EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHMTAP2013/0024

BETWEEN:

MICHAEL MCINTYRE

Appellant

and

MARGERY ANNE MCINTYRE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal Ag.]

Appearances:

Mr. Leslie Haynes, QC, with him, Ms. Denise Haynes,
Mr. James Bristol and Ms. Kimber Guy-Renwick for the Appellant
Ms. Celia Edwards, QC, with her, Mr. Deloni Edwards for the Respondent

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2015: September 16;
2016: January 25.

Civil appeal – Divorce – Division of matrimonial assets – Property adjustment – Ancillary relief – ss. 24 and 25 of Matrimonial Causes Act 1973 (UK) – Whether learned trial judge erred in awarding respondent one half of matrimonial assets – Whether there was proper basis for equal division of matrimonial property – Challenge to findings of fact made by learned trial judge

Mr. and Mrs. McIntyre got married in Grenada in 1997. Prior to the marriage, Mrs. McIntyre lived in Texas, USA but once married, she moved to Grenada to live with her husband. The couple resided in the matrimonial home which Mr. McIntyre had brought into the marriage. For the most part, Mrs. McIntyre was the homemaker; she ensured that the couple had a well-kept and comfortable home to live in. She was also a willing hostess and cook at social gatherings and dinners held at the matrimonial home. The couple often entertained numerous friends and associates of Mr. McIntyre. With the support which Mr. McIntyre received from his wife, he was able to devote his attention to his family owned car dealership business, McIntyre Brothers Ltd.

About 3 years into the marriage, the couple encountered difficulties in the marriage and it eventually completely broke down after a total of 11 years. Mrs. McIntyre filed a petition for divorce in 2008 and the decree absolutely dissolving the marriage was granted on 2nd November 2009. The marriage had produced no children.

Throughout the marriage, Mrs. McIntyre was completely financially dependent on Mr. McIntyre. Before she had moved to Grenada she was fully self-supporting. In Grenada, she was trying to earn money selling paintings but had found difficulty in doing so. Mr. McIntyre, on the other hand, as the company director of McIntyre Brothers Ltd., was earning a gross income of $85,000.00 per annum. He also had other sources of income, which included his interest in a gas station for which he received $24,000.00 annually, and also, income from NIS which amounted to $14,000.00 annually.

Prior to the decree being made absolute, the High Court, on 19th December 2008, made a maintenance order pending the hearing and determination of ancillary matters, which was continued by consent of the parties. Subsequently, on 21st May 2010, Mrs. McIntyre filed an application for ancillary relief seeking, inter alia: that 'the property housing the matrimonial home and the furnishing therein' be conveyed to her; that a vehicle be provided to her; that Mr. McIntyre continue to pay her medical expenses for the next 10 years; that such lump sum be paid to her as the court sees fit; in the alternative, that a one-off lump sum payment of US$1,500,000.00 or such sum the court may deem just be paid by Mr. McIntyre to her; and costs.

This application, which was vigorously opposed by Mr. McIntyre, was heard by the learned judge, who applied the Matrimonial Causes Act 1973 in determining the relevant factors the court must consider on such an application. The learned judge concluded that even though Mr. McIntyre was 68 years old, his income would remain stable, but on the other hand, Mrs. McIntyre had little or no income and remained unemployed. The judge noted that although Mrs. McIntyre had artistic skills and would be able to earn an income in the future from her paintings, in difficult economic times, the sale of the paintings is limited. The learned judge found that Mrs. McIntyre's needs were for housing, income, transportation and provision for her animals. She also found that the parties had enjoyed a high standard of living, entertained regularly and attended various social events, taken holiday trips and enjoyed all the amenities that life at that level had to offer. Concerning the contributions of Mr. and Mrs. McIntyre to the welfare of the family, the judge accepted that Mr. McIntyre was the breadwinner in the family and that in addition to the matrimonial home, he brought most of the assets into the family. However, the judge found that Mrs. McIntyre had made substantial non-financial contributions to the welfare of the family and that such non-financial contributions should not be discriminated against in favour of the money-earner.

The judge then went on to set out the assets that the court should take into account in deciding the application for property adjustment, and identified which of these assets she considered were matrimonial assets. Having done this, the learned judge stated: 'Having regard to all the circumstances, including [Mrs. McIntyre's] needs I award [Mrs. McIntyre] one half of the matrimonial assets, that is, $1,273,018.00'. The order granting Mrs.

McIntyre's application for property adjustment further stated that Mrs. McIntyre was to vacate the matrimonial home, and she was awarded costs of the application in the sum of $8,000.00.

Mr. McIntyre appealed against the judge's decision ultimately on two main grounds, which may be set out as follows: (1) the learned judge erred in law in awarding Mrs. McIntyre one half of the matrimonial assets; and (2) the learned trial judge erred in law in awarding Mrs. McIntyre one half of the matrimonial assets without setting off the benefits received from Mr. McIntyre pursuant to the maintenance pending suit order made on 19th December 2008. In particular, Mr. McIntyre challenged the learned judge's finding that the parties enjoyed a high standard of living throughout the marriage. He also took issue with the decision of the learned judge to include in the list of marriage assets his 50% share in the value of a villa at Calivigny Gardens, the commission earned from the sale of a property/equivalent shareholding in the company Calivigny Gardens Inc. and the balance of an account in the Cayman Islands.

Held: dismissing the appeal, and ordering that Mrs. McIntyre have her costs on the appeal in the sum of $5,333.33, that being 2/3 of the costs awarded in the court below, that:

1. Section 25(2)(f) of the **Matrimonial Causes Act 1973** provides that the court should consider 'the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family'. This section does not refer to the contributions which each party has made to the parties' accumulated wealth. Each party to the marriage should be seen as doing their best in their own sphere. The assets which Mr. McIntyre argues should not have been included in the list of matrimonial assets represented contributions by Mr. McIntyre to the welfare of the marriage and were properly considered by the judge as matrimonial assets. Accordingly, the learned judge did not err in regarding them as matrimonial assets.

   Miller v Miller [2006] UKHL 24 applied; **John Robert Charman v Beverley Anne Charman** [2007] EWCA Civ 503 applied.

2. There was evidence before the learned judge from which it was open to the judge to properly conclude that Mrs. McIntyre had made a significant non-financial contribution to the marriage. There is no basis therefore for this Court to interfere with the learned judge's findings of fact.

3. The learned judge did not provide reasons for awarding Mrs. McIntyre a half share in the matrimonial property. The judge merely stated in very general terms: 'Having regard to all the circumstances, including [Mrs. McIntyre's] needs', in making the award to Mrs. McIntyre. Insofar as the learned judge failed to provide reasons, it therefore falls to this Court to examine the circumstances of the case and seek to discern the reasons the judge had for granting the award.

4. It is the law that an inquiry on an application for ancillary relief is always in two stages, namely, computation and distribution. Although the learned judge awarded Mrs. McIntyre one half of the matrimonial assets (at the distribution stage), she excluded, at the computation stage, certain assets on the basis that they were not matrimonial assets, and offered no explanation for the exclusion of certain of the excluded assets. However, although the learned judge did not explicitly state the approach that she was taking, it is clear that she identified the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle. The learned judge was entitled to take this approach.

5. While the learned judge's reasons for the exclusion of some assets from the list of matrimonial assets were not entirely clear, had she applied the principles of need, compensation and sharing (enunciated in the cases of **Miller v Miller** [2006] UKHL 24 and **John Robert Charman v Beverley Anne Charman** [2007] EWCA Civ 503) which inform the distribution stage of the inquiry on an application for ancillary relief, she would have, at the very least, made the same award to Mrs. McIntyre as she did in the present proceedings. The judge, in effect, departed from an equal division of the assets by allowing Mr. McIntyre to retain the full benefit of the shares in McIntyre Brothers Ltd. as well as the benefit of the other assets which were excluded. In the circumstances, this was a fair result and accordingly, the learned judge did not err in awarding Mrs. McIntyre 50% of all the assets.

   N v F [2011] EWHC 586 (Fam) cited with approval; **Victoria Theresa Jones v Gareth Telfer Jones** [2011] EWCA Civ 41 cited; **Miller v Miller** [2006] UKHL 24 applied; **John Robert Charman v Beverley Anne Charman** [2007] EWCA Civ 503 applied.

6. A maintenance pending suit order only subsists until the determination of the suit, which, in the present case, was the petition for divorce. Accordingly, once the suit has been determined, the maintenance order will cease. In the present proceedings however, the payments made by Mr. McIntyre to Mrs. McIntyre after the decree absolute were as a result of a private agreement between the parties, who had clearly agreed to conduct their affairs outside of the statutory framework. Accordingly, in the circumstances of this case, the parties having agreed to the continued payment of the maintenance post decree absolute, it would not be fair and just for the Court to now arbitrarily vary the amount awarded to Mrs. McIntyre by the learned judge (by deducting the amount that Mr. McIntyre paid to Mrs. McIntyre post decree absolute) in the absence of any evidence of intention by the parties to have those payments referable to the lump sum award.

   Section 22 of the **Matrimonial Causes Act 1973** cited.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal by Mr. Michael McIntyre against the judgment of the learned judge in which she ordered him to pay a one off lump sum of $1,273,018.00 to Mrs. Margery Anne McIntyre, his former wife, on an application by her for property adjustment following the granting of a decree absolute dissolving the marriage between the parties.

[2] Mr. McIntyre is aggrieved by the learned judge's decision and has appealed against the decision. Mrs. McIntyre opposes the appeal.

Background

[3] Mrs. McIntyre met Mr. McIntyre in 1996 whilst on a visit to Grenada from Texas, USA, where she resided. A romance developed between the two on her visit and Mrs. McIntyre returned to Grenada in early 1997 and the two married within a few months of her return.

[4] After the couple married, they lived in the matrimonial home which Mr. McIntyre brought into the marriage. For the most part, Mrs. McIntyre was the homemaker. She threw herself into renovating the matrimonial home and surrounding garden which had been neglected. She was instrumental in building a garden wall and pond; she decorated the house, including sewing curtains and cushion covers and painting. She also made a full length stained glass window for the living room. In essence, Mrs. McIntyre's work around the home ensured that the couple had a well-kept and comfortable home to live in.

[5] During the marriage Mrs. McIntyre was a willing hostess and cook at social gatherings and dinners held at the matrimonial home. She, along with Mr. McIntyre, entertained numerous friends and associates of Mr. McIntyre. Mrs. McIntyre played a critical supporting role in Mr. McIntyre's life and with Mrs.

McIntyre as homemaker, Mr. McIntyre was able to devote his attention to his family owned car dealership business, McIntyre Brothers Ltd., in which he had shares.

[6] The parties were married for 11 years, however about 3 years into the marriage, the marriage encountered difficulties. The couple remained together and continued to sleep in the same bed but for several years there were no sexual relations. The marriage eventually completely broke down and Mrs. McIntyre filed a petition for divorce in 2008. The decree absolutely dissolving the marriage was granted on 2nd November 2009. The marriage had produced no children.

[7] Throughout the marriage Mrs. McIntyre was completely dependent on Mr. McIntyre financially. Before she left Texas to marry Mr. McIntyre, Mrs. McIntyre was fully self-supporting, and had she continued working for 7 more years she would have qualified for social security in the United States, however, this benefit is no longer open to her. Grenada is now her home; however she has no place to live besides the matrimonial home. She is now 67 years old (65 at the time of the judgment) and is trying to earn money selling paintings, but has found difficulty in doing so.

[8] As previously stated, Mr. McIntyre is involved in a family car dealership business called McIntyre Brothers Ltd. He is the company director of McIntyre Brothers Ltd., with a gross income of $85,000.00 per annum. He also receives an annual income of $24,000.00 from his interest in a gas station, in addition to $14,000.00 per annum from the NIS. Mr. McIntyre also has a number of assets which include the matrimonial home, 50% shares in the company Calivigny Gardens Inc., lot 66 Westerhall Heights, one-half share of 39,003 sq ft of land and a 66% share in McIntyre Brothers Ltd. Mr. McIntyre also operated a bank account at the Royal Bank of Canada in the Cayman Islands. The closing balance on that account at the time of trial was US$12,762.40. At one point substantial sums totaling US$1,024,925.00 earned from commissions from Poole Capital and Port Louis

Limited had been deposited in this account. These sums were earned during the course of the marriage; however most of the sums were invested in McIntyre Brothers Ltd. Mr. McIntyre also acted as the agent in the sale of a property for which he earned a commission of US$106,875.00 however he did not receive cash, but rather a shareholding in the purchasing company.

[9] Prior to the decree being made absolute, the High Court, on 19th December 2008, made a maintenance order pending the hearing and determination of ancillary matters which was continued by consent by the parties. The Court ordered that Mr. McIntyre continue to provide Mrs. McIntyre with a car that is reasonably fit for use, and to bear the costs of fuel and maintenance of the said car; that he provide the matrimonial home with an electric clothes dryer for her use; that he provide her with a cell phone and overseas calls access on the telephone line to the matrimonial home up to a credit limit of $350.00 per month; that he continue to provide her with groceries; that he continue to maintain the animals; that he pay her maintenance in the monthly sum of $2,000.00 commencing 31st December 2008 and continuing thereafter on the last day of each succeeding month until further order; and that he pay Mrs. McIntyre's costs of the application in the sum of $1,500.00.

[10] On 21st May 2010, Mrs. McIntyre filed an application for ancillary relief. Mrs. McIntyre sought an order that some of the animals be awarded to Mr. McIntyre; the property housing the matrimonial home and the furnishing therein be conveyed to her; that a vehicle be provided to her; that Mr. McIntyre continues to pay her medical expenses for the next 10 years; that one-half of the cash which was in the Global account in Grand Cayman and the Bank of America account be conveyed to her; that such lump sum be paid to her as the court sees fit; in the alternative that a one-off lump sum payment of US$1,500,000.00 or such sum the court may deem just be paid by Mr. McIntyre to her; and costs.

[11] The application for ancillary relief, which was vigorously opposed, was heard by the learned judge. In addition to the affidavit evidence which was before her, the judge heard testimony from both Mr. and Mrs. McIntyre and from witnesses on their behalf. In her judgment dated 19th July 2013, the learned judge summarised the cases put forward on behalf of each party. She then reviewed the applicable law on an application for property adjustment, and in particular section 24 of the UK **Matrimonial Causes Act 1973** (as incorporated in the laws of Grenada) in relation to the relevant factors the court must consider on such an application. The factors, as correctly identified by the judge at paragraph 22 of her judgment are as follows:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

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

(d) the age of each party to the marriage and the duration of the marriage;

(e) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(f) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

[12] The judge also reviewed the House of Lords decision in **Miller v Miller**.[1] She then went on to summarise the evidence that was presented to her and made a number of important factual findings in relation to the factors the court must consider under section 25(2) of the **Matrimonial Causes Act 1973**. In relation to the income, earning capacity, property and other financial resources which each party has or is likely to have in the foreseeable future, the judge listed the assets of the parties (already mentioned above). She then concluded that even though Mr. McIntyre was 68 years old, there was no indication that he intended to retire from his family business and so this source of income remained; that his income from the gas station would remain a long term asset; that he would continue to collect NIS; and that income from commissions will continue as opportunity arises. The judge concluded therefore that despite his age, Mr. McIntyre's income would remain stable. On the other hand, the judge found that Mrs. McIntyre had little or no income since a short stint she had as a real estate agent early in the marriage and that she remained unemployed. She also noted that Mrs. McIntyre had artistic skills and sold a painting or two, and that she would be able to earn an income in the future from her paintings but that in difficult economic times, the sale of paintings is limited.

[13] In relation to the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future, the judge found that since there were no children of the marriage Mrs. McIntyre's needs were in respect of herself and her animals. Her needs are for housing as Mr. McIntyre had brought the matrimonial home into the marriage and asked to keep it and she had no other home. Her needs are also for income since she has no form of employment and sales from her paintings were limited. Mrs. McIntyre needs a sufficient income to cover not only foods and incidentals, but also utility bills and medical bills. Mrs. McIntyre also needs transportation and provision for her animals. The court found however that if Mrs. McIntyre received a lump sum payment, Mr. McIntyre who lives in the matrimonial home would have no need for

[1] [2006] UKHL 24.

additional housing and he had no need for income given his current level of income and assets.

[14] The judge also found that the parties enjoyed a high standard of living; they entertained regularly and attended various social events; and they also took holiday trips and enjoyed all the amenities that life at that level had to offer. In relation to the duration of the marriage, the judge found that the parties were married for 11 years, despite the fact that challenges arose early on in the marriage and Mr. McIntyre had contended that the marriage had only lasted 3 years. She explained that marriages go through challenges and not because there are challenging periods that a marriage does not exist.

[15] In terms of their contributions to the welfare of the family, the judge accepted that Mr. McIntyre was the breadwinner in the family and that in addition to the matrimonial home, he brought most of the assets into the family. The judge found however that Mrs. McIntyre made substantial non-financial contributions to the welfare of the family. She was the homemaker and a partner in the marriage to the respondent. She recognised that this was the type of contribution that the House of Lords in **Miller** had recognised and that these non-financial contributions should not be discriminated against in favour of the money-earner.

[16] In terms of the conduct of the parties, despite the fact that the parties had made substantial allegations about the other's conduct during the marriage, she found that the allegations were not of such gravity that it would be inequitable to disregard it. Therefore she did not consider conduct in deciding the application.

[17] The learned judge then made findings in relation to the assets for the court's consideration for property adjustment. The learned judge found, at paragraph 56 of her judgment, the following as the assets that the court should take into account:

Matrimonial home	$1,746,300.00
50% of Calivigny Gardens (less the mortgage)	$ 734,306.47
Lot 66 (full value)	$ 285,000.00
½ share of 39,003 sq. ft. lot	$ 390,000.00
Shares in McIntyre Brothers Ltd.	$1,848,555.00
Commission from sale of land (US$106,875.00)	$ 287,280.00
Balance in RBC Cayman Islands (US$12,762.40)	$ 34,203.23
Total	$5,325,644.60

[18] Based on the assets that the judge found were for the court's consideration, the judge then went on to identify the assets she considered were matrimonial assets. The judge found the following to be matrimonial assets:

Matrimonial home	$1,746,300.00
50% value of villa at Calivigny Gardens (less 50% mortgage)	$ 478,253.50
Commission (US$106,875.00 or equivalent shareholding in Calivigny Gardens Inc.)	$ 287,280.00
Balance in RBC Cayman Islands (US$12,762.40)	$ 34,203.23
Total	$2,546,036.73

[19] After identifying the matrimonial assets the learned judge, at paragraph 60 of her judgment opined as follows:

> "Having regard to all the circumstances, including the petitioner's needs, I award the petitioner one half of the matrimonial assets, that is, $1,273,018.00. The court is unable to quantify the benefit of the investment of the commissions earned in McIntyre Brothers Ltd."

The learned judge consequently granted Mrs. McIntyre's application for property adjustment and made the following order:

> "(a) A one-off lump sum payment of EC$1,273,018.00.
> (b) The petitioner is awarded the 3 cats. The respondent is awarded the other animals.
> (c) Upon receipt of the sum payable pursuant to (a) above, the petitioner is to vacate the matrimonial home.

(d) Costs to the petitioner in the sum of $8,000.00."[2]

Grounds of Appeal

[20] Mr. McIntyre appealed against the judge's decision on the following grounds:

(a) the learned trial judge erred in finding as a fact that the marriage lasted 11 years and which finding is against the weight of the evidence;

(b) the learned trial judge erred in finding as a fact that the parties enjoyed a high standard of living and which finding is against the weight of the evidence;

(c) the learned trial judge erred in finding as a matter of law that the villa, commission and bank balance were matrimonial assets when those assets were not the product of the parties' joint endeavours;

(d) the learned trial judge erred in law in awarding Mrs. McIntyre one half of the matrimonial assets and in so doing failed to properly consider:

(i) Mrs. McIntyre's earning capacity;

(ii) the short duration of the marriage;

(iii) Mr. McIntyre's almost total financial contribution to the marriage;

(iv) Mrs. McIntyre's insignificant contributions to the marriage;

(v) Mr. McIntyre's financial needs;

(vi) Mr. McIntyre's age;

(vii) Mr. McIntyre's earning capacity;

(viii) Mr. McIntyre's ability to meet the lump sum order.

[2] Judgment at para. 61.

(e) the learned trial judge erred in law when she awarded Mrs. McIntyre one half of the matrimonial assets without setting-off the benefits received from Mr. McIntyre pursuant to the interim order, such benefits being further financial contributions by Mr. McIntyre;

(f) the learned trial judge erred in law when she ordered that Mrs. McIntyre is entitled to remain in the matrimonial home pending payment of the lump sum ordered and in so doing failed to consider that:

(i) the maintenance pending suit order ceased on the date of the order appealed;

(ii) Mrs. McIntyre does not have nor has she ever had a proprietary interest in the matrimonial home;

(iii) Mrs. McIntyre has no right to remain in the matrimonial home after the decree absolute was granted;

(iv) any claim by Mrs. McIntyre to the matrimonial home is merged in the order appealed and no longer exists.

[21] During the oral arguments, only the following two grounds of appeal by Mr. McIntyre were pursued before this Court:

(1) the learned trial judge erred in law in awarding Mrs. McIntyre one half of the matrimonial assets;

(2) the learned trial judge erred in law when she awarded Mrs. McIntyre one half of the matrimonial assets without setting-off the benefits received from Mr. McIntyre pursuant to the maintenance pending suit order made on 19th December 2008.

Appellant's Submissions

Ground 1: the learned trial judge erred in law in awarding Mrs. McIntyre one half of the matrimonial assets

[22] Mr. Haynes, QC's criticism of the trial judge under the first ground of appeal is essentially two fold. Firstly, learned Queen's Counsel, complains about the court's findings in relation to the assets which constituted matrimonial property. Secondly, Mr. Haynes, QC, complains that on the facts and evidence that was before the court, there was no basis for the judge to award Mrs. McIntyre half of the matrimonial assets. However, Mr. Haynes, QC, did not press the first aspect of the complaint vigorously since the gravamen of his complaints focused on the second aspect which is at the heart of this ground of appeal.

[23] Mr. Haynes, QC stated that since the case was one of property adjustment, the judge had to consider several factors including the needs of Mrs. McIntyre. He contended that on the facts and evidence before the court below, there was no basis for the learned judge to award half of the value of the assets which she decided were matrimonial assets to Mrs. McIntyre. Learned Queen's Counsel argued that the learned judge applied a presumption of equality using the equality principle rather than the yardstick of equality as a cross-check when making the award to Mrs. McIntyre. He pointed to paragraph 25 of the learned judge's judgment where she referenced the equality principle as explained in **Miller** but that the judge did not mention subsequent case law which corrects that approach and which clarifies that equality is a cross-check to be applied to the judge's tentative view at the end of the exercise. He reminded the Court that in **Miller**, Lord Nicholls of Birkenhead dismissed the idea that there should be a presumption of equality, since section 25 of the **Matrimonial Causes Act 1973** makes no mention of an equal sharing of the parties' assets.

[24] Mr. Haynes, QC acknowledged the factors in section 25 of the Act that the learned judge had considered. He argued that it was unrealistic for the judge to have

concluded that at 70 years old (68 at the time of the judgment), Mr. McIntyre's income would remain stable in the foreseeable future when in fact, it was likely that his earning power will be drastically reduced.

[25] In relation to financial needs, obligations and responsibilities, Mr. Haynes, QC accepted the judge's findings that Mrs. McIntyre's needs are for housing, transportation and provisions for the animals; however, he submitted that her earning capacity was not reduced as a result of the marriage but was as a result of her own choices. This he said should be considered as part of the circumstances of the case, and her reduction in earning capacity should not be looked at in isolation. Learned Queen's Counsel also submitted that there was no evidence before the court below to support the judge's conclusion that the parties enjoyed a high standard of living during the marriage.

[26] In relation to the duration of the marriage, learned Queen's Counsel contended that despite the fact that the parties continued to live together and sleep in the same bed, that the marriage was a broken marriage. Mr. Haynes, QC, however, did not contest during his oral arguments that the marriage lasted for 11 years; instead, he argued that although the marriage lasted for 11 years, it lacked quality. He argued that it was a social marriage which had no sexual relations and only served the purpose of entertaining friends.

[27] In relation to the contributions made by each party to the welfare of the family, Mr. Haynes, QC reminded the Court that the learned judge had found that Mrs. McIntyre made substantial non-financial contributions to the welfare of the family as she was the homemaker and partner in the marriage. Learned Queen's Counsel argued however, that while the authorities state that the roles of the breadwinner and the homemaker are to be regarded as being equally valuable to the welfare of the family and that there should be no bias that elevates one above the other, it is still necessary for the court to examine the actual contributions as homemaker and income owner. Mr. Hayes, QC said that Mrs. McIntyre's

contribution to the welfare of the family was negligible and the judge made an incorrect finding of fact. Learned Queen's Counsel argued that there was minimal evidence that Mrs. McIntyre supported Mr. McIntyre in his business; that Mrs. McIntyre did not entertain Mr. McIntyre's clients at home, but rather friends, and her role in entertaining was of dessert maker; and that Mrs. McIntyre's contributions to the matrimonial home were cosmetic. Mr. Haynes, QC further argued that Mrs. McIntyre chose not to work, and that she only worked for a few years in Grenada and did not seek employment thereafter. Accordingly, learned Queen's Counsel submitted that considering the magnitude and level of contribution of the parties, the contribution of Mr. McIntyre was far greater than that of Mrs. McIntyre and that this does not support an equal division of assets.

[28] Mr. Haynes, QC submitted that the cases in which courts have awarded equal division are few and relied on the cases of **White v White**,[3] **CC v RC**[4] and **John Robert Charman v Beverley Anne Charman**[5] as examples to support this contention. Mr. Haynes, QC stated that in **White**, where the parties carried on a business in partnership, the Court, on appeal, awarded 40% of the shares to the wife. In **CC v RC**, at the end of a 17 year marriage, the wife was awarded 40% of the assets; and in **Charman**, at the end of a 28 year marriage, the wife was awarded 36.5% of the assets.

[29] Mr. Haynes, QC submitted that in determining the award, once the section 25(2) factors are taken into consideration, the primary factors are: needs generated by the relationship between the parties, compensation for relationship generated disadvantage and the sharing of the fruits of the matrimonial partnership. Learned Queen's Counsel relied on **Miller** in support of this submission. Mr. Haynes, QC complained that the judge did not undertake a proper assessment of Mrs. McIntyre's needs. Learned Queen's Counsel contended that Mrs. McIntyre's needs are for housing and financial support but that she did not enjoy a high

[3] [2001] 1 All ER 1.
[4] [2007] EWHC 2033 (Fam).
[5] [2007] EWCA Civ 503.

standard of living during the marriage and that the matrimonial home was not a luxurious one; that there was no relationship-generated disadvantage arising from the marriage and Mrs. McIntyre chose not to work; that with respect to the sharing of the fruits of the matrimonial property, some of the assets deemed to be matrimonial assets were non-matrimonial assets. Learned Queen's Counsel also made reference to a recital of Lord Mance in **Miller**, where he opined that:

> "If one partner … were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony. Once needs and compensation had been addressed, the misfortune of divorce would not of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married."[6]

[30] Mr. Haynes, QC concluded that on the evidence before the learned judge there was no basis for equal division of the matrimonial property. He argued that there were no children of the marriage and that whilst Mrs. McIntyre's contribution to the acquisition of any marital assets may have existed, it was not significant. He argued that it could not be said that there was any relationship-based disadvantage and there was no need therefore to consider compensation for any such disadvantage. Learned Queen's Counsel therefore submitted that in considering Mrs. McIntyre's needs, the lack of children should be taken into account and that there was no evidence before the court below of a high standard of living to which Mrs. McIntyre had become accustomed.

Respondent's Submissions

[31] Ms. Celia Edwards, QC, for Mrs. McIntyre, submitted that the learned trial judge considered all the factors under section 25 of the Act and came to a conclusion which cannot be said to be unfair to Mr. McIntyre. Accordingly, this appellate court should not interfere with the judge's award. However, Ms. Edwards, QC said if

[6] At para. 170.

this Court were to come to the conclusion that the award was too small, it should be increased.

[32] Ms. Edwards, QC urged this Court not to interfere with the judge's findings of fact. She contended that the basis upon which the judge reached the factual findings was proper. She argued that Mr. McIntyre desired a wife who could be a social partner and asked that the Court be mindful of the fact that he went to great lengths to beautify Mrs. McIntyre. Ms. Edwards, QC, posited that Mr. McIntyre wanted a partner to host and entertain friends and business associates and that Mrs. McIntyre dutifully fulfilled this role of wife and socialite. Learned Queen's Counsel argued that Mrs. McIntyre's supporting role in the marriage, her network and social connections were critical in increasing the profile of Mr. McIntyre's business ventures, including McIntyre Brothers Ltd. Learned Queen's Counsel argued that people seek different things in a marriage, therefore, the fact that the McIntyre's marriage was basically a social one and lacked sexual relations did not take away from the fact that Mrs. McIntyre was a partner to Mr. McIntyre and made significant contributions to the welfare of the family.

[33] Ms. Edwards, QC argued that the judge excluded the value of Mr. McIntyre's shares in McIntyre Brothers Ltd. notwithstanding that when the parties married the company was operating at a loss but during the marriage with the support of Mrs. McIntyre, the introduction of a new vehicle type and the injection into the company of US$1 million earned by Mr. McIntyre as commission during the marriage, the company turned around to the point where Mr. McIntyre's shares in McIntyre Brothers Ltd. were valued at $1.8 million. Learned Queen's Counsel reminded the Court that the judge excluded the shares because she said the court had nothing on which it could compute the accretion in the value of the shares during the marriage. Ms. Edwards, QC was adamant that the judge ought to have included other assets as part of the matrimonial assets and accordingly the respondent did not receive a fair share of the matrimonial assets. Ms. Edwards, QC urged the Court not to interfere with the findings of the judge nor with the distribution of the

matrimonial property since in any event Mrs. McIntyre received less than her fair share of the matrimonial assets.

[34] Ms. Edwards, QC argued that the court took into account all the required factors and in particular, the financial needs of the parties. Counsel contended that the judge indicated in her judgment that she took into account that Mr. McIntyre's earning capacity was not likely to be reduced in the near future and that the judge had left Mr. McIntyre with all his shares in McIntyre Brothers Ltd. Accordingly, Mr. McIntyre had sufficient funds from which he could satisfy Mrs. McIntyre, who has nothing.

The Law

[35] Section 24 of the **Matrimonial Causes Act 1973** is the applicable legislation to be considered by the court on an application for ancillary relief. Section 24 of the Act gives the courts the power to make order for financial provision and property adjustment. The section provides as follows:

> "**24 Property adjustment orders in connection with divorce proceedings, etc.**
>
> (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 make any one or more of the following orders, that is to say—
>
> (a) …
>
> (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
>
> (c) …"

[36] Section 25 provides the matters to which a court must have regard in deciding how to exercise its powers under section 24. Section 25 provides as follows:

> "**25 Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 and 24A.**

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A or 24B above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(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) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

Discussion and Analysis

The Matrimonial Assets

[37] I will quickly address the first complaint in relation to the judge's findings on the assets which constituted matrimonial property, as Mr. Haynes, QC did not press this point very strongly, but rather, took issue with the award. Mr. Haynes, QC complained that the learned trial judge ignored the principles enunciated by the House of Lords in regard to matrimonial property and did not consider all the circumstances of the case. It is therefore important for this Court to identify the principles that the court is expected to apply and to ascertain whether there is any merit to learned Queen's Counsel's complaint.

[38] In **White** and **Miller**, the House of Lords made a distinction in the source of property that constitutes the assets of a couple upon an application for ancillary relief. Two sources of assets are recognised: (1) property acquired during the marriage otherwise than by inheritance or gift (commonly referred to as the 'matrimonial property') and (2) other property.[7] It is the aforementioned two sources of property that the courts look to in considering section 25(2)(f) of the **Matrimonial Causes Act 1973**. The section provides for the court to consider '**the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family**, including any contribution by looking after the home or caring for the family'. (My emphasis). In **Miller**, Baroness Hale of Richmond stated at paragraph 146 as follows:

> "Section 25(2)(f) of the 1973 Act does not refer to the contributions which each has made to the parties' accumulated wealth, but to the contributions they have made (and will continue to make) to the welfare of the family. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares."

[39] In **Charman**, the English Court of Appeal further considered this point. The Court, at paragraph 81, stated that:

[7] See Miller v Miller [2006] UKHL 24 at para. 22.

> "Like the introduction of property into a marriage at its inception (being property helpfully described by Burton J. in FS v. JS [2006] EWHC 2793, at [28], as "pre-matrimonial") or the introduction into it of property received during it by inheritance or gift (being property there described by Burton J. as "extra-matrimonial"), the generation of wealth during a marriage has conventionally been taken as one obvious form of contribution to the welfare of the family."

[40] Mr. Haynes, QC contended that the learned judge should not have included in the matrimonial assets the villa at Calivigny Gardens, the commission earned from the sale of a property/equivalent shareholding in the purchasing company and the balance in the bank account in the Cayman Islands. Learned Queen's Counsel has made no complaint in relation to the judge's findings that these assets were obtained during the course of the marriage, however, Mr. Haynes, QC argued that the commission and the balance in the Cayman Islands bank account were not as a result of the parties' common endeavours. It is clear however, taking into account the wording of section 25(2)(f) of the **Matrimonial Causes Act 1973** and, the above excerpts from **Miller** and **Charman**, that these assets represented contributions by Mr. McIntyre to the welfare of the marriage and were properly considered by the judge as matrimonial assets. Accordingly, I am of the view that the judge was correct in regarding them as matrimonial assets.

[41] It has been judicially recognised that there are instances whereby the earnings of one party (in many cases that party being the husband) are exceptional, and in particular circumstances, earnings of this character can be regarded as 'special contributions' to the marriage. It is such a contribution that Baroness Hale of Richmond refers to at paragraph 146 in **Miller**. It is noteworthy that learned Queen's Counsel has not put forward any argument that these assets should be considered special contributions. However, I consider that were this argument to have been made it would not have met the threshold requirements to satisfy exceptional contributions. In **Charman**, the English Court of Appeal quite helpfully explained the nature of special contributions:

> "In such cases, therefore, the court will no doubt have regard to the amount of the wealth; and in some cases, perhaps including the present, its amount will be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment. Often, however, he or she will need independently to establish such a quality, whether by genius in business or in some other field. Sometimes, by contrast, it will immediately be obvious that substantial wealth generated during the marriage is a windfall – the proceeds, for example, of an unanticipated sale of land for development or of an embattled take-over of a party's ailing company – which is not the product of a special contribution."[8]

[42] I have no doubt that the learned judge was right to include the assets that Mr. Haynes, QC complains of as these are assets that were generated during the course of the marriage and were contributions to the welfare of the marriage and cannot be considered special contributions. Even if they were special contributions, the court would still be required to have regard to them and share between the parties to achieve fairness. Indeed, the criticism of the judge's characterisation of the assets as matrimonial property is unsustainable.

Award of One-Half of the Matrimonial Assets

[43] As alluded to earlier, Mr. Haynes, QC argued that the judge applied the wrong principles when making her award to Mrs. McIntyre. Learned Queen's Counsel argues that the judge employed a presumption of equality, which is impermissible based on the wording of the statute and used the equality principle rather than the yardstick of equality when making her award to Mrs. McIntyre. Learned Queen's Counsel's complaint is that the judge arbitrarily applied the equality principle without proper regard to the principles stated in **Charman**.

[44] Mr. Haynes, QC also made a number of complaints about the judge's factual findings in relation to Mrs. McIntyre's contribution to the welfare of the marriage, arguing in essence that her non-financial contributions were de minimis. It is well established that an appellate court will be reluctant to interfere with a judge's

[8] At para. 80.

findings of primary fact as well a judge's evaluation of those facts and the inferences drawn from them.[9] There was sufficient evidence before the learned judge to conclude that Mrs. McIntyre had made a significant non-financial contribution to marriage. Mr. McIntyre acknowledged that his wife made improvements to the house and that she hosted social gatherings at the home. I see no reason why these factual findings should be disrupted since the findings were clearly open to the learned judge based on the evidence.

[45] Before going any further, it is important to state that in **Miller**, Lord Nicholls of Birkenhead, at paragraphs 16, 20 and 29 referred to the 'equal sharing principle' and 'sharing entitlement'. This 'equal sharing', Lord Nicholls explained, derives from the basic concept of equality permeating a marriage as understood today.[10] The term yardstick of equality, as developed in **White**, was meant to reflect the 'modern, non-discriminatory conclusion that the proper evaluation under s. 25(2)(f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal'.[11] In **White**, Lord Nicholls of Birkenhead viewed equality as a 'yardstick' against which a judge's tentative views should be checked. However, **Miller** made it clear that sharing was not required to be checked against the yardstick of equality at the end of the judge's sharing exercise.

[46] Returning to the trial judge's judgment, in my view, the learned judge quite properly, at paragraphs 27-52 of her judgment, listed the factors illustrated in section 25(2) of the **Matrimonial Causes Act 1973** in relation to property adjustment. She then identified the property for the court's consideration and made findings in relation to the assets which constituted matrimonial property to

[9] See Landau v Big Bus Co Ltd and Another [2014] EWCA Civ 1102; Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642; Piglowska v Piglowski [1999] 1 WLR 1360; McGraddie v McGraddie and Another [2013] 1 WLR 2477; Fage UK Ltd and Another v Chobani UK Ltd and Another [2014] EWCA Civ 5.
[10] Miller v Miller [2006] UKHL 24 at para. 16.
[11] John Robert Charman v Beverley Anne Charman [2007] EWCA Civ 503 at para 64.

be distributed by the court. At the end of her judgment she proceeded to state the following:

> "Having regard to all the circumstances, including the petitioner's needs, I award the petitioner one half of the matrimonial assets, that is, $1,273,018.00. The court is unable to quantify the benefit of the investment of the commissions earned in McIntyre Brothers Ltd."

The learned judge therefore shared the assets she considered to be matrimonial assets evenly between the parties. It is true that the learned judge did not expressly provide the reasons for awarding Mrs. McIntyre a half share in the property she identified as matrimonial property. She couched the basis on which she made the award in very general terms: 'having regard to all the circumstances, including the petitioner's needs'. It is the law that the judge should have provided clear reasons for making the award that she did.[12] However, her failure to do so is not necessarily fatal. It falls to this Court to examine the circumstances of the case and seek to discern the reasons the judge had for granting the award. Should this Court conclude that the learned judge had no proper basis for granting the award, this Court should set aside the award and make an appropriate order.

[47] As previously stated, the applicable law on an application for ancillary relief is section 24 and 25 of the **Matrimonial Causes Act 1973**. The statutory provisions have been clarified and developed by the courts through case law over a number of years. The statue gives judges wide discretionary powers and the English Court of Appeal and House of Lords in the noted cases of **White**, **Miller** and **Charman** have given lower court judges guidance on the exercise of these discretionary powers. The House of Lords has reiterated that the purpose of the court's discretionary powers to grant ancillary relief is to achieve fairness in the financial arrangements of the parties on or after a divorce.[13]

[12] See: Flannery and Another v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services) [2000] 1 WLR 377; English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409.
[13] See White v White [2001] 1 All ER 1 and Miller v Miller [2006] UKHL 24.

[48] The approach that a court should take to an application for ancillary relief was set out by the Court of Appeal in **Charman** as follows:

> "[T]he starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in s.25(2) other than in the order there set out, a court should first consider, with whatever degree of detail is apt to the case, the matters set out in s.25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future. Irrespective of whether the assets are substantial, likely future income must always be appraised for, even in a clean break case, such appraisal may well be relevant to the division of property which best achieves the fair overall outcome."[14]

[49] The House of Lords in **Miller** identified the three principles which inform the distribution stage of the inquiry on an application for ancillary relief: 'need (generously interpreted), compensation, and sharing'.[15] In **Charman**, the Court explained these principles further and I shall set out their explanation in full:

> "[T]he principle of **need** requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e)).
>
> "The principle of **compensation** relates to prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit of the family during the marriage, for example in sacrificing or not pursuing a career: per Lord Nicholls in Miller at [13], Lord Hope at [117] and Baroness Hale at [140]. But the principle goes wider than that. As long ago as 1976 this court decided that, where the marriage was short, it was relevant to consider whether a party had suffered financial disadvantage arising out of entry into it: see S v. S [1977] Fam 127 at 134C, albeit that the consideration was there directed to restriction rather than augmentation of the award. Equally, in respect of disadvantage arising out of exit from the marriage, s.25(2)(h) requires the court to consider any loss of possible pension rights consequent upon its dissolution. Even disadvantage of the type to which reference was made in the speeches in Miller, i.e. that stemming from

[14] At para. 67.
[15] At para. 144 (Baroness Hale of Richmond); see also paras. 10 to 16 (Lord Nicholls of Birkenhead).

> decisions taken during the marriage, had been held in this court to be relevant before it became the driver for a principle of compensation: per Hale J (as she then was) in SRJ v. DWJ (Financial Provision) [1999] 2 FLR 176 at 182E and per Thorpe LJ in Lambert v. Lambert [2003] Fam 103 at 122G. In cases in which it arises, application of the principle of compensation is an appropriate contribution to the fair result.
>
> "The enquiry required by the principle of **sharing** is, as we have shown, dictated by reference to the contributions of each party to the welfare of the family (s.25(2)(f)); and, as we make clear in paragraph 85 below, the duration of the marriage (the other half of s.25(2)(d)) here falls to be considered. Also conveniently assigned to the sharing principle, no doubt dictating departure from equality, is the conduct of a party in the exceptional case in which it would be inequitable to disregard it (s.25(2)(g))."[16]

[50] In **Charman**, the English Court of Appeal, using the principles enunciated in **White** and **Miller**, produced guidance on how a trial judge should approach the distribution principles. The court noted that a judge, after considering the section 25 factors, is entitled to consider percentages by which assets are to be divided among the parties. The judge is entitled to apply the sharing principle at this point, and as the court noted, in cases dealing with substantial matrimonial property, very often, the application of the sharing principle subsumes the result of applying needs and compensation.[17] However, this need not only apply to cases of substantial assets. As I have stated previously, the trial judge is no longer constrained to provisionally quantify an award and then cross-check her tentative views using the yardstick of equality.

[51] Having found that the judge's factual findings were proper, I will move now to the proper approach to an application for ancillary relief. As mentioned previously, the inquiry on an application for ancillary relief is always in two stages, namely computation and distribution. It must be borne in mind that although the trial judge awarded Mrs. McIntyre one half of the matrimonial assets (the distribution stage), she excluded, at the computation stage, certain assets on the basis that they were

[16] paras. 70-72.
[17] At para 76(b).

not matrimonial assets. The assets left out by the learned judge were Lot 66, one half share of 39,003 sq ft of land and Mr. McIntyre's shares in McIntyre Brothers Ltd. The learned judge offered no explanation for the exclusion of these assets, save an except for the shares in McIntyre Brothers Ltd. The judge stated at paragraph 60 of her judgement that the court was unable to quantify the benefit of the investment of the commissions earned in McIntyre Brothers Ltd.

[52] The exclusion of these assets is a significant factor that this Court has to consider in deciding whether the judge's award to Mrs. McIntyre was fair in all the circumstances. By excluding these assets, Mr. McIntyre got the full value of the assets including the investment in McIntyre Brothers Ltd. as these assets were not shared with Mrs. McIntyre. The English High Court case **N v F**[18] is helpful in considering this point. The case refers to the existence of pre-marital property when the court is considering an application for ancillary relief. Mr. Justice Mostyn explained[19] that there are two schools of thought as to how its expression should be worked out. The first, which was preferred in **Charman**, is the technique of taking into account all property, matrimonial and non-matrimonial, and simply adjusting the percentage from 50% taking into account that to the extent that the property is non matrimonial, there is likely to be better reason for departure from equality.[20] The alternative approach, Mostyn J explained, is 'to identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle',[21] which was deployed by the English Court of Appeal in **Victoria Theresa Jones v Gareth Telfer Jones**.[22] Although the learned judge did not say it explicitly, she clearly took the alternative approach in deciding the application, and in my view, was quite entitled to do so.

[18] [2011] EWHC 586 (Fam).
[19] At para. 10.
[20] See John Robert Charman v Beverley Anne Charman [2007] EWCA Civ 503 at para. 66.
[21] N v F [2011] EWHC 586 (Fam) at para. 11.
[22] [2011] EWCA Civ 41.

[53] As I have said above, except in relation to the investment in McIntyre Brothers Ltd., it is not entirely clear why the learned judge excluded assets which were accumulated during the course of the marriage from what she described as matrimonial assets since she provided no reason for doing so.[23] In any event, I am of the considered view that had the judge applied the principles that were enunciated in **Miller** and **Charman** in relation to the needs, compensation and sharing principles, she would have, at the very least, made the same award to Mrs. McIntyre as she did. There is even a real possibility that Mrs. McIntyre could well have received a larger lump sum bearing in mind the exclusion of a number of assets by the learned judge on the basis that they were not matrimonial assets. In addition, even while finding that the investments in McIntyre Brothers Ltd. should be considered matrimonial assets, she did not take include it in her computation on the basis that she could not quantify the benefit of the investment. Accordingly, the judge in effect departed from an equal division by allowing Mr. McIntyre to retain the full benefit of the shares in McIntyre Brothers Ltd., and the others assets excluded. These assets were not shared with Mrs. McIntyre; it is only the balance of the assets that were shared equally between the parties. I consider this to be a fair result. One must remember that the purpose of the exercise that the court is to undertake upon an application for ancillary relief is to achieve fairness between the parties.

[54] I note briefly that the general effect of the submissions on behalf of Mr. McIntyre is that once Mrs. McIntyre's needs were met, that should be the end of the matter, and an award made accordingly. This was precisely the situation that the House of Lords in **Miller** was trying to move away from. In fact, it was held[24] that it would be unfair that on the breakdown of a marriage, that the award to one partner (usually the wife) is confined to their financial needs but the other partner (usually the husband) who's financial needs are no greater, gets the benefit of the entirety of the rest of the assets.

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[23] Since there is no cross appeal in relation to this issue I will refrain from commenting further on this.
[24] White v White [2001] 1 All ER 1 at p. 12.

[55] In all of the circumstances I am not of the view that the learned trial judge erred in awarding Mrs. McIntyre a 50% share of the assets.

[56] For the reasons I have outlined above, this first ground of appeal fails.

Ground 2: the learned trial judge erred in law when she awarded Mrs. McIntyre one half of the matrimonial assets without setting-off the benefits received from Mr. McIntyre pursuant to the maintenance pending suit order made on 19th December 2008

[57] Mr. Haynes, QC contended that an order for maintenance pending suit contains provision for one party to make periodical payments to the other at a specified rate until decree absolute or the petition is dismissed, when the case ceases to be pending. He argues that in the present case, Mr. McIntyre continues to make payment to Mrs. McIntyre even though the decree absolute has been pronounced. Mr. Haynes, QC does concede however that this obtains by agreement between counsel for the parties. Nevertheless, learned Queen's Counsel argues that this does not alter the law in relation to maintenance pending suit which is that the order ceases on determination of the suit. Mr. Haynes, QC made reference to **Rayden and Jackson's Law and Practice in Divorce and Family Matters** where the authors state:[25]

> "Such an order will cease on the determination of the suit for whatever reason, e.g. dismissal by consent; dismissal at the hearing; abatement; the pronouncement of a decree of judicial separation, the making absolute of a decree nisi of divorce or nullity; or … a determination of no jurisdiction."

[58] Mr. Haynes, QC contended that, in the circumstances of the case, payments made to Mrs. McIntyre after the decree absolute must necessarily be credited to Mr. McIntyre. Learned Queen's Counsel further contended that payments made up to the grant of the decree absolute must necessarily be taken into account under section 25(1) of the **Matrimonial Causes Act 1973** as one of the circumstances and also under section 25(2)(f) of the Act as a contribution to the welfare of the

[25] (16th edn., Butterworths 1991) at para. 29.5.

family. Thus any amount paid must be credited to Mr. McIntyre in satisfaction of any lump sum award to be paid to Mrs. McIntyre by him.

[59] Learned Queen's Counsel submitted that the only payment the court may order after the decree absolute is an order for lump sum payments. Mr. Haynes, QC cites the case of **Wicks v Wicks**[26] and section 23(1)(a) of the Act in support of this submission. Learned Queen's Counsel argued that it is in keeping with the interests of justice that payments continued to be made by Mr. McIntyre to Mrs. McIntyre after the decree absolute was pronounced must be treated as payments toward the lump sum or otherwise fully refundable. Mr. Haynes, QC argued that to conclude otherwise would be to give an additional sum to Mrs. McIntyre which may be substantial should property settlement not be achieved promptly.

Respondent's Submissions

[60] Ms. Edwards, QC argued that if the learned trial judge intended to set off the benefits received from Mr. McIntyre pursuant to the maintenance pending suit order, she would have so ordered. Learned Queen's Counsel contended that the trial judge, in the interests of justice, felt that she excluded enough of the assets of Mr. McIntyre from the matrimonial assets that it would not be just to set off the interim order, as small as it is.

[61] Learned Queen's Counsel further argued that under the provisions of the **Matrimonial Causes Act 1973**, the judge, having ordered a lump sum, this Court has to presume that she took all the factors into account. Ms. Edwards, QC argued that the judgment is premised on the basis that the trial judge took all relevant factors into account and in the interest of justice came to her conclusion as to what was just. Learned Queen's Counsel submitted that as provided by section 31 of the Act, this Court has no jurisdiction to vary the lump sum ordered by the court below.

[26] [1998] 1 FLR 470..

Discussion and Analysis

[62] The court's power to order a party to make maintenance payments to the other party to a divorce petition, pending determination of the petition, is derived from section 22 of the **Matrimonial Causes Act 1973**. Section 22 provides that:

> "On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and **ending with the date of the determination of the suit, as the court thinks reasonable**." (My emphasis.)

[63] It is therefore the law that a maintenance pending suit order only subsists until the determination of the suit, the suit being in this case, the petition for divorce. Accordingly, once the suit has been determined the maintenance order will cease[27]. I am therefore in agreement with Mr. Haynes, QC in relation to this point.

[64] In this particular case the maintenance pending suit order was made in December 2008 and the order was that maintenance payments by Mr. McIntyre to Mrs. McIntyre were to continue until the hearing and determination of the ancillary matters. As a matter of law, maintenance pending suit could only continue to the decree nisi being made absolute, but by virtue of the fact of the December 2008 order, it was made to continue to the hearing and determination of the ancillary matters. However, on 2nd December 2009, the decree absolute was granted but there was no mention of the maintenance pending suit order of December 2008. Further, the application for ancillary relief was made in 2010, and in 2013, there was communication between the parties that as an interim measure, the maintenance payments by Mr. McIntyre to Mrs. McIntyre were to continue pending the hearing and determination of the ancillary matters. Therefore, on the particular facts of this case, even after the decree absolute was granted, Mr. McIntyre

[27] See M v M [1928] P 123 whereby maintenance pending suit cannot be awarded after decree of judicial separation because there is no longer a suit pending.

continued to make maintenance payments to Mrs. McIntyre and this much was admitted by Mr. Haynes, QC.[28]

[65] In addition, I agree with Ms. Edwards, QC that the learned trial judge would have been alive to issue of this agreement between Mr. McIntyre and Mrs. McIntyre and would have taken this into account when making her award to Mrs. McIntyre. Even though she did not say so explicitly, the learned judge, when making her award, indicated that she had regard to 'all the circumstances' of the case.[29]

[66] One has to keep in mind that the payments made by Mr. McIntyre to Mrs. McIntyre after the decree absolute were as a result of a private agreement between the parties. The parties clearly agreed to conduct their affairs outside of the statutory framework. Accordingly, in the circumstances of this case, the parties having agreed to the continued payment of the maintenance post decree absolute, it would not be fair and just for this Court to now arbitrarily vary the amount awarded to Mrs. McIntyre by the learned judge by deducting the amount that Mr. McIntyre paid to Mrs. McIntyre post decree absolute in the absence of any evidence of intention by the parties to have those payments referable to the lump sum award.

[67] Accordingly, for the reasons I have given above, this ground of appeal also fails.

Conclusion

[68] Mr. McIntyre has failed on both grounds of appeal; accordingly, I would dismiss Mr. McIntyre's appeal.

[69] The order is therefore as follows:

(1) The appeal is dismissed.

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[28] Mr. Haynes, QC stated in his written submissions that Mr. McIntyre continues to make payment to Mrs. McIntyre even though the decree absolute has been pronounced and that this obtains by agreement between the parties.

[29] Judgment at para. 60.

(2) Mrs. McIntyre shall have her costs on the appeal in the sum of $5,333.33 being 2/3 of the costs awarded in the court below.

[70] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Paul Webster
Justice of Appeal [Ag.]