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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

CAUSE NO: FAM 39 OF 2015

BETWEEN:

AK

Petitioner

AND

TK

Respondent

Appearances:



**Mrs. Sheridan Brooks from Brooks & Brooks for
the Petitioner**

**Mr. David McGrath from Samson & McGrath for
the Respondent**

Before:

Hon. Mr. Justice Richard Williams

Heard:

**14 -15 June 2016, 22-23 June 2016, 27, June 2016, 9
December 2016 and 17 January 2017**

Husband's written submissions filed: 30 September 2016

Wife's written submissions filed: 3 October 2016

Date of Circulation of Draft Judgment: 30 January 2017

Date of Judgment: 7 February 2017

HEADNOTE

Financial provision - ancillary relief - conduct - spouse supporting other spouse's career to detriment of own potential career in middle length marriage - approach to be taken by Court as set out in McTaggart v McTaggart [2011 2 CILR 366] - clean break principle - time limited spousal; maintenance - duty of experts - guidance on obtaining valuation expert reports if valuation not agreed - effect of delay in processing of permanent residency applications - requirement to provide sufficient evidence if asking court to make orders about chattels - taking into account legal fees paid by both counsel for matrimonial assets - level of legal costs and proportionality

JUDGMENT

The Application

1. This is an application for ancillary relief made by AK, the 44 year old Petitioner husband. The application is made against his 43 year old wife TK. AK filed a Summons for ancillary relief on 25 February 2016 and his Amended Petition dated 12 March 2016 contains the relief sought in its prayer.
2. I hope that the parties will not be offended if from now on I refer to them, for convenience, as the husband and the wife.

The Background - The Divorce Proceedings and the Children

3. The parties were married on 7 September 2002. The parties in effect separated in March 2015.¹ On 9 March 2015 the husband filed his Petition for the Dissolution of the Marriage. The wife filed her Acknowledgement on 23 March 2015, indicating her intention to defend. The wife filed her Answer and Cross-Petition to the Petition on the same date. On 7 March 2016 McMillan J. granted leave to the husband to amend his Petition. The husband filed his Amended Petition on 13 April 2016. The wife filed her Acknowledgement of Service of the Amended Petition on 15 April 2016, indicating her intention not to defend, but also indicating a non-acceptance of the content of paragraphs 12 (b), (c) and (f). On 2 May 2016 leave was granted to the wife to withdraw her Cross Petition. The husband's Amended Petition was proved on 3 May 2016. It has been a medium length marriage.
4. There are two children of the marriage, K aged 12 and M aged 10. On 28 October 2015, following a contested hearing, McMillan J. made a shared residence order in favour of

¹ Paragraph (h) husband's Written Closing Submissions and the Chronology (preliminary document in the trial bundle) – confirmed by both parties at hearing on 17 January 2017.



the parents in relation to both children. The Learned Judge ordered that the children reside with each parent on an alternating week pattern and with each parent for half of every school holiday.

5. After the conclusion of the main ancillary relief hearing, the Court was informed that the wife had been charged for driving under the influence and careless driving following her involvement in a road traffic accident on 20 July 2016. The husband had concerns that this happened at a time when the wife was due to be collecting M from swimming. The parties were informed that I would be fixing a mention date on my own motion at which directions may be given about the filing of evidence and a welfare report. They were also informed of my view that the Court "*may well have to reconsider the current arrangements for the children, which may have a knock-on effect on the ancillary relief orders.*"



6. Although the parties understood why I had to recuse myself in the children proceedings, they were content for me to deal with the mention hearing on 24 August 2016. The Court was informed that the husband intended to issue a formal application to vary the s.10 Children Law orders made by McMillan J., the most significant variation being an order that the children would only stay with the mother on alternate weekends and possibly at agreed times during the week. I directed that the proposed Summons² should come before McMillan J., he being the Judge who had recently made the relevant order. In light of those developments, I extended the time to 30 November 2016 for the parties to file the closing written submissions. The parties were invited to speak in their submissions as to whether I should go on to conclude my ancillary relief judgment, or whether I should

² The Summons was issued on 25 August 2016.

limit myself to making only certain orders or whether I should delay making any decision pending the hearing of the children proceedings.

7. The written closing submissions prepared on behalf of the wife were filed on 30 September 2016, and those submitted on behalf of the husband were filed on 3 October 2016. Although, at various parts in the husband's written submissions, criticism was levelled at the wife due to the circumstances surrounding the charges for driving whilst under the influence, the parties contended that the ancillary relief proceedings should not be postponed pending the determination of the children proceedings. I understand that McMillan J. has given directions in relation to the Children Law proceedings, including the instruction of a Welfare Officer and a hearing of the husband's Summons in January 2017.

8. On 15 November 2016 the husband issued a Summons seeking directions in relation to alleged nondisclosure of the wife concerning her employment and income. At the hearing of that Summons on 9 December 2016 the husband, having had the opportunity to read the unsworn affidavit of the Managing Director of the wife's employer³, invited the Court to make no order on the Summons. No order was made on the Summons, and the Court indicated that it could now go on to conclude the preparation of this judgment which had been delayed by the above-mentioned supervening events.

9. During the preparation of this Judgment I required and requested clarification from the parties about (i) the wife's investment accounts; (ii) the husband's legal costs; (iii) the use of the funds in one of the husband's investment accounts; (iv) whether the wife was seeking a sale of the former matrimonial home; (v) each party's permanent residence

³ A sworn copy the Affidavit of Matthew Wight was filed on 12 December 2016.





applications and the effect on such an application if the former matrimonial home is sold; (vi) what type of property the husband feels would be appropriate for him to purchase if the former matrimonial home is sold; (vii) the mechanics for the payment of future child related expenses; (viii) the parties' position about the investment in to a college fund for the children; (ix) the length of the term for payment of spousal maintenance by the husband sought by the wife; and (x) the date of the parties' separation. The parties appeared before me on 17 January 2017 when they were afforded the opportunity to give the clarification.

10. This is my reserved written judgment given after careful consideration of the parties' oral and written evidence, which includes the evidence given by the Managing Director of the wife's employer, by the wife's property valuer and by the husband's property valuer. I have also carefully reviewed the oral submissions as well as the opening and closing written submissions provided by Counsel.

The Background – The Parties

11. The husband and wife are both Canadian nationals. The parties met in Canada in 1999. The husband moved to Barbados in around April 2001 to take up employment with RBC. The wife followed him to Barbados shortly thereafter, arriving in around September 2001. In cross-examination the husband said that he and the wife had been dating for a year and a half and, after she sold her house⁴, they cohabited for a few months, albeit with a roommate in a property rented from the husband's father. Despite Counsel's unattractive submission that the wife "*decided*" to join the husband "*no doubt because of the weather and the other advantages living in Barbados brings*" and the husband's expressed view that the wife only joined him in Barbados as it was "*her free-will choice*"

⁴ Which the wife states was 6 months after she and the husband met.



as she saw it to be a *“great opportunity to live in the Caribbean,”* I prefer the wife’s evidence when she said in her evidence in chief that the parties had *“been together for one and half years”*, were living as a couple in a *“fully committed”* relationship, were *“very much in love”* and *“whilst not engaged”* they had *“talked about the prospect of marriage.”* I prefer her evidence that this was an agreed and planned move to accommodate and support the change in the husband’s career path. I accept her evidence when she said in chief that *“I had no doubt that we would marry, we knew we wanted to be together”* and *“I gave up a great job to be together and support him.”*

12. On Valentine’s Day, 14 February 2002, five months after the wife joined the husband in Barbados, they became engaged. After a short engagement, seven months later, the parties married on 7 September 2002. These significant events and their timing are highly consistent with the wife’s contentions about the nature of her relationship with the husband when she moved to Barbados, as well as with the reasons given by her for her move there.

13. The wife, who had completed postgraduate studies in sales and marketing, gave up her employment with SMART Technologies, an international technologies company, in Canada to join the husband in Barbados. Due to employment restrictions for non-nationals in Barbados, the wife was only able to find limited employment. She worked in a position that involved administrative responsibilities and some marketing functions at the Canadian High Commission, where she did not require a work permit. Only sixteen months after the marriage ceremony, in April 2004, K was born and the mother ceased work to enable her to be at home to care for him. When she was pregnant with M, the wife took up a six month contract for part-time work from home marketing a sports bar in Barbados. Although the mother found employment in Barbados, due to the nature of that

employment and the reasons for her relocation, I reject the submission made on behalf of the husband that it is “*disingenuous to infer that the wife sacrificed lucrative employment in Canada to go to Barbados.*”



14. In 2006, two months prior to M’s birth, the father was offered employment after being “*head hunted*” to take up a treasury position with a prominent employer in the Cayman Islands. When M was only four weeks old, the husband, the wife and both children moved to the Cayman Islands to enable the husband to take up that employment. It was a family decision that they should move to Cayman where the parties felt they could have a similar lifestyle to the one enjoyed by them in Barbados in a safe environment. The husband is still employed by the same employer, but has been promoted to the post of Senior Vice President and is working in his chosen field of finance. His immigration status in the Cayman Islands derives from his work permit with his long term employer but, as he has reached his 9-year term limit, he has applied for permanent residency.

15. In 2009 the wife obtained part time employment in marketing and public relations for a salary of only \$30,000 per year. The wife worked between 8:15 a.m. to 2:00 p.m. as this enabled her to care for the children, who were then aged 5 and 3, after school. The husband, to his credit, was working long hours to develop his career and to provide well for his family. In 2012 the wife left that employment to work for friends who were trying to set up a business. That business failed to ‘get off the ground’, so in May 2013 she commenced her current employment, as a Sales and Marketing Co-Ordinator, with a residential property developer. The wife is currently working by operation of law, as her work permit was refused in 2013 and she is still awaiting the outcome of her appeal of that decision. The wife, although she had made a joint application with the husband, has now made a separate application for permanent residency.

16. Between 2006 -2014 the family lived in a three bedroom property which they had purchased in Snug Harbour. They sold that property in around 2013/2014 for about US\$900,000-US\$935,000. After selling that property they moved temporarily into rented accommodation which was also situated in the Seven Mile area of Grand Cayman. The family then moved into the matrimonial home located in an upmarket development in Crystal Harbour, which was purchased as a new build from the wife's employer. In February 2015 the wife moved out of the home for a month to rented accommodation. The husband contends that she moved out due to her having a drinking problem. The wife contends that she left as she felt the husband was leaving her with no choice and because she was "bullied" into it. The wife returned to the matrimonial home and the husband and wife have remained living in the property, although they both agree that they in effect separated in March 2015

Issues

17. The Statement of Issues filed as a preliminary document in the final hearing bundle pursuant to Practice Direction No. 11/2014⁵ listed the issues for determination as being:

- (i) what value should be ascribed to the matrimonial home at Crystal Harbour and what should happen to the property;
- (ii) what value should be ascribed to the chattels (both furniture and non – furniture household items) in the matrimonial home;
- (iii) what is the total value of the marital estate;
- (iv) how should the material assets be divided generally;



⁵ The husband's attorney indicated in her email to the Court dated 7 February 2017 that the Statement of Issues was not an Agreed Statement as she was not provided with the bundle until the first day of the hearing.



- (v) what is the true extent of the parties' respective incomes; and
- (vi) what orders should be put in place for child and spousal maintenance.

18. At paragraph 1(j) in the wife's Written Closing Submissions it is contended that the Court is now called on to decide:

- (i) What value should be ascribed to the former matrimonial home and how should the matrimonial assets be disposed of: and
- (ii) Should orders be made for child and/or spousal maintenance.

The Wife's General Position

19. The wife seeks equal division of the matrimonial property, the value of which is to be determined by the Court. The wife contends that equal division is subject to there being ongoing spousal and child maintenance to meet, primarily, her housing needs. It is argued that if such maintenance was not ordered then she would require more than 50% of the value of the assets to "*enable her to rehouse, paid as sufficient capital, and to have borrowing at a level which is affordable to her.*" It is claimed that the capital sum should be sufficient to enable her to purchase for herself and the children "*appropriate, comfortable and comparable accommodation.*" It is submitted that the property should be such as to "*not create the sort of distasteful and inappropriate disparity between two parents' homes.*"

20. The wife contends that the husband should assume direct responsibility for the children's major expenses to include long-term educational and ancillary educational costs. The wife argues that the husband should assume all of the extracurricular costs and if that

cannot be achieved by consent then the Court should quantify the same when making a child maintenance order. In addition the wife seeks child maintenance in the sum of US\$3,000 per child per month to enable her to meet the needs of the children when they are with her for expenses including, but not limited to, food, living/housing, travel/holidays, clothing, haircuts, birthday presents. The wife also seeks term periodic spousal maintenance for at least 5 years at a level determined by the Court to enable her to “re-establish herself on the road to independent financial living” and “so as to bridge the income hiatus which she is about to go through.”



The Husband's General Position

21. Despite it being suggested in his Written Closing Submissions that the husband may be entitled to possibly 55% of the matrimonial assets due to unequal significant contributions made by him, the husband therein also indicates that, to achieve a clean break, he would agree to the matrimonial assets (including pensions) which he identified on an attached spreadsheet being divided equally between the parties. The husband suggests that the chattels which he classified as “*personal property*” in the same spreadsheet should remain in the respective party’s possession. To achieve the above the husband suggested in his Opening Written Submissions that he transfer US\$125,524.60 from his pension to the wife’s pension and raise a loan to pay a lump sum of US\$411,108.52 to the wife. In return for the US\$536,633.12 the wife would transfer her interest in the matrimonial home to the husband as well as vacating the home upon the above transfers taking place.

22. The husband contends that he is currently meeting all of the child related expenses. The husband wishes the status quo to remain and he indicates that he is prepared to pay for all of the children’s major (and most minor) expenses which he totals to be in the region of

US\$6,580.73 per month with an additional US\$3,591.03 being invested each month over a period of four years for each child's college fund, which at this time would give a monthly total of US\$10,171.76. The husband states that his proposals will mean that all of the children's financial needs are being met and would prevent the wife using any funds being paid to her for child maintenance for "*other detrimental purposes*", by which he means on alcoholic drinks. In light of the above, the husband contends that there should be no order for him to pay child maintenance to the wife.

23. The husband contends that, if he made the payments to the wife which are set out in paragraph 21 above, there should be a clean break as he believes the wife will have sufficient "*liquid cash*" to enable her to purchase her "*own alternative, comparative accommodation.*"

The Law and Principles to be Applied

24. The Law pertaining to the making of periodical payment orders and to the division of matrimonial assets is governed by s.19 of the Matrimonial Causes Law ("the Law"), which reads as follows:



"In dealing with all ancillary matters arising under this Law the court should have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities and financial and other resources, actual and potential earning power and deserts of the parties."

25. Section 19 of the Law must be read in conjunction with s.21 of the Law, of which the relevant parts for my consideration in this matter provide as follows:

"At the time of pronouncing a decree under this law, the court shall, as appropriate, make order for:



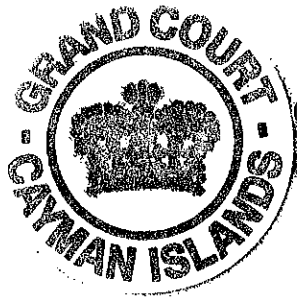
- (a) ...
- (b) *the disposition of matrimonial property, including the matrimonial home;*
- (c) ...
- (d) ...
- (e) *making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
- (f) *providing for periodical payments to be made by either spouse for the benefit of the children of the marriage and the other spouse: and*
- (g) *costs."*

26. Section 19 and s.21 of the Law give the Court a wide discretion when it comes to financial provision and any awards made to the parties. The Courts in the Cayman Islands, in deciding whether to exercise their powers under s.21 and, if so, in what manner have, when considering what is fair in all the circumstances of the case, traditionally had regard not only to the matters set out in s.19, but also been guided by the relevant factors raised in s.25(2) of the Matrimonial Causes Act 1973 ("the MCA").⁶ The factors to be considered include:

- (i) The income earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;
- (ii) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (iii) The standard of living enjoyed by the family before the breakdown of the marriage;

⁶ *Doak v Doak and Riley* [2002] CILR 224, [17], [21], [22], *Wood v Wood* [2009] CILR 255, [12] as commented upon by Sir John Chadwick P. in *McTaggart v McTaggart* (2011) 2 CILR 366[39].

- (iv) The age of each party to the marriage and the duration of the marriage;
- (v) Any physical or mental disability of either of the parties to the marriage;
- (vi) The contributions made, or is likely in the future to be made, by each of the parties to the welfare of the family (to include contributions made by each of the parties to the accumulation of matrimonial assets as well as non-matrimonial property) and any contribution made by looking after the home caring for the family;⁷
- (vii) 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; and
- (viii) The value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring.



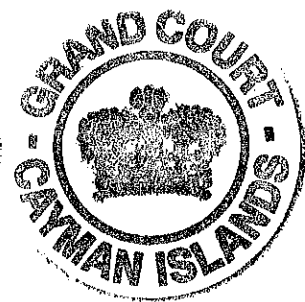
27. In *McTaggart v McTaggart* [2011 2 CILR 366] (“*McTaggart*”) the Court of Appeal clarified the law as it applies in the Cayman Islands in ancillary relief financial claims. Sir John Chadwick, President of the Court of Appeal, in *Valerie Ayala Gordon v Jefferson Raymond Watler* CICA (Civil) 13/2014 (“*Gordon*”) at paragraph 12 reiterated the principles set out in *McTaggart* and the approach to be taken to the case law emanating from England and Wales when he stated:

“12. The correct approach to the division of property in ancillary relief cases was set out by this Court in McTaggart. At paragraph 40 of the judgment in that case the Court said this:

“40. We were referred by the parties, both in the skeleton arguments lodged on their behalf and in oral submissions made in the course of the hearing, to a plethora of judicial decisions in England and Wales and to a few decisions in this jurisdiction. Observations made by experienced judges are, of course, of assistance to an understanding of the application of the section

⁷ *Wight v Wight* [2006] CILR 1, Zacca P. at paragraph 33.

19 factors; but it must be kept in mind that most cases in this field are decided on their own facts and that there is a risk that extensive citation may confuse rather than illuminate. It is not necessary, I think, to look further than the decision of the House of Lords in *Miller* - and in particular the speeches of Lord Nichols and Baroness Hale - in order to identify the principles. Leaving aside, in this context, the best interest of the children, which (as I said) are paramount, there are three strands: need, compensation and sharing [2006] 2 AC 618 at paragraphs [10]-[16] per Lord Nichols and at paragraphs [138]-[143] per Baroness Hale. The ultimate objective, as Baroness Hale explained at paragraph [144], is to give each party an equal start on the road to independent living. She said this:



'[144] Thus far, in common with my neighbour and learned friend Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need, generously interpreted, compensation and sharing. I agree that there cannot be a hard and fast rule, but whether one starts with equal sharing and departs when need or compensation supplied a reason to do so, or whether one starts with need and compensation and shares the balance, much will depend on how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal share start on the road to independent living.⁸'

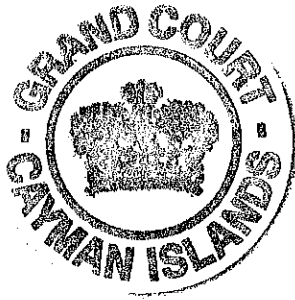
When Baroness Hale referred to "sharing" in that context, she had in mind - as her speech demonstrates - sharing of all the assets; not simply sharing the assets which could be classified as matrimonial property. This court went on in *McTaggart* to say this, at paragraphs 42 and 43:

"42. In this jurisdiction a court will need to consider whether, having proper regard to the section 19 factors, an order under section 21(b) of the Law for the disposition of the matrimonial property will make appropriate provision for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under section 21(e), that is to say, an order making financial provision for that party out of property of the other party.

43. It seems to me reasonably clear (and I would so hold) that, if satisfied that an order under section 21(b) of the Law (or the combination of orders under section 21(b) and (e)) would make

⁸ My emphasis by underlining.

*appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing), the court should not, without good reason, make an order for periodic payments under section 21(f). To make an order for periodic payments - in circumstances where such an order is unnecessary because appropriate provision can be made by the disposition of matrimonial property either (under section 21(b) or by a capital adjustment from the separate property of the other party (under section 21(e)) - would be inconsistent with the principles of clean break to which Lord Scarman referred in *Minton v. Minton*, ([1979] AC at 608).*



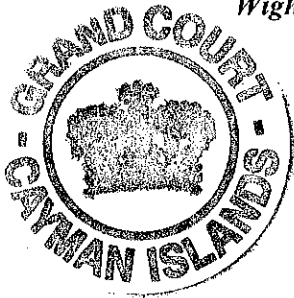
“There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other - of equal importance - is the principle of ‘the clean break.’ The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order....”

*Those observations must be read in the light of the observations in *Miller* - and in particular those in the speech of Baroness Hale to which I have referred - that the ultimate objective is to give each party an equal start on the road to independent living.”*

28. When deciding whether to make an order under s.21(b), and from where any such order should be made, as made clear by the Court of Appeal in *McTaggart*, I am required to consider and decide which assets are to be regarded as being marital property. In the combined House of Lords appeals of *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, [2006] 2 AC 618 (“*Miller*”), Lord Nicholls described matrimonial property as “property acquired during the marriage otherwise than by inheritance or gift.” Its

distinguishing feature is that it is “*the financial product of the parties’ common endeavour.*” In *McTaggart*, Sir John Chadwick P. approved Lord Nicholls’ view.⁹

29. In *W v W* [2009 CILR 225] Sir John Chadwick P. reiterated the importance of the principles set out in (i) *Wight v Wight* 2006 CILR 1 (“*Wight*”), (ii) in *White v White* [2001] 1 A.C. 596 (“*White*”), and in (iii) *Miller*. Referring to Forte J.A.’s ruling in *Wight*, the President stated that the Court should construe s.19:

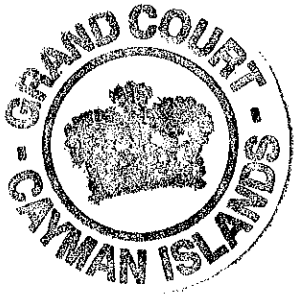


“*On the basis of the new approach to the institution of marriage and the fact that it is a union of partners. Each therefore would be entitled to equal share of the assets acquired in the marriage, unless there is a good reason to depart from that principle.*”

30. The approach taken by the Court of Appeal is consistent with the guidance just given by the Privy Council in *Scatliffe v Scatliffe* [2016] UKPC 36, *Privy Council Appeal No. 0059 of 2015*¹⁰ in its decision delivered on 12 December 2016. It involved an appeal from the Eastern Caribbean Supreme Court (British Virgin Islands) in which the Board was considering s.26(1)(a) of the Matrimonial Proceedings and Property Act 1995 (“MPPA”) which obliges the Court to have regard to “*the property and other financial resources which each of the parties... has or is likely to have in the foreseeable future.*” The approach required under s.26(1)(a) MPPA is similar to the approach taken by the Grand Court in the Cayman Islands when exercising its duty under s.19 of the Law, when it has one eye on guidance given in the English case law concerning the factors under section 25(2) of the MCA.

⁹ The husband’s attorney indicated in her email to the Court dated 7 February 2017 that the husband “*agreed from the outset that all assets were matrimonial assets and should be divided equally between the parties.*”

¹⁰ Copy of decision given to the parties at the hearing on 17 January 2017.



31. The position is that the Court should determine, whilst reminding itself that it must have regard to the best interests of the children first at the outset as well as when then considering the other factors in s.19 of the Law, what the matrimonial assets are and their value and then deciding how they should be fairly divided. If those assets do not appropriately meet the needs of the children and each party, then the Court may consider making a spousal periodical payment orders under s.21(f) of the Law. On the other hand, Sir John Chadwick P. stating the importance of the clean break principle and confirming its applicability to ancillary relief cases in the Cayman Islands made clear that if the division of the assets would make appropriate provision when considering need, compensation and sharing then the Court should not make a spousal periodical payment order “*without good reason.*” An observation which is no doubt supported by the husband who seeks a clean break in this case.

32. I have carefully considered the case authorities which the parties have referred me to. I also have regard to the principles outlined above, much of which was set out in similar detail and terms in my judgment dated 6 March 2015 in *AT v JT* Fam 34 of 2012 and in my Judgment dated 18 February 2016 in *RE v CD* Fam 119 of 2012. As stated by me at paragraph 29 in the latter case:

“The principles highlight that the Court is charged with dividing the assets in a fair and equitable manner, whilst trying to see if there can be a clean break.”

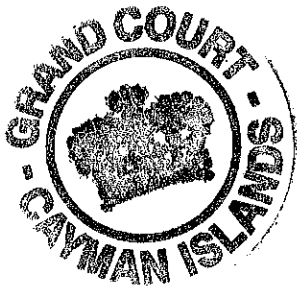
Conduct

33. Before going on to carry out the review required under s.19 of the Law it is necessary to address the husband’s contention that this is a conduct case because of the wife’s troubling problems relating to alcohol intake and also due to her recent driving under

influence charge. I note from emails attached to the closing submissions that the husband has, through his attorneys, been writing directly to the Director of Prosecutions to obtain greater details about the status of the charges. It appears that he was encouraging the Prosecuting authorities to speed up the process concerning the road traffic criminal proceedings involving the wife. I will leave it to others to determine the appropriateness of such direct intervention by a non-party to the criminal proceedings.

34. It is arguable that, although the Courts in the Cayman Islands have gleaned guidance from the decisions of the Courts in England and Wales containing their approach to the more extensive s.25(2) MCA factors when exercising their duty under s.19 of the Law the s.25 (2)(g) MCA, due to the overlap and similarities in most factors, the conduct factor may not be applicable to the same extent or manner in the Cayman Islands. There is no reference to conduct or behaviour in s.19 of the Law, although I note that this has not, in the past, prevented the Courts from being able to draw adverse inferences against a party in ancillary relief proceedings if that party has failed to give adequate disclosure. I have not received any submissions from the parties on this jurisdictional point and therefore I do not seek to herein determine that potential issue.

35. However, proceeding on the basis that conduct may be a factor for the Court to consider, I am satisfied that this is not a conduct case. This is not a case where the Court should find that the wife alone, although accepting that her alcohol consumption has contributed to it, is to blame for the marriage breakdown. Unfortunately, the wife suffers from a generalised anxiety disorder which appears to have been exacerbated by the difficulties between the parties and their marital relationship and has led to the wife, on occasion,



drinking excessive alcohol.¹¹ The wife has obtained therapeutic counselling for quite some time to try to treat and address her illness. The conduct alleged is not of the type that one usually sees in a conduct case, namely conduct which has financial implications such as (i) non-disclosure, (ii) dissipation of assets; (iii) improperly leaving employment to deliberately reduce income capacity: or (iv) injuring a spouse and thereby reducing his/her income capacity.

36. Stanley Burton J. in *S v S* [2006] EWHC at paragraphs 37-39 carefully reviewed non-financial conduct cases and the test to be considered when he had to decide whether or not the alleged conduct in that case should be taken into account. As there appears to be little or no case law in the Cayman Islands on the approach to conduct in ancillary relief proceedings, I see some ongoing benefit being derived by my setting out in full this part of Burton J.'s helpful judgment;

"37. It is common ground that for conduct to be taken into account in the assessment of financial provision/property adjustment, either by way of enhancement of the position of the 'innocent' party, or reduction or elimination of the entitlement of the 'guilty' party, such conduct must be exceptional. The statutory provision in s25(2) I have already set out in paragraph 22 above, namely by reference to subsection (g) that the court shall have regard to conduct "if that conduct is such that it would in the opinion of the court be inequitable to disregard it". The exceptional nature of this course is referred to by Lord Nicholls in Miller at para 65, and again by Baroness Hale at para 145:

"It is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in Wachtel v Wachtel [1973] Fam 72 at 80 the conduct had been 'both obvious and gross' ... It is simply not possible for any outsider to pick over the events of a marriage

¹¹ Paragraphs 16-32 of the wife's affidavit sworn on 17 March 2015 and report from Pauline Vander Grinten, Licensed Mental Health Counselor dated 11 March 2015 in bundle at C tab 2 page 14321.



and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

38. *I have been told by Counsel that there are only rare cases in the reports where this has occurred. I have been taken to what I believe must be all of them. The examples given include:*

i) Armstrong v Armstrong [1974] SJ 579: wife shoots husband with his shotgun with intent to endanger life.

ii) Jones v Jones [1976] Fam 8: husband attacks wife with a razor and inflicts serious injuries: there are financial consequences (wife rendered incapable of working).

iii) Bateman v Bateman [1979] 2 WLR 377: wife twice inflicts stab wounds on her husband with a knife.

iv) S v S [1982] Fam 183: husband commits incest with children of the family.

v) Hall v Hall [1984] FLR 631: wife stabs husband in the abdomen with a knife.

vi) Kyte v Kyte [1987] 3 AER 1041: wife facilitates the husband's attempted suicide.

vii) Evans v Evans [1989] 1 FLR 351: wife incites others to murder the husband.

viii) K v K [1990] 2 FLR 225: Husband's serious drink problem and "disagreeable" behaviour led to the forced sale of the matrimonial home and serious financial consequences to the wife.

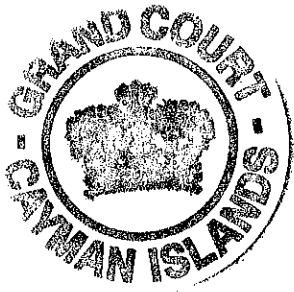
ix) H v H [1994] 2 FLR 801: serious assault and an attempted rape of wife by husband: and financial consequences because the consequent imprisonment of husband destroyed his ability to support her.

x) A v A [1995] 1 FLR 345: husband assaults the wife with a knife.

xi) C v C (Bennett J 12 December 2001 unreported): wife deliberately drugged husband to make him very sleepy and then while he was in a somnolent state placed a bag over his head, which she held in such a way that the husband could not breathe. Although it was found that the wife did not have an intent to kill, Bennett J concluded that the husband did believe that she was trying to kill him, and that her aim was to make him so believe.

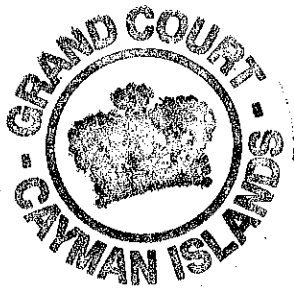
xii) Al-Khatib v Masry [2002] 1 FLR 1053: husband guilty of "very grave" misconduct in abducting the children of the marriage in contempt of court.

xiii) H v H [2006] 1 FLR 990: very serious assault by husband on wife with knife, leading to 12 years imprisonment for



attempted murder and with financial consequences, namely destroying her Police career.

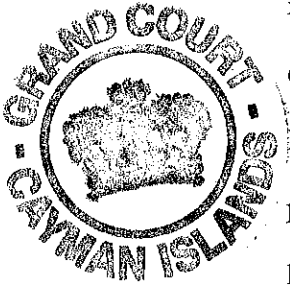
39. *As will be seen, it is not suggested that there were any financial consequences from the conduct of which the Applicant complains in this case, which factor may have exacerbated, in the judgment of Scott Baker J, the facts in K v K referred to at (viii) above. However, that case apart, all of the conduct found in those cases appears of manifest seriousness. Apart from the statutory provision, and the words of Ormrod J in Wachtel quoted by Baroness Hale above, there is a certain amount of recurrent phraseology: "If the courts were in these circumstances not to discharge the order, the public might think that we had taken leave of our senses" (per Balcombe LJ at 355 in Evans at (vii) above): Sir Roger Ormrod in Hall at (v) above describes (at 632) the conduct as 'gross and obvious' which has "nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage" and which the judge's "sense of justice required to be taken into account": Bennett J in C at (xi) above, asks whether "it would be repugnant to any sense of justice for the wife to receive any award at all". Mr Mostyn QC pointed to the words of Sir George Baker P in W v W [1976] Fam 107 at 110D when he referred to the sort of conduct which would cause the ordinary mortal to throw up his hands and say "... surely that woman is not going to get a full award": and, in the course of submissions, he suggested a test of applying what he called the 'gasp factor.'*



37. In reaching my conclusion that that this is not a conduct case, I have regard to the above review and tests. I do not conclude that the alleged conduct of the wife was such that it would be inequitable to disregard it in making my orders as to proper financial provision. The case is distinguishable from *K v K* [1990] 2 FLR 225 where the Court held that conduct was one of the matters "to be weighed in the scales." The husband in *K v K* had a serious drink problem, but he also suffered from a personality disorder and his predicament was found to be "largely self-inflicted." Scott Baker J. on page 230, when

considering conduct, found it to be significant that the husband's drink problem and associated disagreeable behaviour had led to the neglect of the house and ultimately the forced sale of the matrimonial home. There were clearly financial implications flowing from the husband's conduct. The husband's inability to find employment was also considered to be a relevant factor when determining it to be a conduct case.

38. If, at the upcoming hearing to address child residence issues, McMillan J. determines that there should be a variation due to conduct he ascribes to the wife, if that variation involves a drastic reduction in the amount of time that the children spend with the mother, that may have a bearing on the level of child maintenance and may amount to a change of circumstances meriting consideration to vary any child maintenance order that I may make in this judgment. It is unlikely to change the Court's goal to try to give each parent the opportunity to own a relatively comparable standard of accommodation and lifestyle for themselves and for the children to enjoy when staying with them.



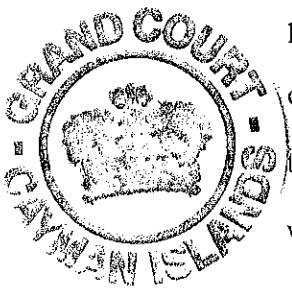
The Matrimonial Assets

39. There is no dispute concerning what assets are to be considered as being matrimonial assets. There is a degree of dispute about the valuation of certain assets, primarily the matrimonial home and certain investment accounts.

The Chattels

40. In the Skeleton Argument filed by the wife at the commencement of the hearing she submitted that a figure of US\$145,239 should be applied to the asset total for household chattels (furniture and non-furniture). The husband values the furniture to be

US\$65,153.21¹² and the wife at paragraph 30 in her opening Skeleton Argument stated that the furniture is valued at US\$102,873. However, at paragraph 10 in the wife's Written Closing Submissions, she accepts that the parties failed to place sufficient evidence before the Court to enable orders to be made about the division of the chattels. The parties reconfirmed this at the hearing on 17 January 2017. I note that in the Schedule of Marital Assets prepared by the husband the items listed as each party's personal property have a total value which is almost the same. Having regard to that and to the absence of any evidence to support the valuations given and the absence of any legal submissions on how to approach wedding rings, I am not able to include a figure for chattels when considering the total figure of assets for division. As also stated at paragraph 10 in the wife's Written Closing Submissions, the parties will as a consequence regrettably have to resolve the issue of chattels between themselves. I note that the husband indicates¹³ that the wife would be entitled to remove non-furniture items which the wife values at US\$49,000.¹⁴



41. When there may be issues about chattels (furniture and non-furniture) to be resolved in ancillary relief proceedings, parties should have regard to the guidance given by me at paragraphs 62 to 71 in my Judgment dated 18 February 2016 delivered in *RE v CD Fam 119 of 2012*. For completeness sake I repeat what I noted at paragraph 69 when considering gifted jewellery, including wedding rings, namely that "... unless it can be demonstrated that it was expressly intended to be returned to the giver in the event of the relationship breaking down, a woman's jewellery is hers to keep regardless of whether it

¹² See paragraph (b) on page 3 of the husband's Written Closing Submissions.

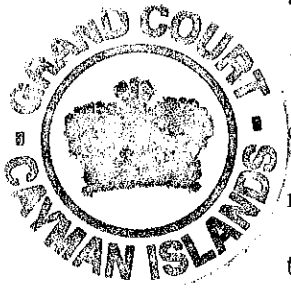
¹³ Paragraph (x) on page 8 husband's Written Closing Submissions.

¹⁴ Paragraph 32 Wife's Closing Submissions. - The husband's attorney indicated in her email to the Court dated 7 February 2017 that the husband had indicated that if these non-furniture items were removed by the wife then they "should be accounted for by a corresponding credit to her side of the equal division of the assets."

was bought or gifted to her." The same approach would be taken in relation to a husband's wedding band.

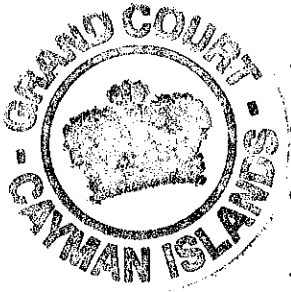
The Matrimonial Home – Valuation – Approach to Experts' Reports

42. The primary matrimonial asset is the matrimonial home which is held in the parties' joint names. The husband wishes to retain the property on the basis that, subject to him being able to obtain sufficient funding, he pays 50% of its equity to the wife. At the hearing on 17 January 2017 the husband's Counsel reiterated that the husband would have to take out a 5 year unsecured loan at the higher interest rate at prime plus 4% due to the fact the matrimonial home was already acting as collateral for the mortgage with his employer on that property.



43. He wishes to retain the property as the mortgage on the same is with his employer at a preferential rate, and he points out that one cannot guarantee whether the property would sell at a figure lower than the value given by the Court and that the children at this unsettled time are enjoying living there.

44. The wife would also prefer to remain in the property for the sake of the children, but she reluctantly recognises that would not be financially viable. At the January 2017 hearing the wife clarified that she was not seeking an order that the property be sold. However, in light of the husband's evidence about the mortgage costs and the US\$8,189.01 per month cost for servicing the additional loan he proposed to take out to compensate the wife, if the Court's findings meant that the husband was not in a financial position to make reasonable spousal and child maintenance provision, she felt the property should be sold and that each party receive 50% of the equity from which they could then purchase alternative properties for themselves and the children.

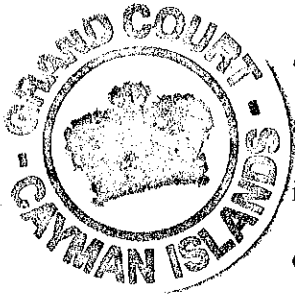


45. The parties are unable to agree the valuation of the matrimonial home. They have each instructed a valuer. The wife instructed Mr. David Groves at DDL (“DG”), a chartered quantity surveyor, who provided a written Valuation Report dated 12 January 2016. In the report he opined that the market value of the property was US\$2,000,000 (excluding chattels). In his oral evidence he said that the value of the property may well have risen above that figure since January 2016. The husband instructed Mr. Michael McGrath (“MM”), Head of Valuations at BCQS and BCQS’ senior valuation surveyor, Kevin Gillett, who provided a written valuation report dated 7 June 2016. In that report they gave a market value of US\$1,875,000 (excluding furnishings).

46. DG indicated that he came up with his figure of US\$2 million based upon his review of comparable sales at the specific development and in the Crystal Harbour area. That valuation included a figure of US\$164,000 for upgrades to the villa. He noted that land in Crystal Harbour had risen by 20%. He expressed a view that the property was the best appointed unit in the development, as it was at the end of a cay with the greatest water frontage and canal frontage as well as benefiting from significant upgrades. He also highlighted that the lot has a larger acreage. He expressed a view that early sales, and in particular the first sale at a new development, will sell at a lower price in order to generate interest. He said that to get the “*relevant valuation*” one should look at the sale price of later properties that have been sold. He noted that Villa #2, the last villa for sale, had an asking price of US\$1,895,000 excluding upgrades.

47. MM indicated that he adopted a comparable sales approach when reaching his valuation of US\$1,857,000. Although he felt it was an unusual approach by DDL to report gross figures, MM conceded that DG had made allowance for chattels when comparing properties. He accepted that properties sold in the development had increased in recent

months and that Crystal Harbour is a “hot area” for sales, but he felt that the older valuations were still relevant in arriving at a figure for what the property is currently worth. He went on to concede that Villa #1, which was sold for US\$1,795,000 (US\$1,945,000 including US\$150,000 upgrades), and Villa #4, which was sold for US\$1,795,000 (US\$1,960,000 including US\$165,000 upgrades), were the “most relevant within the subject development.” He accepted that the matrimonial home is “the premium lot by significant measure in the development,” in the “best location in the development” and with a significantly larger acreage. Despite this and despite hearing DG’s evidence, in re-examination, MM indicated that he did not wish to change the valuation figure expressed in his report.



48. MM informed the Court that in this, and other developments, the stamp duty is paid on the pre-build land value. In this development the land was valued at CI\$300,000. However, he noted that when a contract for sale was entered into for Villa #1 building work had already commenced meaning that the stamp duty paid was on an amount of CI\$420,000 rather than CI\$300,000. He said that needed to be taken into account when comparing the properties. He also stated that purchasers in such developments preferred to buy new-build rather than units already completed, so that they could add their own finishing touches.

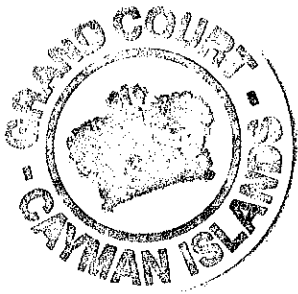
49. It is regrettable that MM’s suggestion made on 9 December 2015 for a joint valuation to be obtained from a jointly instructed expert to resolve any issues in relation to the property was not taken up. The knock-on effect of this, and the parties’ failure to agree the valuation, is that DG and MM had to be called to give evidence. This has inevitably increased the parties’ costs expended on these proceedings and it has occupied a considerable amount of valuable court time. When I make this comment I have regard to

DG's observation in his evidence in chief that the tolerances in valuations are within 10% and that, although he felt MM's valuation to be on the conservative side, it was "*within reasonable parameters.*" I note MM's understandable observation at the end of cross-examination that he "*...was surprised that we are here. We are apart only by 6.2% and the professional governing body within the industry says that the difference can be minus 10 or over 10% out.*"

50. Having regard to the costs of experts, in future ancillary relief cases, parties should have in mind that the use of expert evidence and advice should be governed by the principles of relevance and proportionality. As stated by Thorpe LJ in *Vernon v Bosley (Expert Evidence) (Note) (1998) 1 FLR 297* the expert's fundamental duty is to assist the Court on matters within his expertise rather than state simply that which a party wishes him to represent. The expert should include in his report the standard provision to verify his recognition of the duty of an expert to the Court. When I highlight the above I am satisfied that the two valuers who attended Court at this hearing were willing to make sensible concessions when suggestions were made to them during their evidence and understood their duty to the Court.

51. If there is a dispute, before engaging an expert to value a matrimonial home or other property, the parties should set out their views of valuation at the first appointment hearing. At the first hearing the gap can be established and efforts made to identify and instruct one valuer acceptable to both. Of course, it may be purposeful to engage a valuer at an early stage if negotiations are commenced before proceedings.

52. In the rare occasions that it is necessary to instruct separate experts for each party; this should be raised at the first appointment hearing and consideration given as to whether



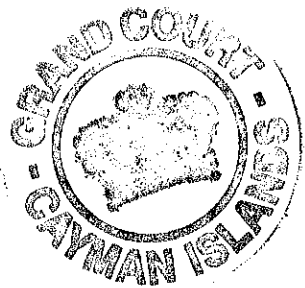
there is identifiable common ground and to reduce the issues in respect of which the experts differ.

53. Experts should be directed to the issues by legal representatives and should be engaged on strict terms by the attorneys. Estimates of experts' costs to date should be available at every stage and be exchanged. Each party should be informed of the hourly rate for attendance at Court. The scope of enquiry should be defined by the attorneys.¹⁵

54. Having reviewed the evidence of the experts, I am of the view that the villas recently sold at the development give the best indicator of the market value of the matrimonial home. I do not accept the husband's approach, set out in the Written Submission filed on 10 June 2016, of utilising the purchase price as the basis upon which to calculate the equity in the home. I find that the market value placed on the property by MM is on the conservative side, although I accept his submission that I should also have regard to the premium placed on a new-build as against a re-sale. Any purchaser of this re-sale and completed property would now have to pay substantially more in stamp duty than for a new-build, something they would take into account when considering the purchase price. The sale of the villa was the first completed at the development and the lower price when compared to recent sales reflects that. In addition, it is accepted that in size and location it is the premium villa, factors indicating that the re-sale price should be higher than that for the other villas.

55. I informed MM that the parties had been told by the Court that if the valuations were contested, and if no valuer attended to give evidence, the Court might take the same approach as it does in Registered Land Law cases when a lender is asking for a minimum

¹⁵ Guidance Notes Applications for Ancillary Relief in the High Court, Northern Ireland, 2006.

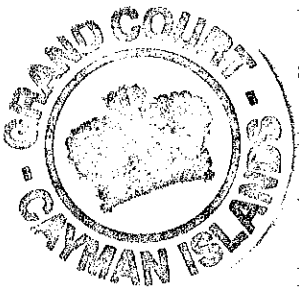


price for sale to be set, namely that it might find a figure midway between the two valuation reports. I then asked him, in light of his expressed surprise and the guidance of the professional governing body, whether such a course would have given a fair figure, he answered "*I would say that would be fair.*" I note that the position of the husband is that, despite his contentions about the appropriate way to value the property, he is "*prepared*", having regard to his valuer's observations, to "*calculate the equity in the home on the basis of this median figure*", namely US\$1,937,500.¹⁶

56. I do not accept on the balance of probabilities that the wife or her employer has, as suggested at paragraph (j) of the husband's closing submissions, manipulated the information provided to the experts. There has been no credible evidence produced to substantiate such a serious contention, the manner in which the final villa for sale is being marketed does not amount to the same. I do not accept the submission made on behalf of the husband that a proper valuation can be reached by only having regard to the purchase price and adding to that the value of any improvements. As the home was one of the first properties to sell, the Court should also have regard to the value of more recent sales as well as comparing the nature of the properties.

57. Having heard the evidence, I am better placed to determine a valuation figure by analysis rather than taking the approach outlined in paragraph 55 above. When I do so, I have regard to the 10% tolerances set by the professional body that guides valuation surveyors. If this had been a new-build, having regard to its location, high-end upgrades and to the recent sales, a market valuation of at least \$2 million would have been appropriate. However, as it is a re-sale, I find that an appropriate figure for the market value is US\$1,950,000 (unfurnished).

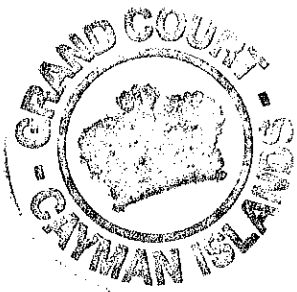
¹⁶ Paragraph (r) page 5 Written Closing Submissions.



58. The US\$1,600,000 mortgage taken out on the property was obtained by the husband from his employer at a preferential 3.5% per annum fixed borrowing rate. Monthly Payments are deducted directly from his salary. The husband has to be the registered title holder of the property and it must be his principal residence. If he ceases to be an employee of the lender, that would be regarded as being an event in default.

59. The mortgage redemption figure in the statement provided by the lender dated the 8 July 2016, the most recent provided to the Court, is US\$1,064,875.79. I therefore find that equity in the matrimonial home is US\$885,124.61. As both parties agree that they have a 50% interest in the equity, that interest can be quantified as being US\$442,562.32.

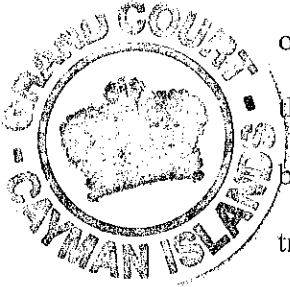
60. The wife accepts that she would not financially qualify to purchase the husband's share in the home. She reluctantly accepts that she will have to find alternative accommodation. To her credit, she recognises that any property that she should be looking to purchase would be of a good standard, but not at the level of the matrimonial home. In her affidavit she suggests that the property be similar to the one which the parties previously owned in Snug Harbour, and with this in mind she estimated the cost to be something in the region of US\$792,000-US\$992,000 (exclusive of closing costs and stamp duty)¹⁷. She indicated that she had a borrowing capacity of US\$365,000 and if she received a half share of the equity in the matrimonial home, namely US\$442,562.32 and having regard to her interest in other assets, she would have sufficient to purchase a home for around CI\$800,000. The Court has been shown sale particulars of suitable homes in the Snug Harbour area in that approximate price range. It is evident that the wife would need as much of the proceeds of sale in immediate cash as possible to enable her to rehouse.



¹⁷ In the Schedule F outgoings drafted and supplied by the wife during the hearing she put a suitable cost for a property exclusive of cost of purchase and stamp duty at US\$725,000.

The Parties' Permanent Residency Applications and Ownership of the Matrimonial Home

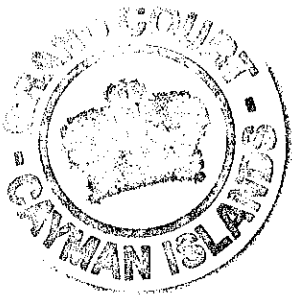
61. Before I move on to consider the other assets, I must address the interrelationship between ownership of the matrimonial home and the parties' immigration status. The husband raises the fact that both of the parties have used the home as grounding for their permanent residency applications. His Written Closing Submissions highlight Factor 3 in the Immigration Regulations (2015 Revision), especially the point that maximum points will be awarded automatically where the total investment in property in the Cayman Islands exceeds CI\$500,000. It is also highlighted that where the investment is jointly owned by spouses, points are awarded based on the full investment amount rather than on the percentage ownership of each spouse. A combined income of both spouses will also be used in the calculation. However, it is unclear whether the parties would be still be treated as spouses after any certification of the dissolution of the marriage even though the applications for permanent residency were made at the time when they were married.



62. The husband contends that his Permanent Residency application would be severely prejudiced if the matrimonial home was sold, as he would not be able to receive the benefit of the full 30 points. The husband states that if the property is sold this may result in the entire family having to "*uproot themselves*" from the Cayman Islands, with him losing his current employment and the ability to support the children. It is not for me to make findings on the limited submissions and lack of evidence before me about his permanent residence application and the Immigration Law. It is clear that, if the husband still has his legal interest in the home at the time that his application is being considered by the Board, his application would be stronger and more likely to succeed. If the property is sold and by the time the Board considers his application he was able to purchase another property with equity of around \$500,000, then again his application may well succeed as he may then again have maximum points. If the property has been

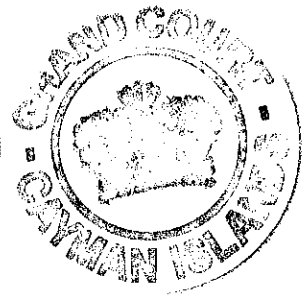
sold and he had not purchased another property by the time that the Board considered his application, then the concern about whether there would be a successful outcome to this application would be heightened. This is, of course, all dependent on the current Immigration Law and the points system still being in place at the time when the Board considers this long outstanding application for permanent residence.

63. The wife does not seem to place as much emphasis on the potential detrimental consequences to her permanent residence application if the property were to be sold. Although not seeking an order for the sale of the property, she contends that the property may have to be sold if the husband would otherwise be unable to properly maintain her and the children and if she would otherwise be unable to suitably rehouse herself. If the matrimonial home is transferred into the husband's sole name upon a payment to the wife or if the home is sold, she would not receive any points for property ownership if she has not invested into a new property by the time the Board considers her application.



64. Although the impact of any sale on the parties' immigration status is not specifically referred to as a factor to consider in S.19MCA or s.25 MCA, it is something that I must, to a degree, bear in mind. If both or either the parties have to leave the Cayman Islands for immigration reasons that would detrimentally affect their income capacity, their living arrangements and their ability to meet their responsibilities to this family. The foreseeability of such changes in the family's circumstances is almost impossible to determine in light of the matters raised by me in paragraphs 61-63 above. I am conscious that if the husband were able to retain the property that would likely enable him to remain and meet the expenditure he says he wishes to make for the children which he details in his evidence. It is but one of a number of the factors required to be taken into account and is not to be elevated above the others.

65. As a consequence of the regrettable current state of affairs in relation to the processing of permanent residency applications, this family and the Court have been placed in a most unsatisfactory position. When the parties made their joint application for permanent residency, if it had been processed efficiently by the Authorities, they would have had more financial certainty as a decision would have been made about where this family may reside long-term. Where there is such an inordinate delay in the processing of permanent residency applications there may well be, as there has been in this case, a change of circumstances for some families due to unfortunate marital breakdown during the interim period. This means that the Court is left in a difficult position when exercising its jurisdiction under s.19 of the Law and endeavouring to put the interests of the children first. Having regard to the Overriding Objective and to the best interests of this family, it would be highly inappropriate for the Court to simply delay making a decision until the outcome of the residency applications. The delay in the processing of the joint permanent residency application, and now of the separate applications, means that this deficient part of the Immigration process is hindering this Court's ability to make informed decisions about this family's circumstances and to carry out its duty to support this and possibly other families within the Cayman Islands who seek assistance within the Family Law justice system.

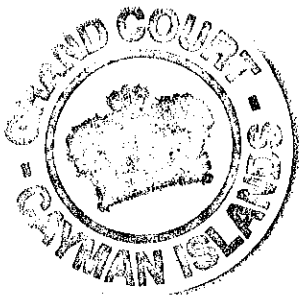


66. The wife contends that, if the former matrimonial home has to be sold, the husband requires sufficient funding to enable him to buy a property of a similar nature and size to the one which she seeks to buy, namely one similar to the former family home at Snug Harbour. Prior to the hearing on 17 January 2017 the parties were informed in writing that the Court would like clarification at the hearing from the husband about the type of property he feels he would require if the sale of the matrimonial home was ordered. Despite this, at the hearing the husband's counsel indicated that no instructions had been

taken on this point, and that in any event he did not wish to take up the opportunity to provide this clarification and would not seek to do so before any order for sale was made and before reviewing the basis upon which any such order was made. In the absence of submissions on behalf of the husband and having regard to the current orders in relation to the children and the importance of each parent to them, I am satisfied that, if I were to order a sale of the matrimonial home, any division of the assets should endeavour to place both parties in a position to buy a family property of a similar value and nature.

Agreed Assets of the Husband

67. The parties agree the US\$ valuations for the following assets under the husband's control:



Butterfield Bank CI account	1,175.43
Butterfield Bank US account	29,044.37
Silver Thatch Pension	264,414.73
SUBTOTAL:	\$294,634.53

Agreed Assets of the Wife

68. The parties agree the US\$ valuations for the following assets under the wife's control:

Butterfield Bank CI account	840.00
Butterfield Bank US account	2,100.00
Pension	13,365.54
SUBTOTAL:	\$16,305.54

Therefore, the total figure of agreed assets is: \$310,940.07

The Parties' Motor Vehicles

69. In relation to the motor vehicles, it is agreed that the husband's Acura MDX is valued at US\$6,509.97. The parties cannot agree the valuation of the wife's 2008 Mazda CX (9) motor vehicle. The wife contends that it has a value of US\$11,280. The husband says it has a value of US\$16,307. In the bundle is an estimate from Mr. Tony Williams at Tony's Toys Automotive Centre dated 8 June 2016 and addressed to the husband giving an estimate of CI\$9,000 to CI\$9,500. The author of the letter also states that the exterior and interior of the vehicle are in good condition and the tires, suspension and mechanical components "*appear*" to be in reasonably good condition. Attached to the husband's affidavit dated 4 May 2015 is a Kelly Blue Book valuation of US\$14,443 for a vehicle in very good (not good or reasonably good) condition. In the Schedule attached to the same affidavit he enters a value for the vehicle of \$18,703.69, a figure which includes a 29.5% mark up for duty and importation costs. It appears that the husband now gives a reduced valuation of US\$16,307 to take into account depreciation. The husband suggests that the Court should use the median figure of US\$13,793.50 from the two valuations. Although, I have not heard from Mr. Williams, who interestingly appears to have prepared the valuation report for the husband and not for the wife, I am satisfied that his evidence, given as a local expert, is the best evidence. The Blue Book valuation was on the basis that the car was in very good condition. Mr. Williams reported that the vehicle was mainly in good condition, but with some parts in only fairly good condition. Mr. Williams' valuation was more recent than the less precise Kelly Blue Book valuation. Accordingly, I value the Mazda, having regard to a median figure in Mr. Williams' valuation, at US\$11,280. This means that the total asset figure for the 2 vehicles is US\$17,789.97

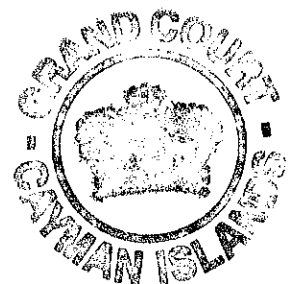


RBC Investment Accounts

70. Both parties hold RBC Investment accounts. Despite the fact that the wife states that she cannot verify the figure as she has not been shown a CDN statement since April 2015 statement, both parties appear to accept that the husband's RBC INV account number ending xx3275 has a balance of US\$0.28¹⁸. In the Bundle at Sec. C Tab 13 pp464-465 there is a US statement for this account dated 31 March 2016 showing the balance to be US\$0.28. The husband has not sought to include the US\$0.28 in the final total of his assets in his Written Closing Submissions. However, the wife highlights the fact that the balance (Canadian and US) as of the date of separation was US\$25,707.58. At the hearing held on 17 January 2017 the husband indicated that the funds from that account were transferred by two payments in the middle of April 2015 to the husband's Butterfield US\$ account ending xx0040.¹⁹ The Court was told that US\$10,000 was then removed from that account at the same time to pay some of the fees owed to the husband's attorneys and that the balance was used to meet ongoing family expenses.
71. Despite the contents of the Schedules provided by the parties attached to their Written Submissions, following the parties' confirmation at the January 2017 hearing, it appears that there is now agreement about the relevant value of the husband's RBC investment accounts. At page 9 of the husband's Written Closing Submissions it is submitted the correct total figure that should be taken into account for the husband's Investment accounts is US\$44,218.57. The wife contends that the appropriate date for the account balances are as of 31 March 2016 and so the figure for the RSP account number ending

¹⁸ Schedule attached to the wife's Closing Written submission.

¹⁹ Page 14481 at tab C9 in the bundle.

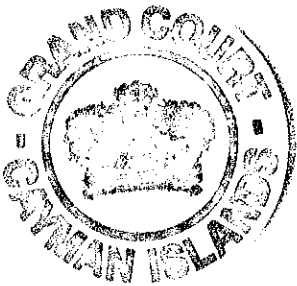


in xx03 is US\$18,346.90 and for the RSP Lira account number ending in xx32 is US\$25,871.67, giving the same total of US\$44,218.57.²⁰

72. At the January 2017 mention hearing the husband clarified which balances he was contending were the relevant ones for the wife's RBC Investment accounts. It was accepted by him that the total figure of US\$153,594 set out on page 9 and 10 of his Written Closing Submissions was incorrect and that the relevant figures were those that appeared in the Marital Assets Schedule attached to the Written Submission which were more accurate.

73. Since their separation the wife has had to withdraw considerable sums from the RBC investment accounts held in her name. The husband has paid considerably more towards clearing his legal fees liability to date, but it is not clear which sources have been used by him to do so. The wife contends that expenditure on fees should be seen as necessary liabilities and that the Court should therefore use the balances in her accounts which were available for disposition in or around March/April 2016 and then also have regard to any later legal fees deductions to get an accurate picture of what assets are available to meet the parties' needs. At the January 2017 hearing the Court indicated to the parties that it could take into account what each party had already expended to meet their fees when calculating the fair division of the assets. The wife's accounts US\$ balances are:

RBC INV end xx90	41,628.96
RBC RSP end xx92	8,969.98
RBC ITF end xx49	17,768.00
RBC RTF end xx93	17,720.00



²⁰ Schedule attached to the wife's Closing Written submission and page 9 of wife's closing submissions.

TOTAL: **\$86,086.94**

The Wife's Total Assets

74. So when reviewing the wife's total assets:

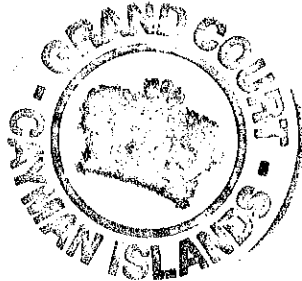
Butterfield Bank accounts 2,940.00

RBC Investment accounts 86,086.94

Pension fund 13,365.54

Mazda Motor vehicle 11,280.00

TOTAL: **\$113,672.48**



The Husband's Total Assets

75. The husband's total assets are:

Butterfield bank accounts 30,219.80

RBC Investment accounts 44,218.57

Acura Motor vehicle 6,509.97

Pension 264,414.73

TOTAL: **\$345,363.07**

The Total of Joint Assets

76. Assets in joint names

FMH (value \$1,950,000 Mortgage \$1,064,875.79) \$885,124.21

The Total of All Assets

77. Total assets are therefore \$113,672.48 plus \$345,363.07 plus \$885,124.21 making a total of US\$1,344,159.76. If the parties have a 50% interest that would amount to US\$672,079.88. The wife's assets amount to US\$113,672.48 and therefore the husband would need to provide her with the sum of US\$558,407.40 to equally divide the assets if the matrimonial home were to be transferred into his sole name.

Division of the Assets - Standard of Living of the Parties – Financial Needs and Obligations and Responsibilities of the Parties - Legal Fees

78. The husband has offered to transfer US\$125,524.60 from his pension fund to the wife's pension and raise a loan to pay her US\$411,108.52. This would make a total of US\$536,633.12, leaving a shortfall of US\$21,774.28 if the assets were to be divided equally. He will need to raise the sum of US\$432,882.80. This means that, having regard to the wife's disclosed borrowing capacity of around US\$365,000²¹, she would have capital in the region of US\$797,883 plus the balances in her RBC investment accounts (minus any legal fees to pay) to invest in a new property inclusive of stamp duty. A property valued at around US\$750,000 – US\$800,000²² would meet her and the children's needs.

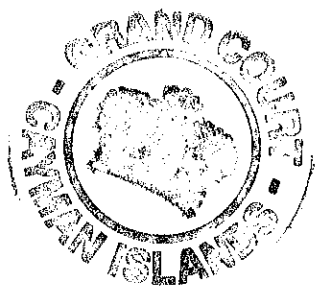
79. Before concluding how the assets should be divided I have regard to the legal fees already spent by the parties. The wife's legal fees position as of 1 October 2016 was that she had paid CI\$55,627 (US\$67893²³) leaving a balance outstanding of CI\$55,373.²⁴ At the hearing on 17 January 2017 and in an email dated 25 January 2017 it was confirmed

²¹ Paragraph 17 of Written Closing Submissions for Wife and email Butterfield Group dated 10 June 2015

²² In the schedule of outgoings drafted and supplied by the wife during the hearing she put a suitable cost for a property at US\$725,000.

²³ Online XE Currency Converter (<http://www.xe.com/currencyconverter/convert/?Amount=55672&From=KYD&To=USD>).

²⁴ See paragraph 50 Written Closing Submissions on behalf of the wife.

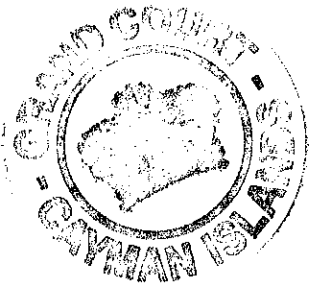


that as of 1 October 2016 the husband had paid US\$97,119.77 in legal fees to his attorney. This means that as of 1 October 2016 the husband had depleted matrimonial assets or from his considerably higher income been able to pay US\$41,746.77 more towards his fees than the wife was able to pay from her income and matrimonial assets.

80. The husband has been able to make these substantial payments, although in his affidavit sworn on 23 March 2015 partly to meet an application by the wife for a costs allowance order he stated that he did not have CI\$20,000 available to give to the Respondent's attorney as the bulk of liquid cash and investable marital assets were in the Respondent's sole name. The husband, whilst acknowledging that these accounts were marital assets, suggested that the wife could access the RBC Investment accounts to meet her legal fees. He stated, "*I would respectfully request that the Respondent pay her legal fees from the accounts in Canada if she is saying that she does not have the funds here in the Cayman Islands.*"²⁵ In other words, the husband was authorising the wife to deplete the marital assets to meet his legal fees, whilst at the same time he depleted marital assets and/or used income to make a greater payment towards his fees.

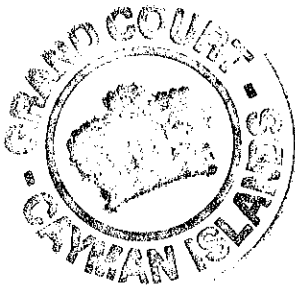
81. Payment of her legal fees is something that will 'eat into' the capital available to meet her and the children's needs. She would need to take sums required to meet the housing needs to pay the costs. As mentioned to the parties at the January 2017 hearing, having regard to the circumstances set out above, it is appropriate that the wife be placed in the same position as the husband as it relates to meeting their legal fees as of 1 October 2016. With this in mind, I direct that the husband in addition pay to the wife the sum of US\$41,746. Subject to any later submission made by Counsel, my preliminary view is that each party should then be responsible for their own remaining fees.

²⁵ Paragraph 88 of husband's affidavit.



82. This means that the wife will transfer her interest in the matrimonial home to the husband and he will retain the assets identified herein as being his, save that he must transfer US\$125,524.60 from his pension fund to the wife's pension fund and pay her a lump sum of US\$474,629.57.

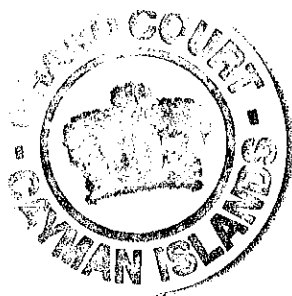
83. Before moving on it would be remiss of me to fail to highlight my concern about the high level of legal fees in this case, well over US\$200,000. I endorse Sir John Chadwick's observations in *B v B* [2014 (2) CILR 234 at 281] when he said;



"As both Lord Hoffman and Lord Hobhouse of Woodborough pointed out in Piglowski, it is important not to lose sight of proportionality. The father and the mother need to ask themselves whether it is really in the best interests of the children to dissipate the limited resources available to them in protracted litigation."

84. I am conscious that there are still ongoing children proceedings which will need to be resolved before the certificate of dissolution can be granted. I accept that this is not a big money case, but as a great deal of money and time has already been squandered on these proceedings, the parties should also pay heed to the sentiments of Munby J. *KSO v MJO & Ors* [2008] EWHC (Fam) 3031 when he stated:

"The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial 'pot' to house the wife and children and to



enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband.the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this.”

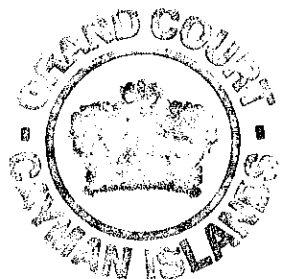
85. It may be helpful for the parties to also pay heed to the following remarks of Jackson J. in *TF v FF [2013] EWHC (Fam)*:

“In my view, the court has a responsibility to discourage currently profligate wasted costs, particularly in a case with a track record like this. It is a matter for each party to decide what they want to spend, but they cannot expect it to be recoverable if it exceeds that threshold.”

The Husband’s Income and Outgoings

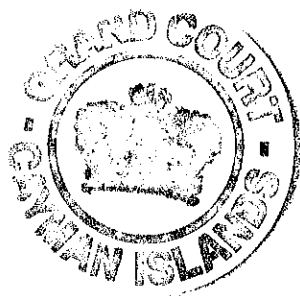
86. As already mentioned, the husband is a Senior Vice President in a firmly established business in the Islands. The marriage has clearly not hindered his career development and the wife has supported the same being prioritised. He is a long serving senior employee and his foreseeable income capacity is likely to be secure especially if his application for permanent residency is successfully processed.
87. In 2015 the husband received a base annual salary of US\$326,350. In 2013 his base salary was US\$280,000 and in 2014 it was US\$305,000. Mr. McGrath rightly submits that having regard to the 3 year average increase of 7-9.8% that his 2016 salary should be assessed at **US\$352,458**, an 8% increase. I assess his income as being US\$352,458.

88. Dependent on the business' profits, the husband is entitled to receive a discretionary bonus each year. The husband indicates that there can be no precise figure placed on bonuses. In 2015 the husband received a bonus of US\$60,000, in 2014 he received a bonus of US\$55,000 and in 2013 he received a bonus of \$50,000. Mr. McGrath again rightly submits that in light of the annual increase by \$5,000 that his bonus payment for 2016 should be reasonably assessed at US\$65,000. I assess his bonus figure as US\$65,000.
89. It is submitted that his income will continue to rise for the foreseeable future. If no bonus or a reduced bonus is received in the future the husband may, at that time, be able to argue that due to a change of circumstances there should be a variation of any maintenance order made.
90. Mr. McGrath rightly submits that, in a case like the one before me, the Court should not overly rely upon a line by line analysis of each party's budgets. However, the Court must still review them to see if the figures and line items raised are reasonable and to enable a more informed decision to be made about what funds may be available and what sums are rightly needed to meet the parties and children's needs. With this approach in mind, I will review each party's declared outgoings and comment upon where savings may be made by them.
91. The husband contends that he should not pay child maintenance to the wife as he is willing to be responsible for meeting all of the major expenses for the children. The



following expenses²⁶ are specified at paragraph (a) on page 11 of his Written Closing

Submissions:



Private School fees-US\$3,673.07	2,755.00 (with rebate)
School uniforms	50.00
School supplies and other items	37.50
Other CIS costs	66.67
School lunches	390.24
Clothes	182.93
Haircuts	73.17
Birthday presents	152.44
Afterschool care clubs/tutoring	350.00
Sports and afterschool activities	550.00
K's hockey fees	86.38
K's hockey equipment	33.33
K's golf	152.34
K's golf lessons	137.20
K's soccer	8.33
K's ice hockey camp	58.13
K's roller ice hockey camp	35.57
M's swimming and equipment	37.50
M's Musicians	132.11
M's soccer	8.33
M's cello	182.93
Sports related travel	1,875.00
K's 3 roller hockey trips	800.00
M's swimming trip	76.02
M's Musicians trip	96.54
Healthcare not covered by insurance	110.00

TOTAL: **US\$6,580.73**
(US\$5,662.66 with rebate)

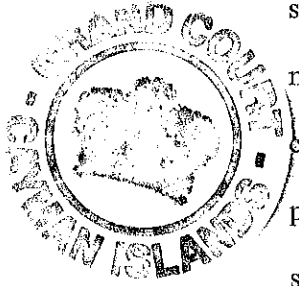
Savings for children's university tuition US\$3,591.03
(US\$42,419.00 per year – 4 years each for K and M²⁷)

TOTAL: **US\$10,171.76**
(US \$9,253.69 with rebate)

92. The husband contends that this would leave the wife with responsibility to only meet expenditure on the children's food when they are staying with her. He contends that this

²⁶ Excluding food, accommodation and child helper.

²⁷ Husband is content for the wife's name to be added as signatory to any college funds savings account opened for each child.



reflects the current position in which he meets all the children's expenses and the wife only pays for small treats for them. The wife is content for the husband to meet all the substantial and extracurricular costs, but would still wish to be in the position to meet the more personal day to day child expenses set out in paragraph 20 above. The husband's comprehensive proposal may to a degree side line the wife's role with the children or place her in a position whereby she will have to approach him and request money to meet some of the day to day expenses.

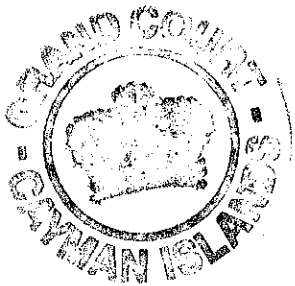
93. When reviewing the husband's schedule in relation to the expenses for the children, the appropriate figure for the school fees should be the rebate figure of US\$2,775. The wife has not sought to question the appropriateness of any of the other figures²⁸, including the US\$9,600 per annum budgeted for K's three roller hockey trips. However, it is not in the children's best interests for the husband to be solely responsible for buying school supplies, children's clothes, children's haircuts and buying presents for the children to attend parties. The mother and the children are entitled to share the enjoyment and partake in the parent/child experience that comes with her physically part meeting these expenses when the children are with her. It is unclear whether the husband's figure of US\$1,829.28 per annum is for birthday presents for the two children or also for presents for parties they will be attending. For the purposes of this judgment, I will take it to be the latter. I therefore find that the outgoings in relation to school supplies can be reduced to US\$20 per month, for children's clothes to US\$90 per month, for haircuts to US\$37 per month, for children's birthday presents to US\$80 per month, a total reduction of US\$219.04. I make these reductions with a view that the wife will also equally contribute to those expenses and I will have this in regard when considering whether to make an order for child maintenance. Having regard to the appropriate figure for the rebated

²⁸ Save for the placing of sums in a college savings fund.

school fees of US\$2,775, the husband's child related expenses could be reduced to at least US\$5,443.62. These may still be further reduced, if the high level of expenditure on the number of children's school sports trips, which could be viewed as being luxury, prevents a reasonable level of child periodical payments and (if deemed appropriate) spousal maintenance being paid to the wife.

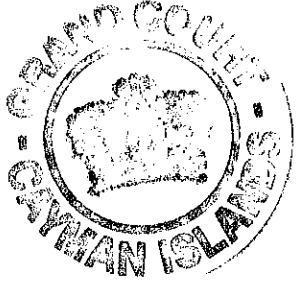
94. Although I accept that if there is disposable income there would be merit in planning for the cost of the children's university education by placing funds in a college savings account, in the circumstances of this case, it is not a necessity that should usurp any requirement for child or spousal maintenance. By the time the children are due to attend university the husband may no longer have the responsibility to pay spousal maintenance or to make the (at least) US\$8,189.01 monthly payments to the unsecured loan he intends to take out to enable him to make a lump sum to the wife in these proceedings. This means that he will then be able to start saving or to pay the lower fees required by a Canadian university from his salary. I therefore find it to be inappropriate for the college savings figure of US\$3,591.00 to be included in his outgoings for the children.

95. During his evidence in chief the husband produced a written schedule of his monthly projected outgoings (budget predictions) in US dollars if he were to remain in the matrimonial home.



DEDUCTIONS FROM SALARY

Mortgage	7,000.00
Life insurance	127.20
Pension	978.38
SUBTOTAL;	\$8,105.00



EXPENSES AT THE MATRIMONIAL HOME

Strata/condo fees	1,237.90
Home insurance ²⁹	1,395.64
CUC electricity	\$70.38
Water	488.91
Water authority (sewer)	140.41
Gas	236.24
Cable TV/internet	64.32
Housekeeper (2 days/week)	975.61
Housekeeper health insurance	195.12
Pet care	40.00
Geothermal maintenance	71.73
Solar panel cleaning	22.01
Pestkill	40.65
SUBTOTAL:	\$4,978.92

VEHICLE EXPENSES

Insurance	49.39
Registration	40.00
Fuel	182.93
Maintenance	150.00
SUBTOTAL	\$422.32

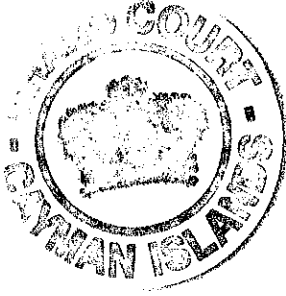
²⁹ Entry in husband's schedule for Home Insurance Inc. contents \$1,025.82 conceded to be an error by husband and should be taken out of schedule).

OTHER EXPENSES

Groceries	925.00
Clothes	60.00
Haircuts	40.00
Vacations	833.33

SUBTOTAL: \$1,858.33

Savings/Emergency fund	\$1,225.35
5 year unsecured loan to pay for wife's interest in the home (US\$411,108.52)	\$8,189.01



96. The above schedule shows a total monthly outgoing of US\$24,778.93.

97. When I review the husband's schedule of outgoings, if he was to remain in the home, I am satisfied that there are reasonable savings that could be made if necessary. A housekeeper for two days a week at US\$975.61 (US\$1,170.73 with health insurance) is a luxury and not a necessity. The cost for a housekeeper's attendance for one day a week would be reasonable and can be assessed at US\$487.80. A figure of US\$9,996 per annum, on top of US\$11,670.72 for school trips, is an excessive amount for travel and may have to be reduced. There is also not an absolute need for a saving/emergency fund investment of US\$1,225.35 per month and I will not include that in the husband's total. I note that the husband indicates that he has a projected grocery bill of US\$925 and, if this is right, the mother is entitled to seek a similar amount as the children are spending equal time with each parent. Accordingly a reasonable figure of the husband's outgoings are assessed to be in the region US\$23,065 per month, with the possibility of further savings

that could be due to the US\$9,996 per annum amount allocated for his vacations and even due to the nature of the unsecured loan.

98. If one adds in the reasonable child expenses set out in paragraph 91 then the total outgoings rise to US\$28,508.62. Having regard to the averaged out figure for the husband's income with a bonus of US\$34,788.16 (417,458 per annum³⁰), he would have a disposable income in the region of US\$6,279.50. As well as acknowledging that there are areas in which the husband could still cut back on his expenditure, I accept that this figure may well decrease if he has to borrow a larger sum of money to meet any sum found to be payable to the wife upon division of the matrimonial assets.



99. The most significant expense arises due to the husband's firm wish to remain in the matrimonial home. Those expenses are US\$7,000 for the mortgage on that property and US\$8,189.01 to buy the mother out of the property. There are no projected figures provided by the husband as to what the outgoings would be if he were not able to remain in the home. If the home was sold and the proceeds of sale equally divided each party would get in the region of US\$442,562.32 pre-any deductions for costs of sale. A sale and an equal division of the net proceeds would also result in a significant reduction in expenses, in particular the proposed five-year secured loan and the size of the current mortgage on the home. It is not clear why the husband seeks to restrict the loan to only five years repayment which makes any repayments very high at this stage. He may need to explore extending the term of that loan if he seeks to remain in the home, and to be able to meet the obligations imposed under any order that I make in relation to the assets and maintenance.

³⁰ Salary US\$352,458 (see paragraph 83 above) and bonus US\$65,000 (see paragraph 84 above).

The Wife's Income, Income Capacity and Outgoings

100. As already mentioned, the wife is employed in real estate sales by a developer. She has a base salary of C\$42,000 plus commission. In 2013, having commenced work in May, she received US\$51,220 but no commission. She continued to receive a US\$51,220 per annum base salary for each year 2014-2106. However, in 2014 she received commission totalling US\$32,899 (2014 total income US\$84,119), in 2015 she received commissions totalling US\$58,525 (2015 total US\$109,745). The estimated commission for 2016 is US\$70,123, making a total of US\$121,343.

101. Evidence was given by the Managing Director of the wife's employer about her foreseeable income. I found him to be a reliable witness, willing to give forthright answers when he was satisfied that the confidentiality of the sensitive disclosure about the status of the development that he was making to the Court would be secured. There remains only one property left for sale by her employer in the development in which the matrimonial home is located, so there will be no further commission from that project.

102. Her employer's other project is likely to be a 3-4 year project and, as realtors may be involved due to targeting of overseas purchasers, the wife's commission will probably be only 0.22% unlike the 0.5% received on the last project. The bulk of the commission will be received upon completion, although the wife may receive interim commission on deposits paid once they go into formal contracts. To date, only a few formal purchase contracts have been executed. Full construction cannot commence until a certain number of the 24 units have been sold and interim commission will not be paid on any formal contracts until full construction can commence. The Managing Director said that the wife may not receive commission on the new development until 2018 and 2019 and despite this there would be no interim increase in her base salary to compensate her reduced

income. He indicated that the best case scenario for the wife would be total commissions totalling US\$160,000 if no realtor was involved, but if a realtor was involved the commission would reduce to around US\$70,000. He did indicate that in 2017 she could get a percentage of a deposit, but only if ten units were sold which could amount to US\$14,500 if no realtor was involved.

103. The wife's income for the next twelve months is likely to be limited to her base salary of US\$51,220 plus a maximum of US\$4,284 commission she may receive if the remaining part of her employer's commercial property was leased out. She will likely receive commission in 2018, but not at the level enjoyed in the recent previous years.

104. There is a further potential development being undertaken by her employer, but this is at an early stage as planning permission was only applied for in November 2016. There is uncertainty as to how and when this will proceed, as there are seven objectors to the application of the planning permission. If permission is granted and construction commences in a timely fashion, the Court was told that the wife would still not receive any commission until at least mid to late 2018.

105. The wife does not have a significant amount of work experience and, having regard to her age, she may have difficulties finding well-paid employment. As I have already found, the role that she has taken for the sake of the family has meant that she has agreed to the husband's career taking priority over her own. She is unable to market any other properties because she does not have a real estate license. Her employer made it clear to the Court that he would "*definitely not be in favour*" of her working for another business relating to other property transactions. The wife has not explored any other employment options or presented the Court with evidence about other possible options as she would

wish to remain with this employer. The husband believes that she could find other better paid employment and that she should be making enquiries. When she is receiving commission, having regard to her work experience, her employment may not be bettered. There is no evidence before me from either party to establish whether in her circumstances there are better paid employment options available to her in the short or medium term, even when she will only receiving her basic salary.

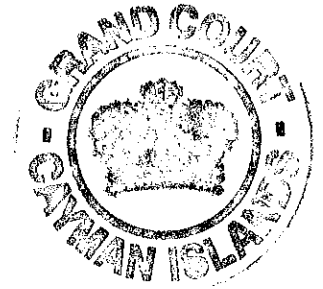
106. During the hearing the wife provided schedules of her outgoings in Cayman dollars. Following the January 2017 the schedules were resubmitted with agreed conversion into US dollars. The wife has attempted to separate the schedules into one for outgoings for the children, one for her personal expenses and one for her costs related to her proposed housing. The wife submits that there is an inevitable overlap within the domestic budget for expenditure to meet the needs of herself and those of the children. Although the wife is content for the husband to meet the significant child related expenses set out in his schedule, she submits that she will need significant child maintenance in order to give the children a similar quality-of-life when they are living with her as they enjoy when they are with the father.

107. In relation to home expenses the wife lists the following;

OUTGOING/ITEM	Monthly US\$ (Rent)	Monthly US\$ (Purchase)
Home	0	
Rent or Mortgage Payments	6,098	2,195
Stamp Duty	0	0
Strata Fees	0	976
Home Insurance (based on 1.3% of US \$725,000)	0	787
Contents Insurance	0	61
CUC	610	610



Water	244	244
Sewage	122	122
Cable	152	152
Internet	152	152
Bottled Water	37	37
Pestkill	0	61
Landscaping	0	122
Helper/Babysitting	1,829	1,829
Helper's Permit	24	24
Helper's health insurance	195	195
Car maintenance	122	152
Car wash	43	43
Food/Groceries /Household Supplies	2,439	2,439
Petrol	183	183
Vehicle insurance	61	61
Vehicle Registration	24	24
Dry Cleaning	30	30
Toiletries	122	122
Sundries/unexpected fees	183	183
SUBTOTAL:	\$12,671	\$10,805



108. There are savings on the housing expenditure that can be made. As I found when carrying out a similar review of the husband's outgoings, the helper's costs of US\$2,048 can be reduced by US\$1,560.20 to US\$487.80. Groceries and household supplies could be reduced by US\$1,439 from US\$2,439 to a figure similar to the husband's, namely US\$1,000, especially as the wife has a separate entry for her lunches and snacks and the husband is paying for the children's school lunches. A reasonable rental in the Seven Mile Beach Corridor could be found for US\$5,600 per month at a saving of US\$498. The sundries heading of US\$150 per month is not a necessity. Therefore the outgoings for the home if renting could reasonably be reduced to around US\$9,024 and if a home is purchased to around US\$7,157.80. The housing outgoings have a bearing on the level of not only spousal maintenance but also on child maintenance due to the inevitable overlap in the listed items being required to meet the wife and the children's needs.

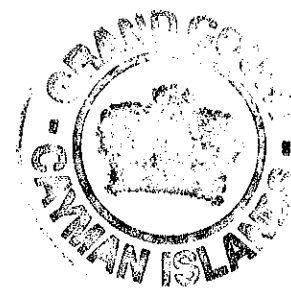
109. In relation to personal expenses the wife lists the following;

OUTGOING/ITEM	Monthly US\$
Personal Items	
Prescription lenses	79
Clothing - approximate \$4000 per year on clothes	409
Skin care	61
Cosmetics, prescription and non-prescription drugs (including vitamins)	122
Lunch meals, snacks, green juice	518
Haircuts/colour	244
Pedicures	79
Entertainment/Dining Out/Other	610
Church Tithes	122
Gym Membership (if not living at CPN)	79
Therapist appointments	366
Permanent Residence Costs (\$3850 yearly divided into monthly)	390
Health Insurance Monthly Fees	127
Uninsured medical and dental	122
Life Insurance	122
Two personal trips/year - Christmas shopping and one other	262
Birthday Gifts for friends	43
SUBTOTAL	\$3,755



110. Although reasonable on the face of them, I note that there are some savings that may have to be made by the wife in relation to her personal outgoings on clothing, haircuts/colour and church tithes. It is unclear how long the payments of US\$390/month for permanent residency costs have to be made.

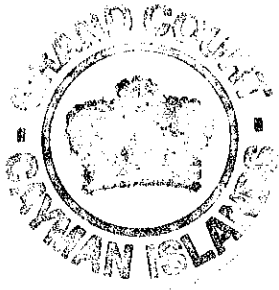
111. In relation to child related expenses the wife lists the following:



OUTGOING/ITEM	Monthly In US\$
Children	
Children's haircuts	73
Clothes and shoes* (children)	183
Entertainment, Apple TV movies, books, DVDs, toys	122
Other Children's Birthdays, presents etc.	152
Restaurant meals/take out	183
Snacks (smoothies, ice cream..etc)	122
School items or craft supplies needed (separate from school year supplies)	30
Our children's Birthday parties, birthday presents, Christmas presents etc.*	183
Children's Allowance	0
Holidays (2 hockey trips, swim trip, Musical theatre trip)	335
2 vacations a year with Mom	555
SUB-TOTAL	1,939

112. When one views the husband's figures for vacations and for attendance on school trips with the children it is hard to criticise the level of the wife's figures for the same items, as she too must be able to be involved in such activities and to take vacations with the children. The husband gave the impression that his figures did not include the cost of travel and accommodation travel for the wife to the children's overseas sport events. However, both parents may need to make savings in this area.

113. The mother and the children are entitled to share the enjoyment and partake in the parent/child experience that comes with her physically part meeting these expenses when the children are with her. For the purposes of this Judgment, I found that it was reasonable for the husband's outgoings for birthday presents for the two children or also for presents for parties they will be attending to be reduced to US\$80 per month for



birthday presents. As there will be some overlap between the parents in meeting these costs, I feel that a similar figure can be made in relation to the wife's claim under these heads for US\$4,202 per annum (US\$335 per month) and there should be a reduction of US\$255. Her costing for haircuts can be reduced by US\$36 from US\$73 per month to US\$37 per month. Her claim in relation to clothing can be reduced by US\$93 from US\$183 per month to US\$90 per month. This could give possible savings of US\$384 giving total outgoings on purely child related expenses of around US\$1,555

114. Accordingly the total figure of the wife's outgoings may be assessed to be in the region of US\$14,718 per month if renting and at 12,851.80 per month if she has purchased a property. As I have previously remarked there is still room for further savings on these figures.

115. If the wife were only to receive her basic salary of US\$4,268.33 per month she would have a shortfall of around US\$10,450 per month if renting or US\$8,583 per month if she purchased a home. If she had an income year similar to her best year, which was 2016 when she was estimated to receive a total income of US\$121,343, her average monthly income would be around US\$10,112 and she would not have a need for ongoing spousal maintenance or child maintenance at the same level as she does now. The evidence of the Managing Director of her employer supports a contention that she will not be earning any significant commissions until at least 2018 and that, when she does, it will not be at the same percentage level as before because realtors will be taking a greater role in the sales

The Clean Break Principle

116. As so clearly stated by Sir John Chadwick P. in *McTaggart*, the Court must try to give the parties finality and enable them to move on with their lives by means of a clean break.

As the husband wishes the Court to make orders that will enable the former matrimonial home to be transferred to him, there appears to be insufficient liquid capital available to order a slightly larger percentage division of the property to the wife which would enable this to be a clean break case when considering fairness and the three strands, namely need, compensation and sharing. Despite the husband's brief intimation, even if it had been fully argued, this is not a case in which the husband could have succeeded in persuading the Court that he should have a larger percentage of the assets due to contributions made even if a clean break is not ordered. This is clearly not a contribution case due to the important supportive role the wife had to this family at the cost of her own career and financial advancement. Any such approach would not be in line with Lord Nicholl's statement in *White v White* when he said,

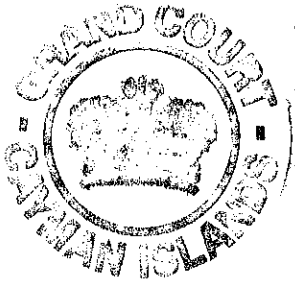


"... there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

117. When I consider the wife and the children's needs I have regard to the standard of living that the parties and the children enjoyed prior to the divorce. This is not decisive and in this case is not fully achievable. I recognise that post-divorce the parties' means will be much more stretched due to the running costs associated with two households. I also have regard to the standard of living the husband and the children will be able to enjoy when they are with him and the need to reduce any disproportionality moving forward for each party.

118. I recognise that, despite the size of the husband's income, his disposable income will be greatly reduced over the next few years if he were able to remain in the home. That said

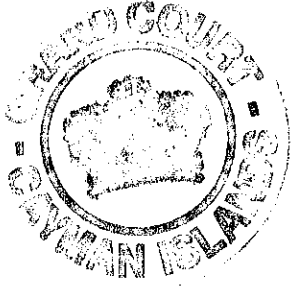
this would be his choice due to his all-consuming desire to retain and remain in the matrimonial home despite this meaning that he would have meet the US\$7,000 per month mortgage and the substantial payments on a proposed unsecured loan to buy out the wife's interest. It is his choice to commend a housing arrangement for the parties which requires borrowing costs for him in excess of US\$15,000 per month plus expenditure of US\$4,978.92 for the running costs of his property. If the matrimonial home was sold he may be better placed to argue for a clean break case by offering the wife a slightly higher percentage of the assets or to have sufficient sums to more easily pay child maintenance after investing in a suitable property with a much lower mortgage and not needing to take out the proposed unsecured loan. It is his desire to try to remain in the home with the more difficult short term financial consequences that will inevitably flow from that arrangement. However, after the loans are paid off, he will have a property which by then should be valued at over US\$2,000,000. In such circumstances the wife's submission that it would not right for the husband to "*channel all of his significant income*" into the home, "*even in a notional, arithmetic sense*" as he would be "*diverting sums away from their first port of call, the maintenance of the children, to paying down a mortgage at US\$15,189 pcm.*"



Conclusions

119. I approach this case on the basis that each party will retain their personal property including assets in their own name, motor vehicle, their pension³¹ and the contents of their bank accounts.
120. The husband must provide the wife with US\$600,153.40.³² If he can achieve that and pay any maintenance order made without the matrimonial home being sold then he should

³¹ Subject to any payout the husband may make upon transfer of the property.



have that option. If he takes that option, it would be acceptable for him to provide the wife with a lump sum of US\$474,629.57 and a transfer of US\$125,524.60. This would enable the wife to rehouse in suitable housing having regard to her income capacity as well as to contribute to her retirement needs. If the husband decides that this option is not feasible then the property should be sold and if sold for US\$1,950,000 he should supply her with the lump sum US\$600,153.40 from the net proceeds of sale and keep his pension intact.

121. For reasons stated in paragraph 116 herein this is not a case in which there can be a clean break. However, the husband is entitled to be able to arrange his long term affairs after the wife's income position has improved. With this in mind, I will place a time limit on the spousal maintenance order of three years. This will enable the wife to better meet her needs over the next three years, the early part of which will see her having a reduced income. The three years will also give her time to explore other employment options if there is not a significant increase in her salary in 2018. The first year of maintenance should be set at US\$3,000 per month and for the second year it will reduced to US\$2,500 and for the last year it will reduced to US\$2,000 per month. This reduction is made as, pursuant to the evidence of the Managing Director of her employer, the wife should be receiving some of her commissions in 2018 and the bulk of them should start towards the end of that year, since the sales at developments should by then reach completion.

122. I have had to think carefully in relation to child periodical payments to be made to the wife. I am satisfied having regard to the figures in her schedule set out in paragraph 109 herein and the overlap in the household expenses that a substantial order is necessary. When I do so I have regard to the fact that the husband will voluntarily be making

³² See paragraphs 77 - 81 herein.



considerable payments³³ and that McMillan J. has ordered that the children will be spending equal time in each party's home. It is important that the level or quality of lifestyle in one party's home is not disproportionate to that which can be offered in the other.

123. I order that, having regard to the wife's and the husband's current income and upon the basis that the husband will meet the child expenses set out in his schedule set out in paragraph 91³⁴, that there should be a periodical payment of US\$3,000 per month per child. This is the figure sought by the wife although this will not enable all of the child related expenditure set out in the wife's home and children schedules to be met. The total child and spousal maintenance orders do exceed the husband's contended disposable income. As I have remarked herein, there are further areas in the parties' expenditure which could be cut back. I accept these maintenance payments will put a strain on the father's finances if he chooses to remain in the matrimonial home due to the high mortgage, unsecured loan and the running costs on that property. What is clear is that the consequences of his choice should not prevent the Court from making the necessary maintenance orders to enable the wife to meet the children's needs at a level that is not too disproportionately lower than the one they enjoy when they are residing with the father. If the husband feels that he is unable to remain in the home due to the orders made, then the matrimonial home can be sold and upon sale both parties will be able to rehouse in suitable properties and the husband will have alleviated the financial strain on him caused by remaining in the home.

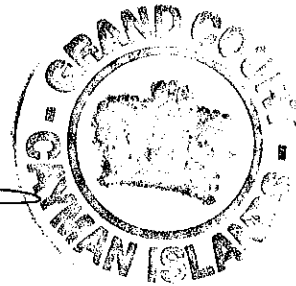
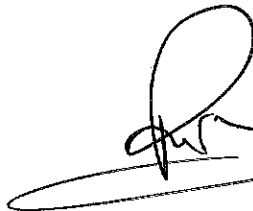
³³ See paragraphs 89-91.

³⁴ Subject to him making reasonable cutbacks on the expenditure on K's overseas trips, sports related travel and the items mentioned in paragraphs 93 and 94 herein.

Legal Fees/Costs

124. Unless I hear from the parties within seven days of the delivery of the perfected judgment that they wish to make further submissions on the issue, I intend to make no order for costs.

125. I end by thanking both Counsel for their careful and well-argued presentation of their clients' respective cases in this matter.



**Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT**