section 49,*
- (h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage, of any benefit (for example, a pension) which, by reason of the*

*dissolution or annulment of the marriage, that party will lose the chance of acquiring*

*and 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 obligation and responsibilities toward the other.*

- [26] Having regard to the circumstances of this case; particularly with reference to my findings that the Respondent earns income in excess of \$28,000.00 a year, has an earning capacity of between \$48,000.00 to \$60,000.00 a year, owns property in St. Vincent which is income generating (although the Respondent refused to disclose this information to the Court) is physically and mentally capable of continuing to earn such an income, and taking into consideration his deliberate attempts to hide his true earnings from the Court, I find absolutely no reason why the Court should make any orders for the maintenance and financial provision for the Respondent. The Respondent closed his accounts to avoid his financial status being examined and scrutinized by the Court. His answers in that regard, explaining his reasons for so doing were once again not truthful. He informed the Court that he closed the bank accounts because he no longer had the assistance from his son in managing these accounts. It was directed to him that his accounts were closed long before his son was moved to Canada. He then changed his story to having closed these accounts because he was not getting any money to deposit into these accounts. Yet he continued to own and manage bank accounts in St. Vincent where he had opened Certificates of Deposit.
- [27] I also find in view of the evidence before the Court there is no basis or reason to grant an order for the maintenance of the Respondent out of income generated by any property and/or assets of the Petitioner, wherever situated should the Petitioner predecease him.

### The Matrimonial Home

- [28] The matrimonial home is located at Road Town in the British Virgin Islands. It is a Waterfront Condominium with a stated value of \$164,000.00. The property was purchased by the Petitioner **prior** to her marriage to the Respondent. The title to this property was registered on the 16 November 1994. In her second affidavit filed on the 10 January 2008 the Petitioner disclosed a valuation of the condominium prepared by Island Real Estate Ltd. That was the best evidence prepared in this matter to assist the Court in determining the value of the property. I find that this property is a matrimonial asset. At the trial of the application, the Respondent contested the value prepared by Island Real Estate Ltd., mainly on the basis that "docking rights" attributable to this property was not considered by the Valuer.

This disclosure was made more than a year before the trial of the matter. The Respondent did not contest the valuation before then, but sought to do so at the trial and tried to introduce a new valuation of the condominium dated the day of the hearing of the matter. This undoubtedly would have resulted in a delay of the trial and was not allowed. It is important that disclosure takes place well in advance of the trial. I have therefore accepted the value of the condominium to be \$164,000.00. I also decided not to allow this additional evidence in the form of the new valuation, as the document presented was not a "valuation" but an assumption of the value of the property without having viewed or inspected it. Valuations are matters of usually differing opinions and are costly.

[29] In determining the division of this asset and all the other matrimonial assets, I am guided by the principles laid out in the recent case *Miller v Miller [2006] 2 WLR page 1288, para 11 per Lord Nicholls*.

*"When marriage ends, fairness requires that the assets of the parties' should be divided primarily so as to make provision for the parties housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."*

At paragraph 16 Lord Nicholas in reviewing the observation that "husband and wife are now for all practical purposes equal partners in a marriage", stated

*"This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasize the qualifying phrase "unless there is good reason to the contrary." The yardstick of equality is to be applied as an aid, not a rule."*

[30] Applying these principles to the facts of this case, I find that *there is good reason to the contrary*. When I examine the contributions made by the Respondent to the welfare of the family, that is as I understand it, to working in the "partnership" to achieve not just the acquisition of matrimonial assets, but towards the mutual benefit of all the parties forming the family unit, I find that the Respondent's contribution was wholly lacking. An important aspect of a family life is the financial contribution that each party contributes or saves the other from contributing towards the family's welfare. If it means that one party remains in the home whilst giving the other the emotional support to pursue his or her career then this contribution is significant. It is a mutual giving and taking to the benefit of the family. However in this case, I have found that the Respondent fell far short of

discharging these obligations to the welfare of the family. His disclosed salary up to the time he left the matrimonial home was \$4,000.00 to \$5,000.00 a month. The Petitioner was not aware or informed of this level of earnings by the Respondent. I have found that after considering the evidence in this case, the Respondent although an able bodied and skilled man, capable of earning a substantial income, almost equal to or more than that of the Petitioner, did not contribute of his finances or his emotional support in any significant or substantial way to the welfare of the family.

[31] The evidence before me and the evidence I have accepted is that the Petitioner paid the mortgage and continues to pay the mortgage for the matrimonial home. The Respondent produced a few cheques into evidence to establish that he too contributed towards the family expenses. I accept the evidence of the Petitioner that she paid the water and electricity bills and the mortgage payments. I also prefer and accept the Petitioner's evidence explaining the cheques presented into evidence by the Respondent drawn on his company account. I accept that the one thing the Respondent paid was the school fees for their child. There is no credible evidence before the Court that would lead me to the conclusion that the Respondent looked after the family by looking after Jordan, cooking, cleaning, or fixing things, that would have allowed the Petitioner to pursue her career and amass family assets. The limited role the Respondent played in contributing towards the welfare of the family has lead me to depart from the yardstick of equality as the starting point and award him a share of fifteen percent (15%) of the equity of the matrimonial home. However, the Petitioner had offered the Respondent twenty percent (20%) in the equity of the matrimonial home and I would so order.

[32] One of the factors I have considered in endeavouring to achieve a fair distribution of the matrimonial assets is the earnings and earning capacity of the parties. I have found that the Respondent has deliberately chosen to hide his earnings and information that would assist me in ascertaining his earning capacity. He has not disclosed sufficiently any credible information or documentation that would lead me to make a proper assessment in that regard. As I said before, I am then free to make findings adverse to him. That is the danger a party to litigation faces when he or she chooses to withhold information and to say simply that the other party has not proven otherwise and must therefore accept the evidence given as is without more. I would disagree. I find that the Respondent earns at least \$4,000.00 to \$5,000.00 a month and is capable of so doing. I find that the circumstances he has presented to the court of his living and financial position is manufactured and has been manipulated to establish that he is a party in need of support. This fortifies me in my decision to make the award I have in paragraph 31.

## CONDUCT

- [33] Conduct played a prominent role in these proceedings. The English legislation and the British Virgin Islands legislation on the issue of conduct are different. Although, I have found that the underlying principles are very similar I am therefore of the opinion that the interpretation of the English principles in this regard is to be applied in cases in this jurisdiction to determine fairness in the distribution of the matrimonial assets.

Lord Nicholls states in *Miller v Miller at page 1298 paragraph 65*

*"In most cases fairness does not require consideration of the parties conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."*

- [34] In most divorces, it is one party's conduct or both that has lead to the irretrievable breakdown of the marriage. It is what supports the ground for the divorce. In most cases, this conduct does not require the Court's consideration to determine fairly the distribution of the matrimonial assets. This is the general principle. However, the exception is where it would be inequitable to disregard a party's conduct in considering the distribution of matrimonial assets.

- [35] In this case although not formally claimed, the Respondent has claimed a share in the Petitioner's law practice. I find as a fact that the Respondent has not contributed to the law practice or to the welfare of the family that could entitle him to a share in the law practice. It is not a matrimonial asset and consequently neither is the trust company. The putting up of a sign, the making of a table, the service of documents on occasion for which I find the Respondent was paid, does not amount to any contribution to this law practice that would entitle him to a share in it. With regards to the Respondent's conduct, I find as a fact that he has done everything he could possibly do to destroy the Petitioner's reputation and also her law practice. From all accounts the Petitioner is a hard working, diligent and successful legal practitioner with a good reputation. The Respondent set out to destroy this reputation and to damage it because he was emotionally hurt by the breakdown of the marriage. He made what I consider to be very serious and scandalous accusations concerning the conduct of the Petitioner's law practice to evade taxes. During cross examination the case put to the Petitioner was that she operated a "cash side" of her law practice and "not everything goes through the business." This was strenuously denied by the Petitioner and I believe her.

- [36] I found no evidence that would lend an inference to the case put to the Petitioner of operating a "cash" side to her business; that she had on one occasion taken

home a large sum in cash to be used the following day for the purposes of bail in a case she was handling. I find the Respondent by his conduct in pursuing this line of cross examination demonstrated and compounded his attempts to destroy the very asset he claims to have a share in. The Respondent's case as I understand it was not that he did not accept the explanation of the cash being used for the purposes of bail or that the Petitioner was not hiding or carrying on a cash side to her business, but that there was no evidence by the Petitioner to support the explanation.

If the Respondent took issue with the explanation given he ought to have requested specific disclosure. These are very serious allegations without so much, as a hint of having any support in fact. This line of cross examination compounded the conduct of the Respondent in the allegations which he made outside of the Court, to clients and to Ministers of Government. I find it astounding that this was the case put to the Petitioner. I could not envisage a clearer circumstance where it would be inequitable to disregard the conduct of the Respondent.

- [37] I have found the Petitioner to be a truthful witness. I believe in total her evidence in writing, given on her Affidavit filed on the 14 February 2008 and particularly in paragraphs 10 to 20. The essence of this evidence is that before and since the filing of the divorce, the Respondent has embarked on a consistent, deliberate and concerted effort to "destroy" the Petitioner's reputation and the law practice she is a part of.

## OTHER ASSETS

### The Time Shares

- [38] The evidence before the Court is that there exist four (4) time shares, one in Tobago, two in Mexico and one in Aruba. I have also found as a fact that all these time shares have been paid for and continue to be paid for by the Petitioner, except for one time share in Mexico. Having considered the evidence in this case and having regard to the circumstances of this case, I would award the second Time Share acquired in Mexico to the Respondent. I would award the remaining three Time Shares to the Petitioner. I would not order the Respondent to pay for this Time Share by refunding to the Petitioner what she has already paid for it. This award is therefore made by way of a property adjustment order in the event the Time Shares are registered in one or other or both of the parties' names.

### The Vehicles

- [39] The vehicles presently owned and in the possession of the parties shall remain their separate property.

### The St. Vincent Lands

[40] There is a parcel of land in St. Vincent which was acquired in the Respondent's name during the course of the marriage. The Petitioner contributed substantially to the purchase price of this parcel of land. The land was intended by the parties to be owned together whether as joint tenants or tenants in common. The evidence is not clear in this regard. Counsel for the Petitioner submitted that the Petitioner is entitled to eighty percent (80%) of the value of this property. As a trade off, the Petitioner is willing to relinquish her interest, whatever it may be, in this parcel of land, in return for her retaining a one hundred percent (100%) interest in the matrimonial home in the British Virgin Islands. The Petitioner submitted receipts evidencing payments she made towards the purchase price of the St. Vincent land. Based on the consideration of the matters that I have to have regard to as set out in **Section 26 of the Act**, I find as a fact that the land in St. Vincent and its beneficial interest is a matrimonial asset. I state it in these terms because the evidence before me reveals that the Petitioner is unable to hold this land as owner with legal title unless she has obtained the relevant licence in St. Vincent to do so. The evidence before me is that the land is valued at EC\$99,000.00. The Petitioner is therefore entitled to eighty percent (80%) of the value of this parcel of land.

I would therefore order the Respondent to pay to the Petitioner eighty percent (80%) of the value of the land which is the sum of EC\$79,200.00 or US\$29,333.00. I would also order that this debt due and owing by the Respondent to the Petitioner, be set off against the Petitioner's debt to the Respondent for the payment of the Respondent's twenty percent (20%) interest in the equity of the matrimonial home; as such equity was on the date of filing of the Petition for the Divorce. For the avoidance of doubt, the parties are to ascertain the indebtedness to the Bank on the date of filing of the Petition, and minus this sum form the value and the remainder is determined as the equitable value of the matrimonial home.

### Other St. Vincent Property

[41] The other properties in St. Vincent which the Respondent has a title to or an interest in will remain his separate property. I will make no property adjustment order in that regard as the Court is entitled to do.

### CONCLUSION

[42] In making my award, I am guided by the matters I am to consider in **Section 26 of the Act** of substantial importance, in arriving at my decision was:

1. the failure of the Respondent to disclose his property, its value and his earnings and earning capacity;



2. my finding that the Respondent deliberately placed himself in a seemingly destitute status in working only intermittently and living with his brother;
3. my finding that the Respondent deliberately closed his company Fino Flush and its bank accounts to hide or prevent any or any proper and adequate assessment of his true means, earnings and earning capacity;
4. my findings of the Respondent's substantial lack of credibility as a witness in these proceedings;
5. the Respondent's conduct immediately on being informed that divorce proceedings were or had been filed in relation to this attempt to harm the reputation of the Petitioner in the conduct of her profession;
6. the apparent lack or minimal contribution he made towards the welfare of the family.
7. my findings that the earnings of the parties are relatively similar, the Petitioner possibly earning slightly more than the Respondent but having greater financial responsibilities;
8. the age of the parties, the Petitioner being older than the Respondent by about three years.

In totality therefore and having regard to the statutory considerations mandated to be considered by the Court in Section 26 and having applied those considerations to the facts in this case, it is my Judgment that the matrimonial assets in this case be divided eighty percent (80%) to the Petitioner and twenty percent (20%) to the Respondent.

My Order is therefore:

1. The matrimonial home registered as Block 2936B Parcel 77 is awarded to the Petitioner and is her sole property.
2. The Petitioner do pay the Respondent twenty percent (20%) of the equitable value in the matrimonial home at the time of filing of the Petition in these proceedings.
3. The Respondent do pay to the Petitioner the sum of EC\$79,200.00 or US\$29,333.00 representing eighty percent of the value of the Respondents parcel of land in St. Vincent.
4. That the parties set off their respective debts to each other in relation to paragraphs 2 and 3 hereof.

5. The vehicles presently in the possession of the Petitioner and the Respondent remain their separate property.
6. The joint account at Banco Popular be divided equally between the parties.
7. A property adjustment order in respect of the Time Shares as follows:
  - (i) The Time Shares in Tobago, Aruba and the first acquired Time Share in Mexico to the Petitioner;
  - (ii) The most recently acquired Time Share in Mexico to the Respondent.
8. The Respondent to pay the Petitioner's cost of this application to be assessed upon application by the Petitioner.

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**Peter I. Foster**  
**High Court Judge (Ag)**  
**British Virgin Islands**