

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHMT 2019/0030

BETWEEN:

SHAKESHA O'NEAL

APPLICANT/RESPONDENT

AND

CARLTON O'NEAL

RESPONDENT/PETITIONER

Appearances: Mrs. Reynela Solomon, Counsel for the Applicant/Respondent
Ms. Stacy L. Abel, Counsel for the Respondent/Petitioner

2020: November 13th

2021: March 23rd

2022: August 17th

JUDGMENT

[1] **ELLIS J:** The Parties herein were married on 18th October, 2014. There is only one child to the marriage, a son who was born on 10th July, 2015 ("the Child"). The Parties cohabited as man and wife from the date of the marriage until December 2017. By 2019 the marriage had irretrievably broken down and in and around May 2019 the Respondent commenced divorce proceedings. The Applicant filed an application seeking maintenance pending suit in May 2019 and the Parties eventually agreed a consent order on 27th June 2020 in which the following was agreed:

- i. The Respondent shall pay spousal support to the Applicant in the sum of US\$400.00 from May to June 2019.
- ii. The Respondent shall pay spousal support to the Applicant in the sum of \$1,700 for July 2019.
- iii. The Respondent shall pay spousal maintenance and child maintenance to the Applicant in the sum of US\$5,724.00 covering the period August 2019 to November 2019 in two installments.

- iv. The Respondent pay the fixed expenses of the Child such as educational, transportation and grooming expenses.
- v. The Respondent relinquishes all rights to the deposits for the apartment and electricity used at their matrimonial residence.

[2] On 31st July, 2019, the Court granted the decree nisi. The Applicant subsequently filed ancillary relief proceedings in October 2019 seeking financial orders in respect of herself and the Child and property adjustment orders under the provisions of the Matrimonial Proceedings & Property Act 1995 (“the Act”). Happily, and after protracted hearings, the Parties were able to arrive at a consent position on all matters relating to the Child.

[3] The Parties have, however, failed to arrive at any agreement regarding the remaining matters which arise on the Application and so the following issues remain for determination:

- i. **Whether the Applicant should be paid spousal maintenance of US\$,1500.00;**
- ii. **Whether there are any Matrimonial Assets; and**
- iii. **If there are found to be any Matrimonial Assets, whether the Applicant is entitled to any share thereof;**

[4] In support of her Application, the Applicant relied on her *viva voce* evidence during the trial along with her four (4) affidavits filed on 29th October, 2019; 8th November, 2019; 6th January, 2019 and 21st February, 2019. The Respondent also relied on his *viva voce* testimony at trial as well as his affidavits filed on 9th December, 2019 and 27th January, 2020 and that of Mr. Kelvin Scatliffe filed on 27th January, 2020. The Court also has the benefit of legal submissions filed on behalf of the Parties both prior to and at the close of the trial.

SPOUSAL MAINTENANCE

[5] The Applicant submitted that she is compelled to seek an order for spousal maintenance because her income is low, unstable and at times non-existent. She pointed out that she is the primary carer of the Child and even with the child maintenance orders which are in place, she is unable to meet the expenses.

- [6] During the course of these proceedings, the Applicant's evidence as to her financial means underwent some revision prior to the trial. Her affidavit filed in January 2020 was offered to clarify and update her evidence about her employment situation. The Applicant indicated that she had managed to obtain a part time work permit and that she was currently employed at Nanny Cay Resort & Marina Limited. She stated that she works from 4 p.m. to 9 or 11 p.m., 5 – 6 days a week since July 2019. She frankly indicated that in December 2019, she received a raise in salary from \$6.50 per hour to \$8.00 per hour. A copy of her biweekly pay slip in December 2019 revealed net earnings of \$479.70. In her earlier affidavit she also represented that in addition she also received a share of the tips paid by customer which averages about \$400 monthly.
- [7] The Applicant asserts that her income is not sufficient to cover all of the household expenses, the minor Child's expenses and her personal expenses. As regards her household expenses, the Applicant evidence is that they total about \$1,330.50 and she apportioned her share of these expenses (since the home is shared by the Applicant and the Child) to be \$665.25. The breakdown of the household expenses includes rent of \$1,100.00 and the utility bills totaling about \$278.33. She also detailed expenses for the Child which roughly total \$700.00 (not including vacation trips and medical expenses and personal expenses which total \$880.00 (not including medical expenses and car loan and maintenance payments).
- [8] In her Affidavit filed in January 2020, the Applicant demonstrates how her monthly expenses exceed her income, following the cessation of the maintenance pending suit order of 27th June 2019. The Applicant's evidence discloses that in order to compensate, she has had to ask friends and family members to assist. In addition to car loan payments of \$250.00, she has also had to borrow \$450.00 to cover rent in December, 2019 and \$700.00 to cover rent in January 2020. The Applicant also indicated that she is currently in arrears on her electricity bill and internet bills.
- [9] Counsel for the Applicant submitted that at her current average monthly salary of \$1,360.00, the Applicant would have only \$30.00 to spare to assist in the Child's expenses which is at least \$1,050.00 and her personal expenses which stand at \$1,245.00 after paying the full cost of the household expenses. She submitted that \$30.00 is woefully inadequate to meet her needs. She

submitted that it is therefore critical that the Respondent assist substantially with the Applicant's household expenses as that would benefit both the Applicant and the Child.

- [10] When she was examined under oath, the Applicant amplified her evidence to explain how the COVID-19 pandemic had affected her. She stated that the pandemic has further worsened her finances as her working hours were significantly reduced as of April 2020. She was eventually laid off by her employer on July 2020. She explained that she received financial assistance from friends and family along with a small stipend from work as well as unemployment benefits of \$164.00 from Social Security Department. However, even with this assistance she was still behind on her household bills. She was unemployed between August – October 2020 but as at the date of the trial she was optimistic about commencing employment as a hair stylist on an *ad hoc* basis at a rate of \$7.00 per hour. This working arrangement was described as unstable with no fixed duration.
- [11] Counsel for the Applicant submitted that the Applicant has demonstrated throughout her evidence that she is a woman of little means. She provided a bank statement which revealed that as at 2019 she had saving of \$4,214.51 and that she maintained an average balance of \$265.00 over the last 6 months. She is unable to afford all basic necessities such as accommodation, without financial aid. At paragraph 65 of her evidence in reply the Applicant says, *"I cannot over emphasis enough how much of a struggle it is and my debt to others continue to increase."* At paragraph 35 of the Applicant's Affidavit filed on 29th October 2019, the Applicant explains that she wants the spousal maintenance so that she can better afford her essential needs, as she says, *"To supplement my small income, it is imperative that I receive spousal maintenance so that my son and I can have a stable life in the interim that I am trying to get back on my feet. Spousal support in the sum of \$1,500 per month for 2 years would assist primarily with the household expenses for Shakyrie and I and some of my personal expenses."*
- [12] In regards, to her earning potential, the Applicant quite frankly disclosed that prior to the pandemic she had been shortlisted for the post of floor supervisor but that would have changed when she was made redundant. The Applicant is a qualified hairdresser/cosmetologist, however she submitted that opportunities to rent chairs in salons are not frequent in the BVI. Had there been such an opportunity available she made clear that she would have capitalized on same to secure financial freedom. She

further submitted that being a foreign national presents its fair share of challenges in the work force. Nonetheless, she asserts that she is making steps towards becoming financially independent and being better able to meet the Child's needs, her personal needs and the household needs. However, she averred that it is a process and that she still requires assistance despite her making progress.

[13] In response to the Respondent's contention that she could utilize her mornings to take on more hours of work instead of going to the gym (which she states is medically necessary to keep her diabetes under control), the Applicant submitted that her job was busy, tiring and taxing as it required her to be standing for long periods. Counsel for the Applicant urged the Court to steer away from requiring the Applicant to do excessive hours of work, particularly when the Applicant's health has to be considered in the balance.

[14] Counsel for the Applicant reminded the Court that the Child resides with her and that it is imperative that he continues to be safely accommodated whilst in her care. She relied on judgment in **Rose v Rose**.¹ In that case, the Court considered a wife's means on an application for spousal maintenance and Lord Denning, L.J. stated that the following considerations should be kept in mind when determining the proper form for a wife's maintenance:

"If a wife did earn, then her earnings must be taken into account; or if she were a young woman with no children and obviously ought to go out to work in her own interest, but does not do so, then her potential earning capacity ought to be taken into account; or If she had worked regularly during the married life and might reasonably be expected to work after the divorce, again her potential earnings ought to be taken into account. Except in cases such as these, it did not as a rule, lie in the mouth of a wrongdoing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance."

[15] Counsel for the Applicant submitted that the challenges which the Applicant faces can be equalized with an appropriate maintenance order for herself and the Child. She submit that after the break down of the marriage, the Applicant was cut off from the support she had grown accustomed to and as such she has since been economically disadvantaged and she pointed to paragraph 12 of the Applicant's Affidavit filed on 29th October 2019, in which the Applicant indicated that the Respondent covered a greater share of the household expenses.

¹ [1951] P 29

- [16] Since the Respondent left the matrimonial home, she has suffered tremendous financial hardship and stress. She pointed out that the Respondent has a steadier job at the Financial Services Commission where he receives a set income. The Respondent earns a net monthly salary of \$6,836.58. Counsel for the Applicant therefore submitted that inclusive of his savings and his assets, the Respondent has the means to pay the spousal maintenance requested. The Applicant suggested that if the Respondent is unable to meet the spousal maintenance of the Applicant from his monthly earnings, some of the property which has a market value of \$195,000.00 may be sold so that the needs of the Applicant and Child are met.
- [17] In the premises, the Applicant seeks spousal maintenance in the sum of \$1,500.00 (which she contends is reasonable given the needs of the Applicant and the Child and the Parties' respective incomes) for a period of 2 years - totaling \$36,000.00. If the Applicant does not get spousal maintenance, she submitted that she and the Child are likely to face further hardship.
- [18] The Respondent however trenchantly opposed this claim for relief. First, he argued that the Court should view whatever short comings the Applicant may be suffering to be the result of her own mismanagement of time and resources available to her. He asserts that the evidence reveals that the Applicant did not want to pursue work in the profession she is most qualified and trained for because of wear and tear on her body and it only paid her minimum wage. Instead, she goes on to find work as a waitress which requires her to work extended hours, in shifts which are not readily dictated by her and which required hours of standing on her feet. He submitted that it is incongruous that the Applicant has chosen to do this type of work which on the face of it is more strenuous and offers less pay.
- [19] He further submitted that the Applicant is well equipped to become financially self-sufficient as a result of the plethora of skills she possesses, all of which are currently relevant. He stated that the Applicant is in an even better position now to obtain full time employment because she has a work permit exemption obtained through her marriage which means that she is no longer subject to the delays and complications which processing takes. He pointed to the fact that during cross examination it became clear that she has had the good fortune to secure at least three jobs in different markets in the Territory: domestic work, tourism and hospitality work, and cosmetology. The

Applicant also gave evidence that she was offered a job as a teller at one of the local banks, but turned it down. According to the Respondent, save for the times when she determined that she was unable to do so, the Applicant has always worked.

[20] Counsel for the Respondent also submitted that on the Applicant's own admission, she does not suffer from any sort of disability which would prevent her from working. Certainly no medical evidence has been presented in this regard. Counsel urged the Court to give no weight to the allusion that there is any potential medical expense attributable to the Applicant's medical condition (diabetic) and operate instead on the basis that both of the Parties suffer from no disability or handicap on the job market.

[21] The Respondent submitted that he has carried the burden of caring for his family, as was his right and obligation, but that he did so only until the Applicant was able to resume work. After the breakdown of the marriage, the Respondent stated that he moved out of the matrimonial residence to live with his mother. He also changed his employment and now currently works at the Financial Services Commission where he earns \$6,836.58 per month. In a summary sheet attached to his affidavit, the Respondent listed his expenses as totaling \$6,353.46, leaving a net disposal income of \$483.12. His expenses, which included, caring for the Child solely (when the Applicant insisted that she could not find work), maintenance and upkeep expenses connected with a child from a previous relationship, payment of a loan which was taken out during the marriage to sustain the Parties and the minor child, and his own personal expenses stemming from his own personal endeavors which total \$5,091.14 monthly.

[22] Surprisingly, even with this rather startling financial position, the Respondent's evidence revealed a saving account which has a standing balance as at January 2020 of \$9,157.88 with an average balance of \$15,819.46 for the past 6 months. Moreover, except for the extracts giving details of the relevant bank loans, the Respondent provided no documentary evidence which corroborated his alleged expenses when it was obviously in his ability to do so over the course of his two affidavits. This presented a difficulty for the Court in several respects. First he indicated that he pays \$500.00 per month on a loan taken out to pay the order granting maintenance pending suit but provided no proof of the loan or the payments. Then, he indicated that he pays monthly maintenance and upkeep

for his daughter but provided no proof of the same. It is also clear that he no longer has to cover the full daycare fee for the Child.

[23] In treating with the Applicant's case, Counsel for the Respondent submitted that the need and financial obligations of the Applicant are basic. She submitted that the Applicant's needs and responsibilities are listed as: rent, food, utilities, and personal care. No evidence has been given about any exorbitant expense in the foreseeable future. Counsel submitted that the Applicant has to cover one household which consists of her and the Child while all of the liabilities of the marriage remain with the Respondent who adjusted his lifestyle to suit his changed financial position.

[24] Turning to the relevant law, Counsel for the Respondent submitted that the three principles that should guide a court when making financial awards are need, compensation and sharing. With regard to financial needs she cited the following quote from Baroness Hale in **Miller v Miller; McFarlane v McFarlane**:²

"The most common rationale [for granting financial remedies] is that the relationship has generated needs which it is right that the other party should meet. ... This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.

[25] In summarising the principles coming out of the relevant judicial authorities, Counsel submitted that when considering a financial order, the Court should consider that a spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated

² [2006] UKHL 24

hard future needs on the part of the claimant. Here, the duration of the marriage and the presence of children are pivotal factors. An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies and where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship. The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the applicant.

[26] The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence. Ultimately, in every case, the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. The court must consider whether it is possible to achieve a clean break between the parties.

[27] Counsel concluded that the facts of this case reveal that the Applicant's needs have remained primarily the same as before and during the marriage. The only new obligation is that of a child in respect of whom the Respondent has always readily shouldered his share of that responsibility. Counsel submitted that the Respondent shares similar needs and is unable to attend to them on account of having had to principally maintain the Child. He submitted that the very short duration of the marriage and the young ages of the Parties, are prime circumstances which the Court should take into account in striving to achieve a clean break between the Parties. As the Applicant has not demonstrated anything particularly outstanding in relation to these considerations, he concluded that the Court should not make a financial order in her favour and should dismiss her Application with costs to the Respondent.

Property Adjustment Order

[28] At issue are three parcels of land described as Block 2839B, Parcel No. 393, (lot 5 which is 0.340 acres); Block 2839B, Parcel No. 392, (lot 4 which is 0.293 acres); Block 2839B, Parcel No. 396, (lot

8 which is 0.302 acres) all located in the Registration Section East Central. The Applicant also claims an interest in the BMW motor vehicle and the funds held in the Respondent's bank accounts. She also claims that she is entitled to benefit from the Respondent's pension plan.

[29] Pursuant to order of 17th December 2019, the three properties were appraised by chartered surveyor, Mr. Abdool Sattaur of Smith's Gore BVI and an appraisal report was produced dated 29th January 2020. The report indicates the market value are as seen below:

- a) \$68,000.00 for property described as Registration section East Central, Block 2839B, Parcel No. 393, lot 5 which is 0.340 acres.
- b) \$62,000.00 for property described as Registration section East Central, Block 2839B, Parcel No. 392, lot 4 which is 0.293 acres.
- c) \$65,000.00 for property described as Registration section East Central, Block 2839B, Parcel No. 396, lot 8 which is 0.302 acres.

[30] The motor vehicle is a BMW purchased in December, 2017 and registered in the name of the Respondent. No valuation was provided. The Applicant seeks a 1/3 share of the equity. The Applicant contends that the Respondent received a payout of \$70,000.00 to \$80,000.00 from the Colonial Insurance Company when he resigned from his employment. She asks that court to award a 1/3 share of the all of the Respondent's savings disclosed and undisclosed as well as his pension entitlements.

[31] With regard to the three parcels of land, Applicant asserted that the Parties acquired the properties with the intention that one would be used for the construction of their matrimonial home while the other parcels would be used to construct apartments which would generate income for the family. At paragraph 13 of her first Affidavit the Applicant outlined that the Respondent purchased Parcels 393 and 393 when they were engaged in 2014. This is supported by the land register which indicates the properties were entered on the register on 23rd April, 2014 and 23rd September, 2014 respectively. The Parties were married on 18th October, 2014. As for the third property which is Parcel #396, that was acquired in 2015 after the Parties were married and living together. The land register indicates that it was entered on the register on 20th January, 2015.

- [32] The Applicant contends that notwithstanding their date of acquisition all three parcels of land are matrimonial property. Counsel for the Applicant submitted that the Court is required to consider all of the circumstances of the case, including the fact that the Parties were soon to be married and that they would have made plans to use the property to further their lives together, to build their matrimonial home and to generate income.
- [33] Cumulatively, the 3 properties amount to 0.935 acres and have a combined market value of one hundred and ninety-five thousand United States Currency (USD\$195,000.00). The Applicant contends that she is entitled to a beneficial interest in the same since she made pecuniary and non-pecuniary contributions as a wife, mother, home maker and income earner.
- [34] It is clear from the Respondent's evidence that he was offered an opportunity to purchase the properties by a "longtime friend" in 2014. That friend appears to be Mr. Kelvin Scatliffe whose evidence dovetails with that of the Respondent. However, he stated that all of the deposits for the properties were paid since 2013. Thereafter, it was just a matter of the waiting for the bank to complete processing the loans which would fund the purchase. Mr. Scatliffe's stated that during his negotiations with the Respondent he could not recall the Applicant "being in the picture". Instead, the only other person he recalls hearing about at the time of purchase was the Respondent's daughter. He recalled that in a conversation with the Respondent (some 4 – 5 months after the initial transaction) the Respondent told him that he wanted to give the last of the properties to his daughter. He was also instructed not to tell anyone about the purchase.
- [35] In response, the Applicant asked the Court to completely disregard the evidence of Mr. Kelvin Scatliffe as being of no significance because the Respondent was under no obligation to discuss all of plans for the property with him. Moreover, she submitted that any conversations that the Respondent would have had with Mr. Scatliffe would not negate the plans which she and the Respondent created as a partners for the property.
- [36] The Applicant does not dispute that she would not contribute financially to the initial deposits made to acquire the properties; however, she contends, that she made indirect contributions after the purchase when she would have contributed towards the pool of funds used to cover the household

expenses and loan payments. According to the Applicant she would have regularly placed her earnings into a furniture drawer which had been dedicated for that purpose and it is from these funds that household bills and incidental would have been paid.

- [37] Counsel for the Applicant submitted that in any event, it would be a step backward to say that a wife did not contribute to its acquisition if she did not make a direct financial contribution to the purchase price for the land. Although the Respondent went to great length to discredit and minimize her contribution to the welfare of the household, Counsel for the Applicant submitted that the Applicant made non-financial contributions as a wife, mother, homemaker and was very helpful in the household. Counsel cite the following dictum from **Jacinth Carty v Oral Curtis Carty**³ in support,

*“What is more, the land was acquired during the time the parties were living together in a relationship akin to marriage, and they already had a child together, who was one year old at the time of acquisition of the land. At the time of acquisition and during the payment of the installments to, CHA, Mr. Carty was working and Mrs. Carty was working, and raising a child, and being a home maker, paying rent and sharing outgoings. It would be a step backward to say in this day and age, because Mrs. Carty did not make a direct financial contribution to the purchase price for the land that she must be taken not to have made any contribution towards its acquisition. She must be taken to have contributed indirectly to the acquisition of the land. In the words of Baroness Hale in **Stack v Gordon**, the law has moved on.”*

- [38] In her affidavit evidence, the Applicant outlines her contribution to the household and the welfare of her family. The Applicant submits that even during the periods when she fled the matrimonial home to go to Jamaica, she was still contributing to the welfare of the family home since their son, was in her care and he was well cared for. She further submitted that her departure from the home would not be a good reason to depart from the principle of equality.

- [39] Counsel for the Applicant relied on the judgment of Saunders J in **Stonich v Stonich**⁴ where the learned judge warned against undervaluing the homemaker and child rearing roles:

“In assessing the respective contribution of husband and wife, there was a time when one regarded the fruits of the money-earner to be more valuable, more important than the childbearing and homemaking responsibilities of a wife and mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife, who

³ 2017 (SKB HCV 2015/0139)

⁴ (2003) BVI Civil Appeal No. 17 of 2002

remained at home. Ironically, if the man's business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple's hard times. The court should not pay too much regard to a contribution merely because it is easily quantifiable in hard currency and too little to a contribution that is less measurable but equally important to the family structure. In the vast majority of cases where these two types of contributions are in issue -- that of a home maker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of discrimination in degrading the woman's role in the home."

"... The point is, there is no basis in law for Courts to regard always as decisive or of special importance the financial contribution made by a party to the welfare of the family. In the normal course of things, any such contribution should be weighed in the same scale as a contribution of a different nature. Spouses may choose to perform a different role in a marriage. If the husband's skill, initiative, hard work and drive yield handsome financial rewards, it is entirely unfair to regard those rewards as being any greater in value than those of the wife who might have employed equal skill, initiative, and dedication at home bringing up the children and keeping a stable household. In such a case, I see no reason why the assets acquired during the marriage ought not to be equally divided. ... [E]ach in their different spheres contributed equally to the family, and as a general guide, equality in the distribution of the matrimonial assets should be departed from only if, and to the extent that, there is good reason for it."

[40] Counsel for the Applicant therefore invited the Court to find that the Applicant has an equitable interest in the properties which amounts to a 1/3 share in the value. In support, Counsel commended to the Court the judgment of **Cumbers v Cumbers**⁵ where the couple separated 18 months after their marriage. The husband had acquired a house on mortgage shortly before the marriage and was paying the installments on it during marriage. The wife had one child and the court found that she helped the family by contributing directly to the housekeeping expenses. After the break-up of the marriage the husband sold the house for a net sum of £1,600.00 and the Court of Appeal ordered that the wife be awarded £500.00 which was just about one-third of its net value, despite the short duration of the marriage and the fact that she had no proprietary interest in the house, on account of her contribution to the welfare of the family. Counsel for the Applicant submitted that **Cumbers** is instructive as it has similar facts to the case at bar and she invited the Court to adopt a similar view that the Applicant is entitled to a share in the value of the properties.

[41] In the event, that the Court is of the view that properties do not form part of the matrimonial estate, then Counsel for the Applicant relied on the judgment of Lord Nicholls in **White v White** to support

⁵ [1974] 1 WLR 1331

his submission that properties acquired prior to the marriage and inherited properties can nevertheless be subject to the sharing principle, if the applicant's financial needs cannot be met without recourse to such property.

Savings

[42] Previously, the Respondent was the General Manager of Colonial Insurance and held that position for a number of years and earning a monthly salary of over \$9,000.00. The Applicants contends that when he left that job, he would have received a substantial payment in excess of \$60,000.00. This large sum may have been severance pay, pension payout or gratuitous award or possibly a combination of same. Counsel submitted that the money the Respondent received would form part of the family assets as it would be considered savings, as the Respondent would generated part of same in the 4 year time span that he worked there whilst being married to the Applicant and she took issue with the fact that details of the same were not disclosed by the Respondent.

[43] By letter dated 31st December 2019, Counsel for the Applicant corresponded with Counsel for the Respondent requesting the position on pension plan with the Respondent's previous employer, Colonial Insurance and details of same. Whilst the Respondent addressed the information requested in part to particulars requested listed at paragraphs 1 – 3 in his subsequent affidavit, Counsel for the Applicant complains that he failed to address the requested information in 4 in his subsequent affidavit filed on 27th January 2020.

[44] At paragraphs 52 – 54 of the Applicant of her affidavit in reply the Applicant stated:

“52. In response to paragraph 20, Carlton list a couple assets that he has and refers to a loan of 2017 where he bought a car. However, he has not been full and frank with the Court that he received a large sum of money from Colonial Insurance between \$70,000 and \$80,000 in July or August 2018 when he stopped working at Colonial Insurance.

53.1 have no idea where Carlton has hidden this money. Since he indicates how careful he is with spending money, I have every reason to believe this money is available somewhere but not on his bank accounts. We are unable to see if Carlton made a huge withdrawal to hide the money elsewhere.

54. He does not refer to any major expense that would cause him to spend this money. We have not received a transaction history of Carlton.”

[45] Relying on the following dictum from **Raishauna Wheatley v Lawrence Wheatley**⁶:

“it is well established that both parties are under a duty to make full and frank disclosure of all material facts to the court and that such disclosure is a crucial part of the investigative process in applications for ancillary relief... if disclosure is not complied with the court is entitled to draw adverse inferences, though such inferences must bear a genuine relationship to available assets”.

[46] Counsel for the Applicant invited the Court to draw adverse inferences from the Respondent's failure to disclosure of his savings. The Applicant however took no steps to secure order of specific disclosure during the course of these proceedings.

[47] Counsel concluded that the short duration of the marriage would not bar an award of a reasonable share of the matrimonial assets, even though she was not the breadwinner or contributed financially equally in the home expenses. In light of her struggling financial situation, her lack of savings or assets (save for her second hand car) Counsel argued that it is fair that she be awarded a portion of the marital assets. She submitted that the Applicant should be awarded between a 1/3 and ½ share of all of the matrimonial assets.

[48] The Respondent disputes that the Applicant has any interest in his assets which form the subject matter of her application. With regard to the three parcels he submitted that the Respondent has not demonstrated that the properties that were intended to be used, or were actually used for the benefit of the family as a whole. He pointed out that apart from exhibiting the relevant land registers the Applicant has not been able to give any clear evidence about the acquisition of the property whether in the initial stages of approaching the vendor, or in the latter stages of dealing with the bank financing. His evidence is that he initially started the process of acquiring the properties sometime in 2014. Two of the properties were available at the same time and so the loan process was started and completed before the marriage. Shortly after this process began, the third property became available and he approached the bank to try and acquire this parcel as well through a second loan. The two transactions were completed within a matter of months of each other, with one falling before the date of the marriage, and the other two months after the date of the marriage. The Respondent further submitted that the Applicant has failed to demonstrate that there was any contribution to the

⁶ BVIHMT 2006/0014

acquisition of the properties because at least two were acquired prior to the marriage. In respect of the last property, he argued the fact that the acquisition of that property was concluded after the date of the marriage does not make it matrimonial asset. All of the loans are serviced from the salary of the Respondent.

[49] He asserted that the properties were not acquired in contemplation of the marriage. Instead he stated that his specific intention was to benefit his minor children. When he was cross examined, he stated that while he had considered owning real property with his wife for the family's benefit, the marriage never got to a point where the Parties could explore owning property together. The properties in question remain undeveloped.

[50] With regard to the BMW motor vehicle, the Respondent agrees that the car was purchased during the marriage, in or around 2017 after the passage of the hurricanes. It was intended to replace his own personal vehicle which he owned prior to the marriage, and which the Applicant drove after the marriage. He stated that it was purchased out of a loan that he secured in order "put the family back on its feet" following the 2017 hurricanes. With these loan proceeds he also purchased replacement furniture, which included a king sized bedroom set valued at nearly \$10,000, a new living room set and a washer and dryer and television. This personal loan was serviced from his salary alone. It is common ground between the parties that all of the furniture was left with the Applicant when he gave up occupation of the matrimonial residence and it remains in her possession.

[51] Finally, the Respondent stated categorically that there is no pension or savings account to which the Court must address its mind. The Respondent avers that he did not receive a pension when he left his previous employer and he was given no "special treatment". The Parties had one shared bank account during the marriage which last contained \$4,000.00. He asserted that the Respondent withdrew \$3,000.00 when she left the Territory in 2017 to relocate to Jamaica. This was not disputed by the Applicant.

COURT'S ANALYSIS AND CONCLUSION

The Law

[52] The starting point is the Matrimonial Proceedings and Property Act, 1995 ("the Act). Sections 23 gives the court the power to make financial provision for a party to the marriage while section 25 gives the court power, inter alia, to make a property adjustment order for the benefit of a party to a marriage or a child of the family.

[53] In the Virgin Islands, the factors which a court must consider in arriving at a fair and just outcome, on an application for spousal maintenance are the identical statutory factors which are applicable to applications for a property adjustment order. Accordingly, in deciding whether to exercise the powers given by sections 23 and 25, the statutory factors and supporting case law will be equally applicable to both aspects of the Applicant's case. The Court must have regard to all the circumstances of the case including the statutory factors stipulated under section 26 of the Act including: -

- (a) the present or foreseeable future income, earning capacity, property and other financial resources of each party,
- (b) the present and foreseeable future financial needs, obligations and responsibilities of each party,
- (c) the standard of living enjoyed by the family before the breakdown of the marriage,
- (d) the age of each party and the duration of the marriage,
- (e) the physical or mental disability of either party,
- (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home,
- (g) any order made under section 49 (not applicable), and
- (h) the value to either party, of any benefit (for example, a pension) which, that party will lose as a result of the dissolution of the marriage.

[54] The 'tail piece' to section 26 requires the court to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other. This duty should be carried out in a just and practicable way having regard to the conduct of the parties.

[55] It is clear from these provisions that the court has a wide power to make property adjustment orders and other financial relief orders and that those powers can be exercised ⁷ at any time either before or after the grant of a decree absolute of divorce. The power is to be carried out having regard to all the circumstances of the case with the aim of achieving a just and practicable result.

[56] In **Stonich v Stonich**⁷, Saunders JA of the Eastern Caribbean Court of Appeal provide useful guidance on how this task should be approached:

“The Act does not rank in any order of preference any of the factors to which Courts are obliged to have regard. It is for the Court to consider all of them. In one case, the facts and circumstances may call for a particular factor to be given special importance. In another case another factor may assume most significance. The point is that there is no basis in law for Courts to regard always as decisive or of special importance the financial contribution made by a party to the welfare of the family. In the normal course of things any such contribution should be weighed in the same scales as a contribution of a different nature. Spouses may choose to perform different roles in a marriage. If the husband's skill, initiative, hard work and drive yield handsome financial rewards, it is entirely unfair to regard those rewards as being any greater in value than those of the wife who might have employed equal skill, initiative and dedication at home bringing up the children and keeping a stable household. In such a case I see no reason why the assets acquired during the marriage ought not to be equally divided. As Lord Nicholls states, each in their different spheres contributed equally to the family and, as a general guide, equality in the distribution of matrimonial assets should be departed from only if, and to the extent that, there is good reason for it.

[57] In **White v White**,⁸ Lord Nicholls of Birkenhead who applied the principle of fairness in considering similar legislative provisions said:-

“As a general guide, equality should be departed from, only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”

[58] The Court will now consider the criteria set out in the Act.

i. Age of the parties/Physical or mental disability

At the time of Petition the Applicant was 33 and the Respondent was 38. There is therefore no significant age difference between the Parties. They are both relatively young people who are very far from mandatory retirement age. Although it was represented by the Applicant that she is diabetic, it appears that she is taking steps to control the same. Her condition does not pose a hindrance to her ability to work and support herself. There is therefore no mental or physical disability of either Party.

⁷ BVI Civil Appeal 17 of 2002

⁸ [2001] 1 ALL ER 1 at paragraph 25

ii. Duration of marriage

The Parties were married on 18th October 2014 and were granted a decree nisi on 31st July 2019. The marriage therefore lasted a little under 5 years. It appears that breakdown of the marriage commenced well into the 3rd year with the Applicant leaving the matrimonial home in December 2017. The Court finds that this marriage was of a relatively short duration.

There is one child of the marriage born in 2015.

iii. Standard of living

The Respondent described the Parties' standard of living was that of an ordinary working class family but it was clear to the Court that the Parties previously enjoyed a comfortable standard of living. The Parties travelled overseas on family vacations. They resided in rented accommodation but there are at least three parcels of land registered in the Respondent's name valued at \$195,000.00. They owned a luxury BMW vehicle and were able to afford paid child care. The Parties were able to maintain this standard of living with the comparatively negligible financial contribution of the Applicant.

iv. Income, earning capacity, property and other financial resources

The Court has considered the written and oral evidence by the Parties. Both Parties live on a defined and limited income.

It is apparent that the Respondent was the breadwinner of the family during the course of the marriage. As at the date of trial he had changed his employment and was earning a reduced but still comparatively significant monthly salary at the Financial Services Commission. It is also clear that he has significant assets registered in his name (real estate (raw land) valued at \$195,000.00). It is also apparent that he owns a registered company and business although the details and income thereof were not disclosed.

He has represented that he has had to downsize his lifestyle after the end of the marriage by moving to live with his mother but the Court is satisfied that this was voluntarily done and not under economic duress since the summary of his financial status indicates that he still maintains a reasonably good standard of living with sums dedicated to gym/bowling and admiral club membership and Netflix.

The Court has taken into account the absence of sufficient cogent documentary evidence supporting his proof of expenses and is not satisfied that he has not been truly forthcoming with his evidence. Save for the loan records, he has provided no proof of any of the expenses or the state of arrears. Looking at his declared income and expenses, the Court can only conclude that it would have necessitated creative accounting methods to make ends meet or that he has either understated his income or

overstated his expenses. see: **Ramsaroop v Ramsaroop**⁹. It has not been demonstrated that the Respondent is financially embarrassed in any way and the Court is inclined to the latter view

The Court has taken into account that there are large gaps in his evidence. The Court is concerned that the following claims are not sufficiently proved: no evidence of any loan (\$500.00 monthly) taken to pay the maintenance pending suit order (although documentary proof of his other loans were advanced); no actual proof of company registry fees (\$850.00 and trade licence fee (\$100.00) or proof that the purported business is a going concern or is in good standing; the day care charges for the Child are no longer solely paid by him as it is now shared equally by the Parties.

The Applicant's financial position is comparatively grim. Prior to the date of trial she earned significantly less income than the Respondent and as at the date of trial she was no longer in stable employment. What employment she did manage to secure had a marginal wage which makes it impossible for her to meet her financial obligations. However from all accounts she is a qualified cosmetologist and it is reasonable to presume that she will do what is necessary to improve her financial position in the future.

Having reviewed her affidavits, the Court is satisfied that they also lack cogent documentary evidence. However, having had a chance to observe her oral testimony, the Court is satisfied that she is struggling financially and would be unable to meet her financial obligations without borrowing or obtaining grants from friends and family. There is no evidence before the Court that Applicant owns any real property. She does however own a motor vehicle secured through a personal loan which is still current.

The Parties' bank account statements prove their disparate financial positions. Over the last six months the Applicant maintained an average balance of \$265.00 while the Respondent's average balance over the same period was \$15,819.46.

v. Contributions made by the Parties

It is well established that where one party has not worked during the marriage but has been a homemaker looking after the dependent children and the other party has been the breadwinner they are treated as having made an equal contribution towards the family and matrimonial assets.

The Parties both gave evidence that they contributed to the household, taking care of the needs of the family. The Court does not doubt this. The evidence before the Court discloses that although the Respondent would have made a comparatively higher financial contribution during the course of the marriage support their standard of living and quality of life and he would have paid all major expenses including utility bills and

⁹ unreported 17th February 1997 HC Trinidad and Tobago 4211/1995

outgoings. It is also clear that he would have contributed the family car and the main residence for the family which was rented accommodation.

The Court has no hesitation in rejecting the Applicant's contention that she was invited to be a homemaker rather than engage in gainful employment. However, the Court finds that the Applicant took on the role of homemaker and caregiver for the Child even during those periods when she would have been gainfully employed and would have contributed to household expenses.

vi. The Parties' Financial Needs Obligations and Responsibilities

It is necessary for the Court to look at each of the Parties' needs in terms of both income and capital. Normally, the Parties would prepare and provide a breakdown, estimating how much they will need to meet all of their outgoings on a weekly/monthly basis. The Court concurs with the Counsel for the Respondent submission that there are gaps in the evidence in this case.¹⁰ There are significant debts owed by both Parties.

It is clear a critical factor would include the housing needs of the Parties as both Parties will need to provide a roof over their heads. As iterated by Henry J, in **Janet Mitchell v Sebastien Mitchell**¹¹:

"Stamp LJ noted in *Martin v Martin* ([1977] 3 ALL ER 762 at 76) "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account in applying section 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there are children of the marriage."

This will be a particularly important need for the primary carer of any dependent children.

It is clear that the Respondent has secured alternate accommodation moving back to his parental home minimal cost. The Applicant on the other hand has no choice but to maintain rented accommodation with at least 2 bedrooms.

The Court has however considered the Parties' current income and expenses. In that regard, the Court has concluded that the Applicant's income is not adequate to cover rent and the other expenses. The Court has taken into account that there is a dependent child who is expected to remain in the physical custody of the Applicant. In practical terms this means that she will have to provide a home for that Child consistent with her previous standard of living. She will therefore require appropriate assistance to facilitate this.

In opposing this Application, the Respondent has failed to adequately address her ability to rehouse herself and the Child.

¹⁰ See: paragraphs 4 – 22 of the Respondent Counsel's Speaking Notes

¹¹ GDAHMT2010/0045 at paragraph 64

vii. The Loss of Any Benefit by Reason of the Divorce

The matters that a court would normally consider under this head would include pensions or annuities, gratuity entitlements and allowance and severance benefits which either spouse may lose by reason of the dissolution of the marriage.

In the case at bar, save for her bare assertion, the Applicant has advanced no cogent evidence which speaks to this factor. The Applicant's representations regarding a possible pay out by the Respondent's previous employers was wholly unsupported. Although it was open to her to engage in appropriate discovery proceedings she chose not to do so and as a result, there is no cogent evidence presented in that regard.

Spousal Maintenance

- [59] The guiding principle in making an order for spousal maintenance is based or premised on achieving a fair and just result. If a court is considering making a financial order, the court will take into consideration, the needs, both present and future of the applicant and the respondent. The court is also concerned about not causing undue hardship. It is accepted that there will be some transitioning when a marriage breaks down, and some hardship is inescapable, however, said hardship must not be extreme, especially to the parent who has custody of any children of the marriage, as the needs of the children are the paramount concern to the court.
- [60] Periodical payments made are aimed at redressing any significant prospective economic disparity which may arise from the way the parties conducted their marriage. An applicant's financial needs obligations and responsibilities will be the starting point for the court. The applicant's income must be factored in in any level of payments ordered. Income and earning capacity should be part of that consideration: not only the present situation, but whether the applicant could improve his/her situation.
- [61] In the Virgin Islands, the test or approach for achieving the fair and just outcome is the reasonable requirements approach. It is clear to this Court that the Applicant herein is a qualified cosmetologist and therefore has the potential to of utilizing her skills talent and training towards becoming financially self-sufficient in the foreseeable future. However, she is not currently earning sufficient money to maintain herself and the Child.

[62] The information borne out on the evidence is that they lived the normal life of a middle-class family. There is no evidence of a particularly extravagant lifestyle, but they did enjoy pleasure trips when resources permitted. The Court has noted that the demise of their marriage has had a significant impact and that they do not presently enjoy the same standard of living. The Court agrees with Counsel for the Respondent submission that the need and financial obligations of the Applicant are basic. She has to cover one household which consists of her and the Child. Her needs and responsibilities are listed as: rent, food, utilities, and personal care. No evidence has been given about any exorbitant expense in the foreseeable future in relation the Applicant. However, it is clear that the Applicant's present obligations/expenses (which are not generally unreasonable) outweighs her income that is without assistance neither she nor the Child would be able to enjoy the previous standard of living.

[63] In the early part of these proceedings, there were previous orders made which acknowledged and reflected this fact. In the Court's judgment not much has really changed as at the date of trial there had been very little change to the Parties disparate financial positions. Nevertheless, the Parties' marriage is of a relatively short duration and the Court has no doubt that the Applicant will take steps to ensure that her financial position improves such that she will become financially independent once the pandemic abates, the Territory reopens and the job market returns to some sense of normalcy. The Court has also taken into account that the Applicant removed for her sole use sums standing to the credit of the Parties in their joint account as well as the fact that she was left with valuable furniture and appliances.

[64] The Court is therefore satisfied that it would unreasonable to order spousal support for a period of 2 years and at the rate sought by the Applicant but it is clear that some sort of assistance is warranted.

Property Adjustment Order

[65] The Parties were married on 18th October, 2014. The evidence of the Applicant is that the Respondent purchased two properties during the period that they were engaged and prior to the date of their marriage and a third property after they were married. Despite a robust effort to prove some equitable interest in these properties, there is simply no evidence which would support a contention that there was a common intention that the Parties would jointly own the Properties. Although they

may have been acquired while the Parties were ostensibly engaged to be married, it is clear that they were acquired with the Respondent's separate funds and earnings and without the participation of the Applicant. She was not able to give any clear evidence about the acquiring of the property whether in the initial stages of approaching the vendor, or in the latter stages of dealing with the bank processes.

[66] The third parcel of land, may have been acquired following the Parties' marriage but again having considered the whole course of dealings during their relatively brief marriage, there is no evidence that the Parties had an express common intention that that property would be jointly owned. In fact, the Court accepts Mr. Scatliffe's evidence that the Respondent urged him to keep the transaction confidential.

[67] The only evidence which the Applicant is able to give to support her claim to the properties is that she indirectly contributed towards loan payments when she would have placed sums of money in a drawer which would have been used to defray household bills. This evidence is surprising given that at the time, the Parties had a jointly held bank account. Obviously no documentary evidence was advanced to prove the purported drawer deposits, but this Court does not doubt that the Applicant comparatively meager and sporadic income when she did manage to secure employment may have in part been applied to the family expenses. The extent of this contribution would however have been negligible.

[68] She also contended that her nonfinancial contributions would have enabled the Respondent to finance the mortgage payments. However, it is now trite law that the mere fact that an individual can demonstrate conduct which may amount to an indirect contribution does not guarantee that a common intention will be inferred. No constructive trust will arise if the contribution is made in circumstances that demonstrate that there was no common intention to share ownership of the property. A common intention would not be inferred if parties have merely done what spouses would normally do. In the words of Chadwick LJ in **James v Thomas**:

"The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest."

[69] This view was also reiterated in **Pettit v Pettit** at page 826 of the judgment:

“It is common enough nowadays for husbands and wives to decorate and to make improvements in the family home themselves with no other intention than to indulge in what is now a popular hobby and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would enter their heads.”

[70] The relevant case law reflects that non-financial contributions must be sufficiently significant so as to lead to the inevitable conclusion that there was a common intention at the outset that there was a shared intention that the Applicant was to acquire a beneficial interest. It is clear therefore that the indirect financial contribution must be in excess of what would be expected as a normal contribution. In the case at bar, the Applicant has simply not met that threshold.

[71] This Court has considered the totality of the evidence presented in support of the Applicant’s case and in so doing the Court has also taken into account the whole course of the Parties’ conduct in relation to the Property. In that regard, the Court notes that the Property was acquired prior to the marriage. The Court has no doubt that during the marriage there would have been no representation made that the properties would have been jointly owned. The Applicant has also represented that the Respondent discussed plans to have one of the properties serve as the location for the matrimonial home. Even if the Court accepts this, it is clear that this intention never bore fruit and that the marriage thereafter would have quickly dissolved.

[72] In the Court’s judgment, there is little evidence upon which the Court can ascertain the Parties’ shared intentions, actual, inferred or imputed, with respect to the Property in the light of their whole course of conduct. Instead, the Court can only conclude that the Property was never intended to and does not comprise the product of the Parties’ joint marital endeavor.

CAN NON-MARITAL ASSETS BE THE SUBJECT OF A PROPERTY ADJUSTMENT ORDER?

[73] In arriving at a just and fair result, in the context of this case, the Court must nevertheless consider whether the assets acquired solely by the Respondent should still be the subject of a property adjustment order. At paragraphs 55 – 82 of the judgment, Moylan LJ in **Hart v Hart**¹² undertook a thorough exploration of the case law on how the courts should treat marital and non-marital property. He first noted that the court's objective, when exercising its discretionary powers under section 25 of the 1973 Act, "*must be to achieve a fair outcome*".¹³ The three underlying principles or rationales (as articulated in **Miller**), are needs, sharing and compensation. Moylan LJ then noted that classifying property as matrimonial or not is relevant to any court seeking to apply the sharing principle. This is because the sharing principle applies with force to marital property but it does not apply, or applies only with significantly less force, to non-marital assets.

[74] For many years the law in this area remained in a state of flux. However, in the Virgin Islands, the Privy Council dicta in **Scatliffe v Scatliffe**¹⁴ has gratefully provided a degree of clarity. In that case, the appellant, Mr. Scatliffe, appealed against an order for ancillary relief made in favour of his ex-wife. The Privy Council dismissed the appeal on the basis that the order for division of property made by the BVI High Court and upheld by the Court of Appeal was fair to both parties in light of all the relevant circumstances of the case. In the process of dismissing what the Board took the opportunity to offer some guidance and clarity on the judicial treatment of non-matrimonial property. In commenting on the fact that Mr. Scatliffe's guest house which he inherited from his parents was erroneously disregarded by the lower courts, the Board outlined the extent to which the non-matrimonial property of a party may still be relevant in the court's division of assets.

[75] At paragraph 25, the Board offered the following points of guidance:

"25.

- (i) Section 26(1) (a) of the 1995 Act 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".

¹² [2017] EWCA Civ 1306

¹³ Lord Nicholls in *White* (p. 604H)

¹⁴ [2016] UKPC 36

- (ii) Thus, when a court finds that an asset is not one in which either party has any interest (such as, in the present case, Parcel 174, beneficially owned by the son Derwin: see para 17 above), no account should be taken of it.
- (iii) It is, however, confusing for such an asset to be described as "non- matrimonial property".

It was when introducing the "yardstick of equality of division" in the White case, cited above, at p 605, that Lord Nicholls proceeded, at p 610, to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the Miller case, cited above, at paras 22 and 23, he described the latter as "non- matrimonial property"; and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".

- (iv) So the phrase **"non-matrimonial property" refers to property owned by one or other of the parties**, just as the phrase "matrimonial property" refers to property owned by one or other or both of the parties.
- (v) Accordingly **it is contrary to section 26 (1) (a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property"**. This raises the question: in what way should regard be had to it?
- (vi) As was recognised in **Charman v Charman (No 4) [2007] EWCA Civ 503**, [2007] 1 FLR 1246, at paras 65 and 66, **it was decided in the White and Miller cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle**. In the Miller case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non- matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the White case at p 610 that, irrespective of whether it fell to be shared, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's needs.
- (vii) In **K v L [2011] EWCA Civ. 550**, [2012] 1 WLR 306, it was noted at para 22 that, **notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need**.
- (viii) Indeed, four years later, in **JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam)**, [2015] 2 FLR 1202, Mostyn J suggested at para 22 that **the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard**.
- (ix) So in an ordinary case **the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters**

specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular, it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the Miller case at paras 137 to 144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other.” Emphasis added

[76] Having considered the relevant case law and the facts of this case, this Court is not satisfied that the sharing or compensation principles should applied here. Instead, the Court is satisfied that the proper approach in this case is to apply the needs principle.

[77] In **Neil Batcheler v Tracy Batcheler**¹⁵ the learned judge noted that the wife acknowledged that she is living comfortably and enjoys the standard of living she did before the breakdown of the marriage. A very different scenario obtains in the case at bar. What is represented is that with the demise of the marriage, the Applicant’s financial security has significantly decreased and she now faces an application which will result in financial hardship. It is clear that she must maintain appropriate accommodation to house herself and the Child. The Applicant contends that she must now pay solely pay rent, utilities and other amenities for herself and the Child in circumstances where her current income is inadequate.

[78] In the case at bar, there simply is no matrimonial property declared. The Court’s must therefore weigh or otherwise reflect the existence of non-marital property The Court is obliged to balance the financial needs of both Parties with the available resources. In doing so, the Court has considered the judgment of Thorpe LJ in **M v B**¹⁶ where he held:

“It is one of the paramount considerations, in applying the criteria in s 25 of the 1973 Act, to endeavour to stretch what is available to cover the need of each party for a home, particularly where young children are involved. The primary carer needs whatever is available to make the main home for the children, but it is also important (albeit to a lesser extent) that the other parent have a home of his own where the children can enjoy contact. The possibility (where there are enough funds by stretching and a degree of risk-taking) of so dividing the funds available that both parties can rehouse themselves is an exceptionally important consideration and one which will almost invariably have a decisive impact on the outcome.” Emphasis mine

¹⁵ GDAHMT2017/0137

¹⁶ [1998] 1 FLR 53

- [79] In deciding whether and what appropriate award should be granted the Court has considered that the flexible approach advocated by Lord Nicholls and Lady Hale in **Miller** is the appropriate course to be adopted. This means that the Court is not required to seek to follow the formulaic approach necessitating a detailed evidential enquiry as a formulaic mathematical approach is not required to achieve consistency or to guarantee a fair outcome. Despite the evidential lacunas which obtain in this case, the Court still has to make findings on such evidence as there is, including by drawing such fair inferences (as in **Prest v Petrodel Resources Ltd [2013] 2 FLR 732, paragraph 47**) or adverse inferences as may be appropriate. The Court will still have to make findings, however broad or abbreviated, as to the scale of the Parties resources. This is because, inevitably, the judge will have to determine that the proposed award is one which the Respondent can meet and which is fair.¹⁷
- [80] Having considered all of the relevant factors set out in section 26 of the Act, it is clear to the Court there is an obvious disparity in the Parties' financial positions. There is no doubt that the Respondent would have been the main breadwinner in the family who through professional experience and skill acquires several pieces of real property prior to the marriage which from all accounts he intended to donate to his children. Apart from motor vehicles the Parties have disclosed no other assets and there is no evidence before the Court that the Parties own any other real estate.
- [81] If there are not enough assets to meet the financially weaker party's needs, then the court will award them a portion of the other side's pre-acquired wealth to ensure that those needs are met. Needs are always regarded as more important than protecting pre-acquired wealth and, in such a scenario, trump all else." At this time, the Applicant's needs are greater than those of the Respondent and it is clear to the Court that her financial needs cannot be satisfied without recourse to the Property. In coming to this decision the Court has considered that, under section 26(1) of the Act, courts are under a duty to have regard to all the circumstances of the case and under section 25(2) to various particular matters, one of which is: - "(a) ... *property ... which each of the parties in the marriage has or is likely to have in the foreseeable future*".

¹⁷ Hart v Hart [2017] EWCA Civ. 1306 at paragraphs 101 – 102

- [82] The Court has also considered the plethora of case in this case including the seminal dictum of Lord Nicholls at page 1583H in **White v White** where he observed that the consideration that property was acquired before marriage or that it was inherited during marriage, although a relevant factor, can "*in the ordinary case be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property*".
- [83] Applying the words of the statute and the relevant case law, the Court is required to take into account all properties of each party. This must include the property, which was acquired prior to the marriage. Having considered all of the circumstances, the Court is satisfied that fairness in this case demands a property adjustment order whereby the Applicant is awarded an interest in the Respondent's property.
- [84] In the interest of achieving a clean break, the Court will order that the Applicant pay to the Respondent a lump sum representing the fair value of the Applicant's 5% share of the current market value of the Property to be paid within six months of the date of this judgment. In arriving at this conclusion, the Court has determined that the Applicant has capital assets (the Property) available sufficient for this purpose. see: **Wachtel v Wachtel**.¹⁸ The Court has also taken into account the fact that the Applicant would have had the benefit of valuable personalty i.e. furniture and appliance left at the matrimonial residence and a larger share of the proceeds from the joint bank account.
- [85] In that way, the Parties who have hitherto enjoyed a reasonable standard of living will then leave the marriage with some prospect of having their immediate and future needs met and the Respondent will have the means to secure suitable alternative accommodation.
- [86] In the case at bar it is accepted that there is no significant age difference between the Parties and that the Applicant should be in a position to financially recover, once she has some financial assistance to re-start her life and provide for herself and the Child. Accommodation expenses are likely to be the Applicant's most expensive monthly expense and this is currently \$1,100.00 monthly. In light of the Applicant's financial constraints, the Court is satisfied that some spousal maintenance would be appropriate. Pending the payment of the lump sum payment, the Court will order the

¹⁸ [1973] EWCA Civ. 10

Respondent to pay a monthly sum in spousal maintenance in the sum of \$800.00 per month. Such payments are to commence from the date of this judgment and will continue until the lump sum is fully paid.

- [87] This would assist in alleviating likely financial hardship. The Court acknowledged that both Parties both have had to adjust their standard of living in order to make ends meet, for the best interest of the family unit and in acknowledgement of the same the Court will only keep this order in place until the Applicant received the proceeds of her lump sum payment which reflects the property adjustment order. Thereafter the spousal maintenance order will cease.

Other Claims

- [88] The Court will dismiss all claims which the Applicant would have advanced in relation of the Respondent's savings and his purported benefits paid out of the pension plan. In the case of the former, the Court is not satisfied that any entitlement has been made out and in the case of the latter, the Applicant has not discharged her burden of proof that such benefits even exist.
- [89] The Court is however satisfied that the motor vehicle solely registered in the name of the Respondent is matrimonial property. The Parties whole course of dealings with regard to that vehicle indicated that although it was acquired in the sole name of the Respondent, it was clearly intended for use by both Parties (but principally driven by the Applicant) and for the benefit of the family as a whole. It was however clearly acquired with the Respondent's earnings and in light of the duration of this marriage, the Court is satisfied that the equal sharing principle would not be appropriate here and will award a 1/3 share in the value of the vehicle.

COSTS

- [90] Costs lie in the court's discretion. Having regard to the orders made, the Court cannot ignore the outcome of the litigation which saw partial success on both sides. The Court is therefore of the view that the Parties should bear their own costs.

[91] It is hereby ordered as follows:

- (i) The Applicant is awarded a 5% interest in the Property.
- (ii) The Respondent shall pay to the Applicant the sum representing 5% share of the fair market value of the Property, to be paid within six (6) months of the date of this judgment.
- (iii) The Respondent will pay the Applicant spousal maintenance in the sum of \$800.00 per month until payment of the sum ordered in (ii) above.
- (iv) The Applicant is entitled to a 1/3 share in the BMW vehicle.
- (v) No order as to costs.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar