

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

**IN THE HIGH COURT OF JUSTICE
(MATRIMONIAL)**

Claim No. BVIHMT 2019/0027

BETWEEN:

TAMEEKA CORION

Petitioner/Respondent

and

ARTHUR CORION

Respondent/Applicant

Appearances: Ms. Marie Lou Creque, Counsel for the Petitioner/Respondent
Ms. Nelcia St. Jean, Counsel for the Respondent/Applicant

2020: December 13th
2021: December 17th

JUDGMENT

[1] **ELLIS J:** Following the grant of decree nisi in December, 2019 the husband (“the Applicant”) then filed an application for ancillary relief on 25th May 2020. He seeks a number of orders relating to the child of the marriage, Taraji Azana Milan George-Corion born on the 22nd day of April 2010 (“the Child”). In addition, the Applicant seeks to have the wife (“the Respondent”) to vacate their residence within 14 days of the Court’s order on the basis that there are no marital assets. However, in her response to the Application, the Respondent seeks a lump sum payment representing her interest in the matrimonial home, which she places at 33%.

[2] Happily, the Parties have been able to arrive an agreement in respect to the following matters in relation to the Child:

- (i) Joint custody, with the Respondent having primary care and control.
- (ii) The Applicant shall have the following access to the Child - every other weekend and overnight visits every Tuesday. The Child shall also spend one month of summer vacation with the Applicant and alternating Christmas and Easter vacations and such other visitation as the Parties may agree.
- (iii) The Applicant shall pay maintenance in respect of the Child in the sum of \$300.00 per month until the Child attains the age of 18 years or completes her first degree of tertiary education, whichever is later.
- (iv) The Parties shall equally bear all uninsured medical expenses until the Child attains the age of 18 years or completes her first degree of tertiary education, whichever is later.

[3] The Parties have however failed to arrive at any agreement regarding the education expenses incurred by the Child.

[4] It follows that the following issues remain for determination:

- i. Whether the Parties should equally share the educational expenses incurred in respect of the Child.
- ii. Whether the property located at Block 3139B Parcel 211 Registration Section East Central is matrimonial property ("the Property").
- iii. What, if any, interest does the Respondent have in the Property.

THE MINOR CHILD – EDUCATIONAL EXPENSES

[5] Turning first to the order sought in relation to the minor child, the Court notes that at the time of the Application, the Child attended First Impressions Primary School. This is a private school in the Virgin Islands in respect of which Parents are expected to pay tuition and related costs. The Child is expected to complete her primary education in 2023.

[6] The Respondent asks that the status quo be maintained such that the Applicant ought to continue to pay for the further tuition costs associated with the Child's private school primary education (\$435.00), while she continues to pay for uniforms and books. Thereafter, she proposes that the

Parties should equally share in the cost of the Child's public school secondary education. The Respondent argues that the status quo ought to be maintained given the already stressful matter of divorcing parents and imminent change of accommodation. Counsel for the Respondent submitted that a sudden change in educational environment could potentially have far reaching psychological effects on a child. More particularly, she submitted that in this era of Covid-19, it has been the private schools that have maintained more in-house education than the public schools which have had limited on-line classroom study.

- [7] In support of this contention, Counsel for the Respondent relied on the case of **Aldridge v Aldridge**¹ in which the Court observed:

"In determining an application of this nature, the first and paramount consideration is therefore the welfare of the child. It has however been long recognized that the welfare of the child though of "paramount importance" is not exclusive and must take into account other just as important considerations. The "other considerations include the wishes of the child old enough to be considered, the wishes of the parent, conduct of the parents towards each other and the child, maintenance of the family unit, material standards and advantages which the child reasonably expects or preserving the status quo in the child's life."

- [8] This was further enunciated by the words of d'Auvergne J in **Alvin Hodge v Maguerite Densie Hodge** who said "... much weight is now given to the child's sex, age, the physical emotional and educational needs, the likely effect on the child with regard to any change in his circumstances and any harm he or she may be at risk of suffering as a result of the change."²

- [9] Counsel concluded that as the interests of the child are paramount, maintaining the status quo, such that the Child remains at First Impressions Primary School, is in the best interests of the Child. The Respondent further submitted that the Child should fare no less than the Applicant's other daughter such that the Applicant ought to pay 100% for the Child's tuition and accommodation for tertiary education, if same is pursued, until she attains her first degree, save and except library expenses and books which will be borne by the Respondent. It is further proposed that any travel associated with such tertiary education will be equally borne by the parties. The Petitioner argues that parity of treatment of the Respondent's children ought to obtain.

¹ BVIHMT 2013/0031 at para. 22

² d'Auvergne J in **Alvin Hodge v Maguerite Densie Hodge** 33/2002 quoted by Olivetti, J in the case of **Neville Clairmonte Brathwaite Jr v Angeline Sherrzar Brathwaite nee Paul** BVIHMT 2001/0069

[10] While the Applicant submits that he may concede to paying more than 50% of all educational expenses while the Child is in primary school, he does not believe that the Respondent should pay less than 40% of all educational expenses. The Applicant submits that shoes, clothes and books are purchased either per term or per school year and that after school lessons are offered at the Child's school for free or at a much lower fee and that the reading classes which the Respondent states that the Child started in September 2019, which may not been going on for some time due to the current pandemic.

[11] The Applicant submitted that the standard rule should be equality between the Parties and such equality should not apply to distribution of assets but also to obligations as well. Counsel for the Applicant relied on the judgment in **White v White**³ in which Lord Nicholls stated that:

“as a general guide, equality should not 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”.

[12] According to the Applicant, the evidence before the Court does not show that the Applicant is in a better financial position than the Respondent. Rather, Counsel for the Applicant submitted that in fact the Applicant's financial obligations far exceeds those of the Respondent and should the Court apply the relevant consideration of section 26 (2) of Matrimonial Proceedings and Property Act⁴ (“the Act”), it would appear that:

“... to so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each had properly discharged his or her financial obligation and responsibilities toward the child” that both parties should equally contribute to the child.

Court's Analysis and Conclusion

[13] At law, parents have an equivalent financial obligation to maintain their children. It is equally undeniable that *“arranging for education commensurate with the child's intellectual needs and*

³ [2001] 1 ALL ER 1

⁴ Act No. 6 of 1995 of the Laws of the Virgin Islands

abilities is an... incident of the parental responsibility which arises from the duty of the parent to secure the child's education." **See: Re Z (A minor) (Identification: restrictions on Publication)**⁵.

- [14] When exercising its discretion to decide whether to make an order of financial provision for the child of the family and if so in what manner, a court must consider all of the circumstances of the case including all of the factors listed in section 26 (2) of the Act. This provides that in deciding whether to order a party to make financial provision for a child under section 24 the court must have regard to the financial needs of the child, the income, earning capacity (if any) property and other financial resources of the child, the standard of living enjoyed by the family before the breakdown of the marriage and the manner in which he or she was being educated and in which the parties to the marriage expected him or her to be educated or trained.
- [15] Section 26 (2) mandates the court to:
- “and so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards the child.”
- [16] In determining whether or not an order should be made compelling the Parties to equally share the costs of the Child's private school fees, the Court has considered the factors mandated by the Act. The Court notes that neither Party has averred that the Child suffers from any disability. In the same way, the Court was not presented with any evidence regarding the income and/or earning capacity of the Child, neither have the Parties asserted that the Child owns any property and other financial resources which would be relevant.
- [17] The Court has considered the needs of the Child and in that regard the current status quo reveals that the Child who is now 10 years old, has been attending the First Impressions Primary School. She is expected to complete her primary education in 2023. Currently her monthly tuition fee of (\$435.00) is covered solely by the Applicant while the Respondent pays for uniforms and books.

⁵ [1997] Fam 1 at page 26

- [18] As to the way forward, and the manner in which the Parties to the marriage expect the Child is to be educated or trained, it is apparent that the Parties have very divergent views. Clearly, the Child's private schooling is significantly more expensive than if she were to attend the public or government school. As the parent with primary care and control, the Respondent has determined that the Child will continue to attend the private school. In the case at bar, the Applicant's position evolved. In his first affidavit filed on 25th May 2020, he unequivocally agreed that he solely bears the school fees for the Child. At that time his only issue was that he was not being adequately provided with information about the child's performance reports or activities. By his second affidavit filed on 10th July 2020, the Applicant simply indicated that "*it would be an unfair burden on me to pay the tuition for the child solely up to an including tertiary education.*" In the event that the Parties were unable to arrive at an agreement whereby they would split the educational expenses, the Applicant asked that the Court order that the Child should attend public school and that the costs of tertiary education be split equally between the Parties. It is in his third affidavit filed on 2nd October 2020 that the Applicant crystallised his position. There, he represented that he seeks to have all educational expenses equally shared by the Parties because he is unable to bear sole responsibility for the same. At paragraphs 4 – 10 of that affidavit he proceeds to detail his financial position.
- [19] In determining an application of this nature, the first and paramount consideration is therefore the welfare of the child. This requires a court to assess the material standards and advantages which the child reasonably expects or preserving the status quo in the child's life. There is clear support for this in the Act which contemplates that as far as it is just and practical to do so, the court should ensure that the Child is placed in the financial position in which she would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards her. In conducting this analysis, a court must take into account the fact that where a child has become accustomed to a particular arrangement, it may be disruptive to the child to change the arrangement. A disruption of the Child's educational plan is clearly not desirable and thus the current status quo should be maintained.
- [20] It has however been long recognized that the welfare of the child though of "*paramount importance*" is not exclusive and must take into account other just as important considerations. Often a case will turn on the financial capability of parties, current and future, in light of needs of the parties. The court

must therefore consider a range of factors, including affordability, if a couple are trying to create and support two homes out of the income that used to support one family home and school fees. The court must apportion that obligation between the parents according to their relative abilities to contribute to the performance of the obligations. A court must avoid making orders that are beyond the means of the party ordered to pay.⁶

[21] During the course of the trial of this matter, the Court also heard viva voce testimony on this issue. Having reviewed the written evidence and having had an opportunity to observe the Applicant under cross-examination, the Court was not satisfied that he has been entirely forthright in his evidence. While the current financial climate may have no doubt affected the Applicant's business, it has not been represented that this is anything more than a temporary setback. Moreover, looking at his declared sources of income and personal expenses, the Court can only conclude that it would have necessitated creative accounting methods to avoid serious financial embarrassment.⁷ Apart from the outstanding bills for services and material and supplies incurred by his construction business, it has not been demonstrated to this Court that the Respondent faces personal jeopardy. Where necessary he has secured the assistance of family members to keep his obligations current and there is no reason to conclude that this position could change. From all accounts he has managed to keep the tuition fees current.

[22] The Court has also considered the Respondent's evidence as to her income and expenses. What is clear is that the evidence before the Court discloses the disparate earning capacity and resources of the Parties making it obvious that the Applicant will have to bear more of the responsibility of educational expenses of the Child and meeting any short fall in tuition costs, until the Respondent's earnings are enhanced. The Respondent does however have an equivalent moral and legal responsibility to ensure the Child's educational needs. She must therefore take all necessary steps to ensure that she is in a position to equally share the expenses.

⁶ Derrick v Derrick Claim ANUMT2011/0127

⁷ Ramsaroop v Ramsaroop unreported 17th February 1997 HC Trinidad and Tobago 4211/1995

[23] For that reason, the Court is satisfied that she must contribute 30% of the Child's total educational expenses inclusive of tuition and incidentals while she continues to attend private school. When the Court has regard to the Respondent's current actual contribution to the Child's expenses, the Court is satisfied that this is a fair and equitable order. Thereafter, it is contemplated that the Child will pursue her secondary school education at the public or government school at which time the Parties will equally bear all associated educational expenses.

[24] As regards the tertiary educational expenses, in the Court's view it is reasonable to presume that the Respondent will do what is necessary to improve her financial position in the future and that she will be able to equally contribute towards the education of the Child. The Court is satisfied that in the event that the Child reaches the age of 18 and is pursuing a course of study, all tertiary education expenses must be equally borne by the Parties.

PROPERTY ADJUSTMENT ORDER/LUMP SUM

[25] The Respondent is the sole registered owner of property known as Registration Section East Central Block 3139B Parcel 211 ("the Property"). The Property consists of a two-bedrooms, two and a half-bathrooms residential dwelling and an annex consisting of a three-bedrooms, two and a half bathrooms, fully furnished rental unit and a downstairs rental unit comprising of a fully furnished, 2-bedroom, two and a half bathrooms' residence.

[26] The Applicant contends that the Respondent does not have an interest in the Property. He asserts that he owned the Property prior to the marriage and at no time did he allow the Respondent to believe that she would have an interest in the Property or that it belonged to them jointly. The Applicant relies on the judgment of Lord Nicholls of Birkenhead in **White v White**⁸ where he stated that a distinction must be made between marital property and inherited property (that is, property acquired by one spouse before the marriage or during the marriage by gift or succession or as a beneficiary under a trust). The Applicant also relies on the case of **Gissing v Gissing**⁹ in which the English House of Lords held that a claimant must prove that the legal owner of the land induced him

⁸ [2001] 1 ALL ER 1

⁹ [1971] AC 886

or her to believe they would be entitled to a share in the ownership. Counsel for the Applicant asserts that this is expounded in **Lloyds Bank Pie v Rosset**¹⁰ where Lord Bridge stated that:

“the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.”

[27] According to Counsel for the Applicant, there is also no evidence before the Court that indicates that the Respondent, acted to her detriment on the belief that she had an interest in the Property. In fact, the evidence of the Applicant states that the Respondent always referred to the Property as his own and this has not been refuted. Counsel further submitted that if the Respondent wished to claim an interest, she would need to show two things: [1] that there was either a verbal agreement or arrangement that allowed her to believe she had an interest and [2] that she acted to her detriment based on that belief. Counsel for the Applicant submitted that neither an agreement or arrangement nor any detrimental behaviour on the part of the Respondent to that effect has been shown in this present case. Based on this, the Applicant submitted that the Respondent has no beneficial interest in the matrimonial home.

[28] The Respondent agreed that on the face of it, the Property is non-matrimonial property. Counsel for the Respondent referred the Court to the judgment in **Charman v Charman**¹¹ and **Hart v Hart**¹² which both considered the issue of pre-matrimonial or non-matrimonial property. In **Hart** the court defined non-matrimonial property to be:

“...assets (or that part of the value of an asset) which are not the financial product of or generated by the parties’ endeavors during the marriage. Examples usually given are assets owned by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse typically from a relative during the marriage.”

¹⁰ [1989] Ch 350

¹¹ [2007] EWCA Civ 503 at para 66 as quoted by Smith, J in *Neil Batcheler v Tracey Batcheler*, GDAHMT 2017/0137, para. 16

¹² [2017] EWCA Civ 1306 at paragraph 2 as quoted above

[29] However, Counsel for the Respondent submitted that on the dissolution of the marriage a court is tasked with seeking to achieve a fair outcome in accordance with the relevant legislation and case law, and having particular regard to the “sharing principle”. In that regard she pointed the Court to section 25 (1) of the Act which speaks to the jurisdiction of the court in making a property adjustment order.

“On granting a decree of divorce, a decree of nullity or a marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute) the Court may, subject to the provisions of sections 29 and 33 (1), make any one or more of the following orders:

- (a) An order that a party to the marriage shall transfer
 - (i) To the other party,*
 - (ii) To a child of the family, or*
 - (iii) To a specified person for the benefit of a child of the family, property, specified in the order, being property the first mentioned party is entitled to, either in possession or reversion;**
- (b) An order that a settlement of property that may be specified in the order, being property that a party to the marriage is entitled to, be made to the satisfaction of the Court for the benefit of the other party to the marriage and any child of the family;*
- (c) An order varying for the benefit of the parties to the marriage and any child of the family any antenuptial; or postnuptial; settlement (including such a settlement made by will or codicil) made on the parties to the marriage;*
- (d) An order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement.”*

[30] Counsel then pointed to the factors which a court ought to take into consideration in making a determination under section 25:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future,
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future,
- (c) the standard of living enjoyed by the family before the breakdown of the marriage,
- (d) the age of each party to the marriage and the duration of the marriage,

- (e) any physical or mental disability of either of the parties to the marriage,
- (f) contributions made by each of the parties to the welfare of the family, including any contributions made by looking after the home under section 49,
- (g) any order made under section 49,
- (h) in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage, or of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring,

And to so exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to the other.

[31] Counsel for the Respondent submitted that at the time of the marriage, the Applicant had already constructed the Property which included the Parties' residence as well as the income-earning apartments. However, only the matrimonial home was furnished. The Respondent worked part-time in the Applicant's construction business. According to the Respondent, at one point in the marriage, she was effectively the Applicant's administrative assistant, human resources manager, marketing and book-keeper. She therefore assisted the Applicant in his business, saving him time and money that he would otherwise have had to do himself or expend for other staff, such that he was able to meet his monthly obligations, including the mortgage and purchase such furniture for the rental properties as he has been able to do, thereby increasing his earning potential for said units.

[32] After the birth of the Child in April 2010, the Respondent worked from home in the Respondent's business until the Child was old enough to attend pre-school, which she did from age of 4. In January 2014, she stated that the Applicant terminated her services causing her to immediately file suit for wrongful dismissal which she later discontinued at the Respondent's request. The Petitioner continued working with the Respondent, attending various job-sites (with the child in tow) until he eventually made her redundant in November 2017.

[33] The Respondent accepts that the Applicant was the major financial contributor who routinely reiterated that it was "his" house. However, she contends that it was her actions which helped him to make and keep such money to be able to pay the mortgage and utilities. She also bought groceries

and spared him expense of a nanny, cleaning, laundry, cooking etc. as she sought to build their life together and improve their home. Counsel for the Respondent pointed out that she will now have to find alternate accommodation and pay bills attendant upon same, inclusive of security deposit, rental and utilities, and thus seeks a monetary lump sum to permit her to do so.

[34] The Respondent therefore asserts that the Applicant was not solely financially providing for the family. She further contends that she also contributed by performing the usual wifely duties of building a home and life for the couple and their daughter, including cooking, cleaning and laundry as well as improving the décor of their home and garden. However, with the demise of the marriage, and the Applicant making the Respondent redundant, her income earning capacity significantly decreased. She has nevertheless demonstrated her willingness to contribute, working in any income earning capacity, including cleaning houses (which resulted in her suffering the Respondent's verbal belittlement) and operating as a taxi driver. Counsel for the Respondent submitted that if the Applicant were to "evict" the Respondent with regard to her contribution to their home, this will mean that the Respondent must now pay rent, utilities and other amenities for herself and the Child. The Respondent therefore seeks a lump sum payment, in accordance with the clean break principle, of her interest in the property which she asserts to be one-third of the value of the Property.

[35] Counsel for the Respondent relied on the case of **Neil Batcheler v Tracy Batcheler**¹³ in which the court was concerned with determining whether the sharing principle applied in the case of pre-marital assets. Smith J was of the view that non-matrimonial property should only be resorted to in order to meet needs which was in accordance with fairness, principle and practicality. According to Counsel for the Respondent, **Batcheler** was unique in that neither party was financially bereft whereas in the instant case, the Respondent and the Child will be severely hamstrung without recourse to the sharing principle, or at the very least, a lump sum payment of spousal maintenance.

[36] Counsel submitted that in the case at bar, the Parties have hitherto enjoyed a reasonable standard of living and it is accepted that with the age difference between the Parties the Respondent should be in a position to financially recover, once she has some financial assistance to re-start her life and provide for the Child. Counsel invited the Court to consider the fact that the Respondent contributed

¹³ GDAHMT 2017/0137

to his business, earning a nominal income considering the many roles she played; the fact that she gave up her career interests to assist the Respondent and the fact that she cared for their daughter at home for 4 years, while taking care of the home.

[37] Counsel further submitted that it is imperative, that with the breakdown of the marriage, that each have a roof of their head and be in no worse position, as far as possible, post-divorce than during marriage: see: **Janet Mitchell v Sebastien Mitchell**¹⁴.

[38] Counsel further submitted that as in the classic case of **Miller**¹⁵, and **McFarlane**¹⁶ the Respondent in this case sacrificed her career to help the husband. She relied on the following observations of Lord Nicholls of Birkenhead on the **McFarlane** appeal:

“91. A third feature is that the high level of the husband's earnings after the breakdown of the marriage was the result of the parties' joint endeavours at the earlier stages of his professional career. The wife gave up her career to devote herself to making a home for them both and for the children. As Bennett J noted, the husband was able to reap the benefits of the wife's contribution not just during the marriage. He continued to do so after the separation and after the divorce.

92. A fourth feature is that the career foregone by the wife was a professional career as successful and highly-paid as the husband's. This is not a case where the wife's future success was a matter for speculation. Speculation of this character is seldom helpful. Here the wife had a proven track record when the parties agreed she should give up her job. A fifth feature is that, as primary carer of the three children, the wife continued to be at an economic disadvantage and continued to make a contribution from which the children and, indirectly, the husband benefited. He was relieved of the day to day responsibility for their children.”

[39] Counsel submitted that the Respondent has worked in the home and business of the Applicant to her disadvantage; she has earned an interest to which she ought to receive the financial benefit and thus ought to be awarded a share in the non-matrimonial property.

[40] In regard to the quantification of that interest, Counsel for the Respondent referred the Court to the case of **XW v XH**¹⁷ where much of the appeal centered on the failure of the court below to explain

¹⁴ GDAHMT 2010/0045, at para. 64

¹⁵ 2006 [UKHL] 24 on appeal from [2005] EWCA Civ 984

¹⁶ 2006 [UKHL] 24 on appeal from [2004] EWCA Civ 872

¹⁷ [2019] EWCA Civ 2262, 2019

the reasoning of how the award was calculated. Moylon, LJ, summarised the facts of the case as follows:

“The wife appeals from the final financial remedy order made by Baker J (as he then was) on 21st December 2017. In simplified terms, he ordered that the wife should receive capital resources which, when added to her own assets, would give her approximately £152 million being roughly 29% of the parties’ combined capital resources of £530 million. The bulk of the award comprised a lump sum of £115 million, being 25% of the growth in value during the marriage of the husband’s shareholding in a company, based on the difference between the value at the date of the marriage (as given by an expert instructed in the proceedings) increased by indexation, and the proceeds of sale realised when the shares were sold at about the end of the marriage.

The underlying factual context of this case is that the husband’s shares in the company, which he, with others, had established some years before the marriage, realised a very significant sum when the company was sold. By the date of the hearing below, the proceeds received by the husband from the sale of his shares had become worth approximately £490 million net, out of the combined total of £530 million”.

- [41] The court in that case determined that there was no “straightjacket” approach to determining what percentage of the wealth accumulated from the husband’s business was premarital and what percentage was derived during the marriage. The court must do its balancing act of assessing each party’s contribution as well as the value/weight of contribution to what may be considered unilateral assets – in this case, the matrimonial home. Baker LJ at paragraph 123 of the judgment stated:

*“... it is of the very essence of special contribution that each party’s contributions have to be balanced. The wife is not thereby using her contributions “as a shield”. Nor does she have to claim that she has made a special contribution. In particular, contrary to those submissions, when the court is determining “whether there is sufficient disparity to make it inequitable to disregard” a party’s contributions (**Gray v Work**, at [102]), balancing the wife’s contributions including as a mother is at the very centre of this determination.”*

- [42] The learned Judge continued at paragraph 130 of his determination:

“However, when applying the sharing principle, I would suggest that in most cases the court will be able to, and should, make clear at some stage what part of the value of the asset or assets the court has determined is non-marital property. I would also suggest that the same applies when special contribution has been established.”

- [43] The learned Judge accepted the determination of the lower court that the husband’s shares should not be excluded from the sharing principle as to do so would be discriminatory. At paragraph 145 of the judgment, he made the following determination:

“This is why I have concluded that the application of a different approach to business assets, in other than short, childless marriages, would result in the sharing principle being undermined in the same way identified in *Charman* and, accordingly, that the judge was wrong to take this factor into account, at [239].”

- [44] Of the latent potential value of the husband’s shares and special contribution, Baker, J criticized the determination on the basis that there was no detail of whether the judge had taken the correct approach to assist in how he arrived at his award. The court ultimately equally divided the value of the matrimonial home (which had been previously awarded solely to the wife) and equally divided the matrimonial “business” wealth. Counsel for the Respondent submitted that in the instant case a similar approach should be adopted. The Respondent having assisted, at a nominal salary in the growth of the Applicant’s business and having assisted in the home, relieving him of added expenditure, she is entitled to a lump sum award in respect of her contribution in the home.

Court’s Analysis and Conclusion

- [45] Assigning property rights to married couples once their relationships have broken down has historically been a difficult task. This is particularly so where there is an absence of legal joint ownership in the matrimonial or family home. In such cases, one recourse is to establish equitable interest under property law, trust principles or equity assumptions. In the case at bar, it is not disputed that the Property is registered in the sole name of the Applicant. It follows that the legal interest in the Property is vested solely in him. In ***Stack v Dowden***,¹⁸ the House of Lords stated:

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”

- [46] Where legal title is in the sole name of one spouse, the other spouse will normally have no beneficial interest. However, that spouse may be able to establish a share of the beneficial interest where he is able to prove that the legal owner of the land induced him to believe they would be entitled to a share in the ownership. He may prove this by demonstrating an (i) express agreement or (ii)

¹⁸ [2007] UKHL 17, per Baroness Hale of Richmond at paragraph 56

contribution to the acquisition. In addition, that spouse must have acted to his detriment. If these requirements are demonstrated, the defendant will be considered to hold the property on a constructive trust for themselves and the claimant. The court will then calculate the respective shares in the property either by a 'holistic' examination of the whole course of dealing between the parties or, where no clear intention can be found, imputing what is fair in the context.

[47] In the case at bar, the Applicant trenchantly denies that the Property is matrimonial property in which the Applicant has a beneficial interest. The Court has considered the totality of the evidence advanced by the Respondent and it is clear that she does not contend that there is any direct evidence of a common intention either by express representations (written or oral). She also does not advance evidence by way of direct financial contribution either to the purchase price or the mortgage payments or to payments for repairs and improvements. Indeed, she frankly asserts that it was always the Respondent's preference and insistence that she make no significant financial contributions towards the home from the inception of the marriage. In the Court's judgment this goes a long way in dispelling any possibility of finding or inferring a common intention trust such that the Respondent could suggest that she had a beneficial interest in the Property.

[48] However, the Respondent asserts that there is indirect evidence of common intention which can be inferred from her indirect non-financial contributions in relations to the property. She stated that for a number of years she performed the role of an administrative assistant in the Applicant's construction business. She has sought to rely on the role which she played as a housewife and caregiver for their Child, thus freeing him to devote his attention to his business. She indicated that at some point she stayed at home and *"did housekeeping and cleaning, laundry, cooking, gardening (both decorative and vegetable – the latter with a view to reducing the grocery bill) grocery shopping, ironing, vehicle washing and interior cleaning."*¹⁹ She also contends that as she is also an events planner she was *"able to provide [her] input in the home décor and colour ideas...including making 'personal touches in purchasing home décor items here and there giving our home a personal and family feel'".*

¹⁹ Paragraph 6 of Respondent affidavit filed on 1st July 2020

[49] The English Court of Appeal in **Grant v Edwards** concluded that indirect evidence of common intention could be inferred by the conduct of the Parties when such conduct on the part of the claimant is directly referable to the purchase of the property and could only be explained by reference to a person acting on the basis of having a beneficial interest in that property. This position has since been qualified and in that regard the Court is also guided by the learning in **Pettit v Pettit** and more recently by the Privy Council decision in **Abbott v Abbott**.²⁰ Somewhat similar to this case, the wife gave up working early in the marriage and remained a homemaker for the majority of the marriage. In delivering the Privy Council's judgment, Baroness Hale emphasized the fact the parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership. In that case, the court favoured the reasoning of the trial judge Mitchell J, who relied heavily on the fact of the parties joint and several liabilities to repay the mortgage supported by their life insurance policies and also that fact that their income went into a joint bank account in concluding that the Parties had equal beneficial interests in the home.

[50] The relevant case law reflects that non-financial contributions must be sufficiently significant so as to lead to the inevitable conclusion that there was as common intention at the outset that there was a shared intention that the Claimant 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. **Jackson v Jackson**²¹ illustrates this legal principle clearly. In that case, the wife had made no direct financial contribution to the property which was registered solely in the husband's name. She relied on the fact that the search for a matrimonial home had been a joint search and that she made substantial financial contributions to the family home. In rejecting her claim, the Court held that her contribution amounted to no more than that of an average housewife.

[51] In **Button v Button**²², Denning MR stated the position in this way:

"This is the first case, I think, to come before us where the wife has done work on the husband's house but has made no financial contribution. I think that similar principles apply as when it is the other way about. The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property. Take the present case. The wife was

²⁰ [2008] 1 FLR 1451

²¹ 2010 Jamaica Supreme Court Judgment

²² [1968] 1 WLR 457 at 462

economical in spending on the housekeeping, as most wives are. She helped with the decorating and improvements to the house, as many wives do. It no doubt improved the value of the property. I was inclined during the argument to accept that her work was so great as to entitle her at least to a share in the house. But after discussion with my brethren, I have come to the conclusion that the proper inference from the evidence is that it was the ordinary kind of work which a husband or wife may do on the matrimonial home without giving the other a share or interest in it.”

- [52] Moreover, 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 the 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.”

- [53] 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 baths 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.”

- [54] 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 which occurred on 22nd August 2009. The Court has no doubt that during the marriage, the Applicant constantly made it clear that the house was solely owned by him. This would have led to some significant disquiet on the part of the Respondent who would have responded by refusing to make any direct financial contributions to the Property or indeed to any utilities and outgoings

concerning the Property. The Court has no doubt that this Respondent formed the view that the Property was solely owned by the Applicant and conducted herself in that vein.

[55] The evidence further reveals that the Applicant was the obvious breadwinner who kept his assets and his business registered solely in his name. To the extent that the Respondent rendered any service in the business, the evidence reveals that she would have done so purely as a paid salaried employee. She cannot therefore now assert that would have contributed underlying, such paid employment disclosed an unspoken intention that the ownership of the Property would be shared.²³

[56] 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 is persuaded that for the entirety of their marriage, the Parties conducted themselves as if the Property was solely owned by the Applicant and 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?

[57] However, the Respondent's case goes further. Bearing in mind that the Applicant now seeks vacant possession of the Property, it is clear that the Respondent will now have to find alternate accommodation and pay the attendant bills attendant upon same, inclusive of security deposit and utilities. Applying the reasoning in **Batcheler**, she seeks a lump sum payment, in accordance with the clean break principle, representing her interest in the Property which she states as being one-third.

[58] In the context of this case, the Court must consider whether the assets acquired prior to the marriage should still be the subject of a property adjustment order. This issue was squarely addressed by the English Court of Appeal in **K v L**.²⁴ In that case, the husband and wife cohabited for 21 years and there were three children of the relationship. In 2007, the parties separated. In 1973, the wife had

²³ Jackson v Jackson

²⁴ [2011] 3 ALL ER 733 at paragraph 2

inherited shares, which were worth £28m at the time of the separation. Throughout the marriage, neither party generated any earned income and each contributed fully to the life of the family at home. The parties pursued a modest lifestyle—the family's average net annual expenditure during the later years of the marriage was £79,000 and the value of the former matrimonial home was £225,000. The husband's existing capital after separation was £300,000. In his substantive claim for ancillary relief, the husband's proposals included £2m to purchase property and an estimated budget of £105,000 pa exclusive of the costs of the children when with him. At the time of the hearing before the judge, the shares were worth £57·4m. The first instance judge ordered that the wife make a lump sum payment to the husband of £5m on a clean break basis.

[59] On appeal, Counsel for the husband submitted that the judge erred in principle in ruling that the award to the husband should be limited to an assessment of his needs, albeit a generous assessment. He submitted that the judge had effectively found that the wife had made a special contribution to the welfare of the family and that the judge should have followed the guidance in **Charman v Charman**, namely that fair allowance for special contribution within the sharing principle would be most unlikely to give rise to departure from equality further than to 66·6% – 33·3%, which would have yielded an award in the sum of £18m to the husband.

[60] The English appellate court in that case therefore had to consider the application to non-matrimonial property of the sharing principle in the modern law of ancillary relief following divorce. At paragraph 2 of that judgment, Wilson L.J observed:

“We know that non-matrimonial property belonging to one spouse can be awarded to the other to the extent that the other needs it...”

[61] However in that case, although Counsel for the husband conceded that the award met the husband's needs, generously assessed, he complained that the trial judge failed to make an assessment by reference to the *sharing* principle. He therefore appealed on that basis correctly reminding the appellate court that *'when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail'*²⁵ The court of appeal considered the judgment in **Charman v Charman** and ultimately determined that

²⁵ *Charman v Charman* [2007] EWCA Civ 503 at [73], [2007] 2 FCR 217 at [73]

although non-matrimonial property also fell within the sharing principle, equal division was not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the other two principles of need and of compensation were likely to be very different; but the ordinary consequence of the application to it of the sharing principle was an extensive departure from equal division. The court of appeal determined that the judge's award was not disproportionate and dismissed the appeal.

[62] It is useful, in the interest of clarity, to restate that relevant dictum from **Charman v Charman**. At paragraph 66 of his judgment, Sir Mark Potter P stated:

“To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in para [68], below. Such an answer might better have reflected the origins of the principle in the parties’ contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale of Richmond in *Miller* at paras [141] and [143] to ‘sharing ...the fruits of the matrimonial partnership’ and to ‘the approach of roughly equal sharing of partnership assets’. We consider, however, the answer to be that, subject to the exceptions identified in *Miller* ... the principle applies to all the parties’ property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality.”

[63] In the English High Court decision of **JL v SL (No. 2)**,²⁶ Mostyn J stated as follows:

“Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination.

These arguments do not apply to property received or created outside the span of the partnership, or gratuitously received within the partnership from an external source. Such property has little to do with the endeavor of the partnership and the equal sharing principle as explained by Lord Nichols just cannot apply to it on any moral or fair basis. However, as I will explain, pre-marital property not uncommonly becomes part of the economic life of the spousal partnership and thus acquires a matrimonial character giving rise to a (not necessarily equal) sharing claim in relation to it...

... In my decision of **S v AG** [2011] 3 FCR 523 [2011] EWHC 2637 (Fam) I in effect updated my compendium in **N v F**. I stated as para 7: “Therefore, the law is now reasonably clear.

²⁶ [2015] EWHC 360 (Fam) paragraph 18 et seq.

In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally ...**By contrast, it will be a rare case where the sharing principle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is commonplace, but as Wilson LJ has pointed out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs.**"

Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard." Emphasis mine.

[64] At paragraphs 55 – 82 of the judgment, Moylan LJ in **Hart v Hart**²⁷ 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"²⁸. 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. However, it does not apply, or applies only with significantly less force, to non-marital assets. The learned judge noted that he was not aware of any case decided post-**Charman**, in which a party had been awarded a share of non-marital property by application of the sharing principle.

[65] There is an inherent tension between the approaches adopted by courts in this area. This was helpfully summarised in the case of Grenadian case of **Batcheler** where Smith J noted:

"The scope and application of the sharing principle, it would appear, cannot yet be considered settled law. Charman, on the one hand, is authority for the proposition that it applies to both matrimonial and pre-marital property while *JL v SL*, on the other hand, states that there was neither moral nor principled foundation for applying the sharing principle to pre-marital assets (except to meet needs) and that such a case would be as rare as the white leopard. In *K v L*, Wilson LJ conceded that such an award would be made some day, but not in his court that day. There had still been no such decided case on the issue by the time of *Hart v Hart* in 2017 – and none has been presented to this Court in the case at bar."

²⁷ [2017] EWCA Civ 1306

²⁸ Lord Nicholls in *White* (p. 604H)

[66] Luckily in the Virgin Islands, the Privy Council dicta in **Scatliffe v Scatliffe**²⁹ has afforded 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.

[67] At paragraph 25 the Board offered ten points of guidance:

- (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".
- (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".
- (iv) 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".
- (v) **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.
- (vi) **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?

²⁹ [2016] UKPC 36

- (vii) 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.
- (viii) 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**.
- (ix) 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**.
- (x) 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 mine.

[68] Having considered the relevant case law and the facts of this case, this Court is not satisfied that the sharing or compensation principles should be applied here. In **Batcheler**, 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 Petitioner's financial security has significantly decreased and she now faces an application which will result in her "eviction" from the Property. It is clear that she must now find alternative housing/accommodation to put a roof over the head of herself and that of the Child. The Respondent contends that she must now pay rent, utilities and other amenities for herself and the Child in circumstances where her current income is inadequate.

[69] In deciding whether and what appropriate award should be granted. This Court must therefore weigh or otherwise reflect the existence of non-marital property. In so doing, 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*³⁰), 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.³¹

[70] Turning therefore to the factors listed in section 26 of the Act, the Court finds as follows:

i. Age of the parties - Physical or mental disability

At the time of the hearing the Applicant was 57 and the Respondent was 37. There is therefore a 20 year age difference between the Parties. Although the Applicant is a self-employed business man engaged in the construction industry, it bears noting that under the Virgin Islands Retirement Age Act 2016, the minimum compulsory retirement age is 65 years. There is no mental or physical disability of either Party.

ii. Duration of marriage

The Parties were married on 22 August 2009 and were granted a decree nisi on 16 December 2019. The marriage therefore lasted for just about 10 years. Although it appears that breakdown of the marriage commenced well into the 6th or 7th year it is clear that this was not a marriage of short duration. There is one child of the marriage now age 10 who is in private school.

iii. Standard of living

It is common ground that the Parties previously enjoyed a comfortable standard of living. They resided in a comfortable home with the Child having her own bedroom with air conditioning, and a back-up generator. The Child attended private school. They were able to maintain this standard of living with the comparatively negligible financial contribution of the Respondent.

³⁰ [2013] 2 FLR 732 paragraph 47

³¹ Hart v Hart [2017] EWCA Civ 1306 at paragraphs 101 – 102

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

The Court has considered the written and oral evidence by the Parties. It is apparent that for the past 3 years the Applicant net income has suffered because a downturn in his business. The Applicant is the owner of a going concern which presumably still has assets since he continues to generate income from small contracts. There is no indication that the current slump is anything more than temporary.

Nevertheless, it is clear that he has better financial resources, given the rental income from the 2 apartments located at the Property which he solely owns. The Property also contains the Parties personal residence. As a registered business contractor, has resources at his disposal for the maintenance of the Property. The Court is now in possession of a Valuation Report which discloses that as at 20th November 2020, the Property was valued at US\$1,313,000.00.

There is no evidence before the Court that either of the Parties own any other real property.

On the other hand, the Respondent's income is comparatively small. The Respondent is currently employed at the Tourist Board, which by all account is the last of a number of short term or tenuous employment stints. She earns \$11.00 an hour and her hours fluctuate between 20 – 40 hours per week. In an affidavit filed on 27th January 2021, without leave of the Court and after the hearing of the matter the Applicant produced evidence which appears to indicate that the Respondent owned a small business in respect of which she would have received financial assistance from the Government in 2020. The Respondent does not appear to have any savings or own any property but she will likely improve her financial standing over the course of time when better income opportunities become available.

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 evidence before the Court discloses that although the Respondent would have contributed to the cost of groceries and food, during the course of the marriage that the Applicant paid all major expenses including mortgage and utility bills and outgoings. It is clear that he contributed the major asset in the form of the Property. This provided not only a main residence for the family but the rental income derived from the 2 apartments also served to support their standard of living and quality of life.

The Court also finds that the Respondent took on the role of homemaker and caregiver for the Child. There was also a period during which she acted as a paid assistant to the Applicant in his business. The Court has no hesitation in rejecting the Respondent's

contention that she gave up a career in order to assist the Applicant in his business and at his insistence.

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 Counsel for the Respondent's submission that there are significant lacuna in the evidence in this case.³² However, it is clear a critical factor would include the re-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**³³:

"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."

As is the case here, this will be a particularly important need for the primary carer of any dependent children. The Court will normally be asked to consider the costs of purchasing alternative accommodation in which to live together with the parties' mortgage capacity to raise or borrow money. Unfortunately, no specific evidence has been provided in this regard, but it is clear that the Respondent will now have to find alternate accommodation and pay the attendant bills, inclusive of security deposit and utilities. The Court has however considered the Parties' current income and expenses. In that regard, the court has concluded that the Respondent's income is not adequate to cover such expenses. She will therefore require appropriate assistance is she is to ensure that the Child enjoys the same standard of living as before the breakdown of her parents' marriage. The Court has also noted that the Respondent is some 20 years younger than the Applicant which suggests great longevity in earning capacity. There are significant debts owed by the Applicant's company.

The Court has taken into account that there is a dependent child who is expected to remain in the physical custody of the Respondent. In practical terms, this means that she will have to provide a home for that Child consistent with her previous standard of living. In maintaining that the Respondent has no equitable interest in the Property, the Applicant has failed to adequately address the Respondent's ability to rehouse herself and the Child save to say that any lump sum award should not exceed \$6,500.00, to be paid over a period of 3 months. According to the Applicant that lump sum would cover a security deposit and first three months' rent for the Respondent for an apartment not

³² See: paragraphs 4 – 22 of the Respondent Counsel's Speaking Notes

³³ GDAHMT 2010/0045 at paragraph 64

exceeding \$1,600.00 per month. The Applicant believes that any amount beyond this would be prejudicial and not in the interest of justice. In the Court's judgment this would be wholly inadequate in the circumstances of this case.

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

The matters that the Court would normally consider under this head would include pensions or annuities. This is no evidence presented in that regard.

[71] The Court cannot ignore the fact that there is only one capital asset available for consideration and that this Property served not only as the Applicant's residence but also as an income generator. Both Parties live on a defined and limited income. There simply is no matrimonial property declared. 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**³⁴ 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

[72] Having considered all of the relevant factors, it is clear to the Court that each party requires a home. There is an obvious disparity in the Parties' ages and hence in their expectation of life. There is no doubt that the Applicant would have been the main breadwinner in the family who through his business acumen and skill purchased and developed the Property prior to the marriage. The Parties have disclosed no other assets and there is no evidence before the Court that the Parties own any other real estate in the Virgin Islands. 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 Respondent's needs are greater than those of the Applicant and it is clear to the Court that the Respondent's financial needs cannot be satisfied without recourse to the Property.

³⁴ [1998] 1 FLR 53

[73] 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". The Court has also considered the plethora of case law in this area 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.*"

[74] 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 by the Applicant. Having considered all of the circumstances, the Court is satisfied that fairness in this case demands a property adjustment order whereby the Respondent is awarded an interest in the Property. In the interest of achieving a clean break, the Court will also order that the Applicant pay to the Respondent the sum representing the fair value of the Applicant's 10% share of the current market value of the Property to be paid within twelve (12) 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**.³⁵ In that way, each party 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.

COSTS

[75] Costs lies in the Court's discretion. Having regard to the financial position of the Parties and the orders sought and made herein, the Court is of the view that each should bear his/her own costs.

³⁵ [1973] EWCA Civ. 10

[76] The Court's order is therefore as follows:

- i. The Parties shall bear the total current educational expenses of the Child in the following proportions: the Applicant 70% and the Respondent 30%. Thereafter (commencing from secondary school level) the Parties will equally bear all education expenses until she attains the age of 18 or complete her first degree in tertiary education, whichever is later.
- ii. The Respondent is awarded a 10% interest in the Property.
- iii. The Applicant shall pay to the Respondent the sum representing a 10% share of the fair market value of the Property, to be paid within twelve (12) months of the date of this judgment.
- iv. No order as to costs.

[77] Finally, the Court conveys its sincere regrets for the inordinate delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar