**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**FAMILY DIVISION**

**No. 121 of 2000**

**BETWEEN:**

**JOSLIN EUGENE JOHNSON APPLICANT**

**AND**

**HUBERT OSCAR JOHNSON RESPONDENT**

**Before the Hon. Madam Justice Margaret A. Reifer, Judge of the High Court.**

**2011: January 31st**

**February 1st and 2nd**

**March 23rd**

**August 19th**

***Mrs. Beverley J. Walrond, Q.C,. Attorney at law for the Applicant***

Ms. Marilyn Moore of Elliott D. Mottley & Co., Attorneys at law for the Respondent

**DECISION**

**The Nature of the Claim**

[1] This is an application for the determination of the property interests of the parties (hereinafter the 'Husband' and the 'Wife') to this action.

[2] The file in this matter having been misplaced, in an attempt to reconstitute the same, counsel for the Wife filed an affidavit, which shows that an Application for Dissolution of Marriage was filed by the Wife in February 2000. The Husband responded in March 2000 by filing a Statement of Financial Circumstances.

[3] Several months later the Wife filed an Affidavit seeking maintenance for the two sons of the marriage. She filed therewith her Statement of Financial Circumstances. It appears undisputed that the Husband shortly after the filing of the divorce application and/or his Statement of Financial Circumstances above-mentioned, commenced monthly maintenance payments for the children in the sum of US$300, on the advice of his then attorney at law.

[4] A formal Application was filed in January 2003 for the maintenance of a minor child and a young adult child of the marriage together with an Application for the court's declaration that the property situate at Lot 7 Ellerton Park in the parish of Saint George is owned by the parties in equal shares. The Affidavit in Support of this Application outlined the costs of the minor child at private school and the college/university costs of the young adult child of the marriage. This part of the Application is no longer being pursued as the children have now completed their education.

[5] In addition thereto, the Wife/Applicant sought the following Orders:

> (a) "… an order under section 57 of the Family Law Act altering the interests of the parties in the property so as to vest in the Wife not less than 70 per cent in the equity thereof;
>
> (b) that the Wife be at liberty to purchase the share of the Husband aforesaid in the said property by paying him for his share and interest as ordered and keep the said property as and for her sole property."

[6] In support of her Application for the settling of the property the Wife filed an Affidavit of November 4th 2009. Both children were adults at this time.

[7] The Husband's Affidavit in response was filed in June 2010.

[8] The trial of the property application (orders under sections 27 and 42 having been granted in 2009) commenced on January 31st, 2011 and on the 1st February 3rd, 2011 both parties at the request of the court filed current Statements of Financial Circumstances.

[9] Both parties gave evidence under oath and were cross-examined. There were no other witnesses.

[10] A valuation of the property was admitted into evidence with the mutual consent of the parties. The February 2011 valuation of the property is $557,000, the land itself being valued at $157,280. The two apartments attached to the home have a current annual rental value of $8,400 each.

**The Background to this Claim**

[11] These parties married in 1981 at the age of 23 and 31 respectively. They had two sons, built a home and lived together up until 1996 when the Wife left for the United States with the two sons of the marriage. The two boys were at that time 9 and 14 respectively.

[12] The Wife did not tell the Husband that she was leaving him. He visited them once and remained in communication. He was of the opinion that they were still a family, just living apart.

[13] He became aware about 4 years later that this had always been her intention when he noticed that the Wife had stopped wearing her wedding ring and shortly thereafter, filed for divorce. Her divorce Application clearly implies that this was the true reason for her immigration to the United States (she gives the date of separation as 1996 at para. 8 of the application for Dissolution of Marriage) as does her evidence to this court.

[14] The land on which the house is built was bought by the Wife one year prior to the marriage. After marriage a mortgage was obtained in both names after the Wife transferred the title into both names. Both parties contributed to the deposit required for the mortgage although there is some dispute as to the proportions.

[15] At this time the Husband was a seaman and while he was at sea he had moneys deducted monthly by his employers and remitted to the Wife in Barbados impliedly for the household inclusive of mortgage and maintenance of children. There is no dispute that this was done but counsel for the Wife raised as an issue whether the quantum was sufficient to pay the mortgage and maintain the home.

[16] His employment as a seaman ended in 1987.

[17] The Husband however alleges that in the early days of the marriage he was the greater wage earner (the wife was an accounts clerk at Cave Shepherd) and that he paid the greater share of the expenses. Neither of the parties put into evidence their exact or approximate earnings at that time and there was no evidential basis on which to corroborate this argument.

[18] However, it is fairly safe to assume from the evidence that the Husband's income from employment in Barbados was below that earned as a seaman and below that earned by the wife.

[19] The matrimonial home has two floors. The family occupied the top floor and there is an allegation by the Wife that there is a study downstairs which she states that she financed with an $8,000 loan. Also downstairs are two apartments built in 1984, which were rented and used to supplement the parties' income and specifically designed to assist in the paying of the mortgage.

[20] From 1987/1988 the Husband has worked with the British High Commission, first on a part-time basis, but as a full time employee from 1991 in the capacity of Driver/Security Officer. His salary then and now is modest, from $1,228 in 1991 to $3,417.06 today.

**The Case for the Applicant/Wife**

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[21] The Wife alleges in her Affidavit of November 2009 that she is entitled to the greater share of the property for two significant reasons:

1. "That the Husband received income from the two apartments attached to the matrimonial home, that he failed to share these monies and he failed to account for these monies. In that Affidavit she prays to the Court for an Order calling upon the Husband to account for the rents which he has received from the 6th January 2003 to the present;

2. The Wife further alleges that she is entitled to a greater share because she " …can truly say that she had to bear the cost of educating our sons almost singlehandedly". At paragraph 5 of the said Affidavit she deposes: "I therefore stand by my application to be granted the larger percentage of this property having regard to the contributions made throughout the marriage, both financially in respect of our sons maintenance and education and as a parent to our two sons."

[22] It is her argument that she should be given a greater credit as a parent and homemaker pursuant to section 57 (3) both for the period when her Husband was at sea and also for the period that they resided with her in the United States. I will return to this later.

[23] The Wife alleges that she paid the university education of her sons and their private schooling. She states that the Husband did not see the need for them to go to college as he himself had never done so. Commendably she persisted and made sacrifices to ensure that they did attend college and receive a good education.

[24] The Wife alleged in her Affidavit that prior to commencement of regular maintenance in 2000, the Husband sent one lump sum of $300 and in 2000 plane tickets for the children to come to Barbados for a visit. The Husband disputes this. He states in his 2010 Affidavit with respect to his contribution to the maintenance of his children after the Wife left as follows:

"19. I did not make regular maintenance payments to the Applicant for my two sons. I simply could not afford to make the mortgage payments and all the ancillary payments that went with the mortgage and the house and pay regular maintenance for them too. However, whenever the Applicant asked me for money for my sons I did my upmost to provide it. I used to make at least 4 to 5 payments per year of approximately $300 to $400US per time. I simply could not afford to pay more."

[25] Neither party produced documentary proof of this. Curiously, in answer to a direct question from her attorney, the Wife confirmed the Husband's position. It went as follows:

"Question: Did Mr. Johnson make 4 or 5 payments per year of $300 to $400 US per time?"

Answer: Yes."

[26] She further alleged that he has had the benefit of living in the home and has

not been a good steward of the same.

[27] In her sworn evidence to the court the Wife addressed her contributions to the sole matrimonial asset by way of her sole purchase of the land, her contribution to the initial construction of the home, her contribution to the building of the two apartments, the study constructed downstairs the home, the purchasing of the furniture and the erection of the fence.

[28] She currently owns a home in New York. The Husband claims no share of this but argues that it should be treated as a financial resource within the meaning of section 53(2). The Wife further argues that the Court should not take this into consideration whatsoever. Her counsel submits that she acquired the house in 1998 (within two years of her immigrating to the United States in my observation) and

at that time the Husband was not sending any money to maintain the children so it cannot be argued that she was assisted in any way financially in her purchase of this home.

[29] To acquire the home she lived frugally together with her sons in one room in the home of her sister in order to save and did in fact save approximately

US$10,000, and by juggling her credit cards was able to afford a down-payment of US$22,000.00 on this home. The property was then further financed by a thirty year mortgage of US$240,000. Her Statement of Financial Circumstances shows that there is a balance outstanding of US$153,000.

[30] There is an apartment attached to the home from which she continues to derive income. No valuation was provided for this property, but the Wife gave it an approximate value in her Statement of Financial Circumstances of February 2011 of US$325,000. It was not disputed by the Husband and was accepted by the Court.

[31] No documentary evidence was tendered in support of any of the above. Counsel for the Husband also drew to the Court's attention that this very relevant information was not revealed by the Wife in her Applications of 2000 and 2003 respectively.

[32] The Wife argues that it would be just and equitable in view of the above that

this court finds her to be the 70% owner of the matrimonial home and that the Court so order. Additionally this Court should order that the house be sold and the Wife given first option to purchase the same. She further argues that the Husband is employed while she is not, he will receive a National Insurance Pension in due course, and from his 30% share he can make alternative arrangements for his accommodation. She proposes to relocate to Barbados and seeks an Order for possession of the matrimonial home.

**The Case for the Respondent/Husband**

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[33] The case for the Husband was as set out in his Affidavit of June 2010, his evidence in chief and his cross-examination.

[34] His argument is that the Court's Order should also be 70/30, but in his favour. While conceding the Wife's contribution to the matrimonial home from 1980 to 1996, he argues that since she left in 1996 she has made no 'direct' (my word) contribution to the conservation, maintenance or improvement of the matrimonial home. This fact is not in dispute.

[35] Counsel for the Husband usefully enumerates in her Written Submissions the disputes of fact to be addressed by this Court and I propose to adopt them. They are as follows:

(1) The respective contributions of the parties to the deposit for the mortgage;

(2) The period for which the apartments were rented;

(3) The income or potential income generated by the apartments;

(4) The maintenance paid by the respondent for the two children;

(5) The party who paid the premiums to the policy with the Mutual;

(6) The level of repairs and improvements undertaken to the property by the respondent since 1996.

[36] The Husband claims to have paid an insurance policy with the Barbados Mutual Life Assurance Society which said policy was later cashed by the Wife for the benefit of the boys' education. The Wife disputes this, saying that after the Husband failed or refused to pay the premiums she did so herself.

[37] With respect to the Wife's failure to disclose her ownership of a home in the United States in her earlier documents, counsel for the Husband while referring to the requirements of the Family Law Act (section 57(1) and Rule (Rules 68 and 69) in this regard, also referred to the Australian case of **Weir 1993 FL (92-338 at 79593 40)** where the Full Court of the Family Court of Australia restated this requirement and further stated

"It seems to us that once it has been established

that there is a deliberate non-disclosure… then

the court should not be unduly cautious about making

findings in favour of the innocent party. To do

otherwise might be thought to provide a charter for

fraud in proceedings of this nature."

[38] It has however been my observation, both as a practitioner, a judicial officer and an observer of human nature, that there is rarely, if ever, an "innocent" party in family proceedings.

[39] The approach was of the **Australian Family Court** adopted by **Williams JA** in **Wilson v Wilson** but in the opinion of this Court with a more pragmatic twist: **Williams JA** in that case advocated the following approach.

> "[48] Attorneys-at-law in family law cases have an obligation to ensure that full disclosure is made. A party that has failed to make disclosure of material evidence or whose credibility is questionable cannot expect a favourable assessment of his or her case. **The Judge must inevitably make an assessment based only on the credible evidence; there is no scope for speculation especially in favour of an untruthful party or a party who fails to make full and frank disclosure of all material facts and documents."**

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**The Law to be applied**

[40] In determining, declaring and altering the interests of the parties under sections 56 and 57 of the Family Law Act, the Barbadian Courts have routinely looked to Australian cases as persuasive authority, as was done in the Court of Appeal case of **Proverbs v Proverbs reported at 61 WIR 91.** In that case our Court of Appeal followed the three step approach as applied in **Pastrikos v Pastrikos (1980) FLC 90,897; Lee Steere (1985) 91,626 and Ferraro v Ferraro (1993) FLC 92-335.**

[41] I have applied this three step process identified by the Court of Appeal of Barbados in the case of **Proverbs vs Proverbs** as follows:

> "(i) the net property of the parties must be identified and
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> valued by the court;
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> (ii) the respective contributions of the parties within the terms of section 57(3) must next be considered and evaluated; and
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> (iii) the section 53(2) factors, so far as relevant, should
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> then be considered."

[42] In addition to applying the three step process outlined above, the Family Law Act enjoins the Court under section 57[2] not to make an Order under this section **"unless it is satisfied that, in all the circumstances, it is just and equitable to make the Order."** Some recent Australian case law has referred to this as the Fourth Step.

[43] The clear meaning of the Act in its reference to "property of the parties" relates to all property of the parties and not merely property acquired jointly by both parties during the currency of the marriage: **see In the Marriage of Duff (1977) FLC 90-217; W and W (1980) FLC 90-872.**

[44] Thus, the argument of the Wife that the property purchased in the United States should not be taken into consideration in this exercise cannot in law be sustained.

[45] Counsel for the Husband referred to the case of **Jordan v Jordan # BB2005 HC 9.** In that case Kentish J. in addressing the same issue adopted the approach of former Chief Justice the Honourable Sir Denys A. Williams, then Puisne Judge, in the Barbadian case of **McClean and McClean (No.131 of 1982)**, where he endorsed the following extract from the Judgment of the Full Court of the Family Law Court of Australia in the case of **Carter v Carter (1981) FLA 91-061 at p.76,485.**

> **"**Section 79(1) (section 57(1) of the 1981 Act) is quite clear. It refers to applications as to the property of the parties to the marriage or either of them. It does not differentiate as to when or how the property was acquired or which of the parties owns that property. The section provides that the Court may make such order as it thinks fit altering the interests of the parties "in the property including an order for settlement of property". Again, there is no differentiation as to when or how the property was acquired or which of the parties owns that property.

Any property of either party or their joint property can therefore be dealt with by the Court. No part of the property is to be separated out or defined as matrimonial property or any other sort of property. There is no part of the property that is to be excluded from the jurisdiction of the Court to make an order changing ownership of that property.

The proper approach is to ascertain what property is owned by the parties and then, applying the principles set out in subsection (2) and (4) of section 79 (subsections (2) and (3) of section 57 of the 1981 Act), to determine what orders ought to be made.

Where there is only one piece of property e.g. an interest in a matrimonial home, then the determination of the issue is relatively simple. Where the property is diverse, its acquisition took place at various times and the parties made differing contributions at differing times, then the position is more difficult from the practical point of view but the principles to be applied do not vary.

When property is absolutely owned by one spouse before marriage, different considerations may apply under section 79(4)(a) and (b) in the sense that the other spouse may not be able to rely on a contribution to the conservation or improvement of that property … the position is that all property is to be brought into account and appropriate weight is to be given to the different factors relevant to each item."

[46] In keeping with the above, and the three step process advocated by our Court of Appeal in **Proverbs v Proverbs** above, the property of the parties shall encompass ALL the assets listed in the parties' Statements of Financial Circumstances and the values attributed thereto by consent. This Court accepts as a fact, however, that the Husband made no contribution to the acquisition, conservation or improvement of this property as it has accepted that the Wife made no contribution to the conservation maintenance or improvement of the Ellerton property after 1996..

**An Analysis of the Evidence**

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[47] The case for the Husband is that he went overseas as a seaman and repatriated moneys monthly. Before leaving Barbados his evidence is that he arranged for a monthly allotment of US$300 to be remitted to the Wife. He also states that he would sometimes send extra money, food and other items to assist the household. While the house was being built he also sent extra money. During this period he never once received a request for more money or was he ever told that this was not enough and he has always felt that it was.

[48] The issue raised by counsel for the Wife is whether these funds were sufficient to pay the mortgage and maintain children and household.

[49] Both parties have an obligation to maintain the children to the extent that that they are able to do so. This is the law. (Section 51 of the Family Law Act). There is no evidence to suggest that the Husband's income was such that the amounts remitted were unreasonable taking into account the quantum of that income. No specific evidence was given as to the amount being earned by the Wife during this period and how her contribution compared with that of the Husband. These are the relevant matters.

[50] The Husband alleged that the mortgage was paid from his salary. The Wife disputes this, but neither party tendered any evidentiary/corroborative evidence in support of their position. On the evidence the Husband' position is unlikely, since for the period 1982 to 1987, he was at sea; and for the period 1987 to 1991 he was only a part time employee. It is more credible that the mortgage was paid from his salary after the Wife went to the United States.

[51] Also, the evidence clearly shows that throughout the marriage the Wife was the money manager. She received the monthly remittances from the Husband and took care of all the expenses.

[52] In the opinion of this Court what is critical and what the evidence confirms is that during the period 1981 to 1996 these two parties acted as a couple, as partners, and pooled their resources for the benefit of the family unit.

[53] It is to my mind an undisputed fact that the Husband's salary when he returned to Barbados, was and is a modest one. His income generating skills appear limited and the Court accepts his evidence that he has no source of income from employment other than from his earnings, firstly as a seaman, and on his return to Barbados, his employment as a Driver Messenger with the British High Commission. In fact, it was never put to the Husband that his income was other than what he stated to the Court. The parties as a couple needed the rental income to make ends meet and with the Wife gone and the increase in the mortgage payments the Husband would not have been able to survive on his salary. It is against this background that this Court accepts his evidence that he understood when the Wife left that

he was fully responsible for the expenses in Barbados.

[54] After the Wife left for the United States the Husband never paid any regular maintenance until he was served with an Application for maintenance in 2000. As soon as this Application was filed and served he proceeded on a regular basis to remit moneys for the maintenance of the children.

[55] Much is made of the fact that he never regularly maintained the children for this 4 year period until he was taken before the Courts. His explanation of this was alluded to earlier, that is that he would the pay the mortgage and maintain the matrimonial home while the Wife would work in the United States and look after the children. It was his evidence that he could not pay all the expenses and maintain the children.

[56] This is a credible explanation taking into account his modest income. The income of the Wife as well as the income from the apartments was critical in this Court's opinion to these parties' meeting their expenses. The Wife herself in her evidence in chief admitted that this was the case. She said:

> "The mortgage payments changed to over $700 after I went to the United States…I accept that he could not make the mortgage payments and pay maintenance."

[57] This Court believes this to be what the Husband genuinely thought and that there was no willful refusal to maintain the children. It was the impression gleaned by this Court that the Wife made her plans and arrangements and subsequently left. There was little or no discussion between the parties. This Court believes that the Husband no doubt thought that the USA being the land of milk and honey, that the Wife would have earned sufficient money to maintain both her and the children.

[58] Ironically, the reality did bear this out. In cross-examination, the Wife outlined her employment history and income outlining annual income ranging from US$40,000 to $70,000 in her last employment. Her accomplishments speak for themselves.

[59] This Court also accepts, primarily because there is no evidence to contradict this, that there was no demand made before the Wife filed her Application in 2000. The Wife could not and did not say in evidence that she had ever broached the subject before filing her action in the Courts. The Husband was guilty of inattention, inconsiderate behaviour, but not of willful refusal. In fact, his behaviour was enabled by the Wife's behaviour.

[60] It is the finding of this Court that the Husband was forced to use the income from the rental of the apartments to supplement his income in order to meet the household expenses and similarly used this income to fund the maintenance payments of US$300 from 2000 to 2009.

[61] What this Court believes is critical here is that the decision to immigrate to the United States was not a family decision. The Wife was dissatisfied with the Husband and perhaps to a lesser extent with life in Barbados. She decided to leave Barbados for greener pastures and carry her children with her. The Husband never knew that the Wife was leaving him and the marriage when she immigrated to the United States.

[62] The Wife is a strong, progressive, ambitious Barbadian woman. It is evident that these parties were unevenly yoked and the differences that were not evident in the early days of the relationship and marriage became the source of marital discontent. The Wife must be highly commended for the fact that she left Barbados with two young children, went to a foreign country, and by dint of hard work, ingenuity, sacrifice and financial acumen educated herself further (she now holds a Masters degree and describes herself professionally as a Project Manager), educated her children at private school and saw them through university; and in addition to this, was able to acquire a substantial asset, namely a home, from which she was also able to derive income. It is indeed admirable that she achieved so much within two years of taking up residence in the United States.

[63] By virtue of this stellar achievement should this Court conclude that her contribution to the matrimonial home in Barbados was, in the words of her counsel, "immense", and that by virtue of this she should be granted a 70% interest in the matrimonial home in Barbados, and that no account whatsoever should be taken of her financial resources in the United States?

[64] I have looked at the parties' contributions in two significant segments: firstly the period of acquisition and cohabitation, and secondly, the period of separation.

**The Period of Acquisition and Cohabitation**

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[65] In looking at this first period, there is no evidence to suggest that either party's contribution to the acquisition of the home exceeded that of the other. The parties during this period pooled their resources and there is no evidence that the income of one greatly exceeded that of the other. We know that the Wife dealt with the construction of the house, its finishing and furnishing while the Husband was at sea. But this was from a joint pool and the evidence does not satisfy this Court that she alone should be credited or given greater credit than the Husband.

[66] In fact, in cross-examination by counsel for the Husband, it is significant, to my mind, that the Wife stated as follows:

"Between 1977 and 1998 I did not know his exact

salary, so I cannot say that my salary was more than his."

[67] It is only fair and equitable that the Wife be credited with the fact that she brought the land to the marriage and there was no contribution to its acquisition by the Husband.

[68] However, the parties' direct and indirect contribution to acquisition, conservation and improvement of the home placed on this land during this period, appears to have been largely equal. Certainly, by 1996 when she left Barbados the Wife in all likelihood would have been earning more than the Husband, but the matrimonial home, the sole asset, would have been acquired and improved (the two apartments) long before that time.

[69] Thus I will not give the Wife separate credit for the improvements prior to 1996 in the form of the patio, the installation of security bars at the lower windows, the solar system, the study or the fencing. I take a similar position with respect to the furnishings in the home. The Husband's evidence is that during this period he provided money to the Wife for the benefit of the household and cannot speak to how this money was spent.

**The Period of Separation**

[70] What poses a challenge is how this Court deals with the period after which the Wife took up residence in the United States.

[71] It is undisputed and significant evidence that for the entirety of this period the Wife made no direct financial contribution to the payment of the mortgage or to the maintenance of the subject property. It has now been 15 years since she left the former matrimonial home. Her focus during that time has been on herself and her sons. The Husband paid the mortgage and "maintained" the home, and when it was demanded of him he paid a sum towards the maintenance of his two sons. The Husband produced receipts dated as recently as 2009 corroborating his assertion of the regularity of his contributions after 2000.

[72] There is no suggestion that he failed to maintain his sons after 2000 or that he paid less than his salary allowed. There is no dispute that his salary was modest and that he had no other employment. The Wife strongly and clearly articulated her belief that he could have done better, but an analysis of his employment income (the only evidence provided to the court) does not bear this out.

[73] The most important issue in this exercise surrounds whether he received income from the rental of the two apartments attached to the home and what he did with the income that he ought to have received.

[74] And additionally, the Court must assess the Wife's assertion that her

contribution to the parenting and education of the children, particularly in the period 1996 to date, far exceeded that of the Husband and by extension resulted in an indirect contribution which is 'immense'. By virtue of the fact that they lived in the United States and he in Barbados, did of necessity result in her making a greater contribution towards the parenting of the children.

[75] This Court disagrees with the Wife and her counsel as to the value that should be placed on this. The Husband had no choice, the Wife decided that she was leaving and he himself was not aware that she was leaving the marriage until much later. That choice was taken away from him. Similarly, he played no part in the decision to send the children to private school or their college/university choices. The Wife agreed in cross-examination that the children received public education in Barbados and stated further:

"It was my decision to take them to America and put them in

paid education."

[76] While his approach that they should not go to the university was misguided and unenlightened, and clearly demonstrated the chasm between the Wife's thinking and his, when advised by his attorney to make a monthly contribution, he immediately and faithfully did so from 2000 to 2009.

[77] Counsel for the Wife asks the Court to draw certain conclusions from the fact that the Husband kept poor records of the tenancies for the two apartments. This Court is loath to expect and/or demand (after of the fact) standards of behaviour not consistent with the average person. The average individual, without the expectations of legal proceedings is unlikely to keep commercial grade records. Having observed the Husband and listened carefully to his evidence it is reasonable to infer that he lacked that savvy and inclination. One would more expect this of the Wife.

[78] This Court makes certain significant findings in this regard. Though not of the significance and cost suggested, the Court accepts that the Husband spent money maintaining both home and apartments.

[79] This Court accepts that the said apartments would not have been consistently rented for the period of disclosure demanded by the Wife (February 2003 to date).

[80] More importantly, this Court is of the view and finds as a fact that without an additional source of income, the Husband, with the

loss of a joint income after 1996, needed the income from the apartments not only to maintain the house, and meet the expenses thereof but most importantly after 2000 to send payments to the Wife for the two boys of the marriage.

[81] I have accepted his Statement of Financial Circumstances of 2000 on which he was not cross-examined. Nor was it anywhere suggested or put to him that the claimed expenses were untrue. According to this Statement he earned annually $27,348 or $2,279 monthly. After deductions of Income Tax, National Insurance and Medical Pension, I estimate his monthly take home to be approximately $1,888. In 2000 there would have been a further deduction of approximately $800 per month towards the mortgage. This deduction would have left the Husband with approximately $1,000 per month to maintain the vehicle that he used and satisfy his transportation needs, to feed and clothe himself, to pay the land taxes, household insurance, electricity gas and fuel, water, telephone, all necessary and allowable expenses. At no time was it put to him that the amounts so claimed in his Statement of Financial Circumstances were excessive. Also it must be remembered that it was around March 2000 that he commenced monthly payments of Bds. $600.

[82] Thus, the evidence of the Husband in this regard is credible. He had to use whatever income he derived from the rentals to make ends meet as well as fund ongoing maintenance. In his 2000 Statement of Financial Circumstances his expenses exceeded his income by more than $15,000 (to which one can add a further $7,200 per year after the Husband started monthly maintenance); and in 2011, without adding thereto the income from rentals, his expenses exceeded his income by almost $10,000.

[83] It seems evident from the above that (in fact it can be the only reasonable inference drawn) that the Husband relied heavily on what rental income he received and has not been accumulating and/or spending an excess of income over allowable expenses. This conclusion is reached even although the Court accepts that sometime after 2001/2002 mortgage payments would have ceased.

[84] This Court finds that the Husband maintained his children to the extent that he was reasonably able to do so, bearing in mind his level of disposable income.

[85] This Court also accepts that he used rental income received to fund the conservation of the property. Counsel for the Husband points out to the Court the objective proof of this fact. The 2003 property valuation of A N Kirton adverts to roof decay and other signs of deterioration. His February 2011 report however states:

> … the roof covering has been changed from asphalt shingles to permaclad sheets; some of the damaged close-board was replaced and the ceiling redecorated; the awning window to the windward side of the house have been replaced with sash windows; the floors in the apartment units have been tiled with ceramic tiles."

[86] The photographs of 2011 also show that the house has been repainted and external doors replaced as sworn by the Husband.

[87] There is no evidence to support the Wife's assertion that the two apartments would have been rented for every day of the period February 3rd 2003 to date. She accepts that before 1996 the apartments were rarely rented for long periods of time. She agreed that there were often periods of 3 to 4 months between rentals. She admits to the apartments being untenanted on one of her visits home to Barbados. She remembers specifically coming to Barbados in 2007 when her mother died and at that time only one apartment was tenanted. When she left Barbados in 1996 only one apartment was tenanted.

[88] The Respondent should not be punished because he is a simple and

unsophisticated man. The Wife never gave evidence that she instructed the Husband to manage the rental of the apartments in a particular way and that he refused to do so. He never thought to advertise the apartments but instead like many Barbadians relied on word of mouth. He kept the apartments empty by his evidence while he carried out repairs. These are matters that, perhaps, the Wife would not have done, but the Husband clearly marches to a different band.

[89] In the absence of financial records this Court accepts on a balance of probabilities that the subject apartments would have been rented for the period 2003 to date, but there would have been periods of inactivity while repairs and maintenance were being carried out. There would also have been periods of inactivity owing to the Husband's inability to find tenants. In the absence of financial records it is impossible to conduct a mathematical analysis, but there is enough evidence to make findings on a balance of probability.

[90] The Husband is presently 61 and the Wife 53. The Husband is still employed with the British High Commission, the Wife is unemployed since August 2010 and now wishes to return to Barbados. It is her intention to secure employment in Barbados and at the time of trial indicated that she had already begun the process of seeking employment.

[91] Counsel for the Husband urges the Court to apply the "just and equitable"

provision of the Family Law Act for the following reasons: The asset that the Wife seeks to have altered has been the home of the Applicant for the last 29 years. At 61 he possibly has a further 4 to 5 years employment. The effect of a 30/70 alteration in favour of the Wife would be to make the Husband homeless. He would be forced to rent accommodation at a time in his life when his income would be reduced. The suggestion by counsel for the Wife that he could reside in his mother's property is not a viable one. He is not an only child, has no expectation of inheriting that property to the exclusion of his two sisters and four brothers, if at all, and no proprietary interest in the same.

[92] On the other hand the Wife's prospects are much more sanguine. She is 53, a trained accountant with post graduate qualifications in Administration and Project Management and has, post qualifications, held a number of positions in this field. In conclusion, counsel argues that she is more employable with a possible working life of 12 years, probably more. She has an income generating asset in the

United States and two sons at least one of whom is financially supportive.

[93] She urges the Court on behalf of the Husband to make a finding of 70/30 in favour of the Husband because it would be 'just and equitable' in accordance with section 57(2) of the Family Law Act to do so.

**Section 53 (2) Matters**

[94] Counsel for the Wife submitted that section 53 matters were not relevant; the main plank of her argument resting on contribution, direct and indirect.

[95] I differ in my conclusions and have found the following subsections

relevant:-

(a) "the age and state of health of each of the parties;

b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(g) where the parties have separated or the marriage has has been dissolved a standard of living that in all the circumstances is reasonable.

(n) any fact or circumstance that in the opinion of the Court, the justice of the case requires to be taken into account".

[96] **Simmons CJ** had this to say in **Proverbs v Proverbs** on the application of Section 53(2):

> "[38]. The section 53(2) factors come into play in situations where there is a disparity in future earning capacity, or there are special needs on the part of one party …An adjustment is made because one has greater needs and the other has stronger means."

**The Just and Equitable Provision of the Family Law Act (Section 57(2)].**

[97] Ironically, both parties seek the protection and application of section 57(2) of the Family Law Act and urge the Court to exercise its discretion under this section in their favour.

Section 57(2) states:

> "The Court shall not make an Order under this section unless it is satisfied that, in all the circumstances it is just and equitable to make the Order".

[98] **The Australian Family Law Act 1975** the first version of which was used as a model for our own **Family Law Act 1981-29**, has an identical provision at section 79(2) of that Act.

[99] The interpretation of sec. 79(2) has been touched on repeatedly in the

Australian case law: see for example **In The Marriage of Ferguson (1978) 34 F.L.R. 342; In the Marriage of Rogers [1980] F.L.C. 90-**

**874; Nygh J. In The Marriage of Hirst and Rosen [1982] F.L.C, 91-230.**

[100] It is a given that section 79(2) (57(2) of the Barbados Act) is construed against the background of the considerations set out in sections 79 (4) ( section 57(3)of the Barbados Act): see **Mallett and Mallett 156 CLR 605** and **In the Marriage of Hirst and Rosen** above.

[101] But Section 79(2) (57(2) can override these considerations where the Court finds it just and applicable to do so.

[102] It is not a stand alone concept: see **DDM v GAJ[2003] FMCA229**. In this case the **Federal Magistrates Court of Australia** applied the full Court's decision in **Russell (1999) FLC 92-877** in opining that it is the justice and equity of the actual orders that are utilised to effect that distribution.

[103] In referring to the Full Court's rejection of property settlement being based upon a party's needs as opposed section 79 factors the Court cited the Full Court's decision at paragraph 90 as follows:

> "It must be remembered in this regard that under section 79(2) of the Act the Court is required to be satisfied that it is the order to be made which is just and equitable, not just the underlying percentage duration of the net value of the parties assets. Indeed, we take the opportunity to emphasise that in what his Honour has termed "the fourth stage" that is, the consideration of whether the result is just the equitable, it is the justice and equity of the actual orders, not of the percentage distribution which must be considered."

[104] However, **In The Marriage of Marinko [1985] F.L.C. 91-609 Hagan J.** had this to say about the interpretation and application of Australia's section 79(2):

> "No exhaustive definition of the matters to be considered to do justice between the parties is possible nor can guidelines be laid down to provide for the evaluation of these matters or the weight to be given to them either individually or collectively. All the circumstances of each case require consideration and upon such consideration a judicial exercise of discretion should be made to achieve a result which is just in all these circumstances."

**Application of Section 79(2) of the Family Law Act 1975 of Australia.**

[105] A review of some of the leading Australia cases on this point re-enforces the wisdom of **Hagan J's** analysis as above. Stated differently, they show conclusively that each case must be determined on its own peculiar facts. There is no boiler plate definition or enumeration of what is 'just and equitable' see **In The Marriage of Ferraro v Ferraro [1993] F.L.C. 92-355,** where the Full Court of the Family Court of Australia held that the trial judge approached the exercise of discretion in a way which was contrary to principle and that the discretion was miscarried.

[106] See also **In the Marriage of Bates v Bates [1985] FLC 91-627** where the same Court after looking at the contributions of the Husband and Wife, stated as follows at 80,090.

> "Obviously in determining within this area what is a just and equitable order to make under section 79 the wife's present and future needs and responsibilities are very significant factors."

In this case the net assets were the Husband's.

**<u>The Application of Section 57(2) of the Family Law Act by the Barbadian Courts</u>**

[107] A review of our local cases reveals that the Australian approach has been adopted.

[108] **In Cox v Cox # BB 2004 CA 26 Williams CJ (Ag.)** had this to say about the interpretation and application of Section 57(2).

> "(16) Section 57(2) has been interpreted as follows: the Court shall not make an order altering the interests of the parties unless it is just and equitable to do so. What is just and equitable is to be determined broadly within the confines of the considerations set out in section 57(3). Any Order made must be just and equitable or fair to the parties:
>
> Dickey pages 677 to 684."

[109] In response to counsel's argument that the Wife had made the greater contribution to the acquisition of the matrimonial home and should therefore be given the greater share on distribution of the assets, Williams C.J. (A.g) had this to say:

> "… First, contribution is only one of a number of factors to be considered in exercising discretion to alter property interests. There is no hierarchy in relation to the factors to be taken into account and the relative weight to be given to each factor will vary according to the circumstances of each case. Secondly, an elaborate mathematical approach to ascertain the contribution of each party to the acquisition of property is in most cases inappropriate."

[110] The further findings/observations are indeed applicable to the particular facts of this case when he stated at para. 18 as follows:

> "Similarly, the wife is not entitled to some notional larger share because she took care of all the business. In any marriage there are strengths and weaknesses in terms of roles played and responsibilities shared. The discretionary apportionment of interests in property will not therefore generally be based on the functions performed by the husband or wife."

[111] See also **Jordan v Jordan #BB 2005 HC9; Noel v Noel # BB 2004 CA**

**26; Wilson v Wilson #BB 2007 CA6; and Proverbs v Proverbs (above-**

**mentioned).**

[112] In **Jordan** after having found that the parties' contribution was 50%, **Kentish J** on an invocation of Sections 53(2) and 57(2) granted the Wife a further 10% share in one of the assets on the following rationalization.

> "…However, taking into account the Section 53(2) facts set out above in particular the disproportionate retirement income of the respondent and financial resources vis-à-vis the applicant; the need of the applicant to have a reasonable standard of living past dissolution of the marriage as compared with the respondent; the fact that due to his conduct she was forced to leave the matrimonial home; and the fact that she had little or no benefit from the sale proceeds of the U.K property, I find that she is entitled to a further 10% as a share in the Barbados property".

**THE COURT'S FINDINGS AND DISPOSAL**

[113] The net property of the parties has been identified. Declarations are however being sought only with respect of No. 7 Ellerton Park. In 1996 the Wife's contribution exceeded that of the Husband by reason of her contribution of the land. For the last 15 years however she has made no contribution to the matrimonial home. Her resources fuelled the children's education, her education and the acquisition of her property in the United States. She relegated to the Husband the role of caretaker of the matrimonial assets in Barbados in 1996. She assumed the role of primary caregiver of the children and made decisions for their care without reference to the Husband.

[114] While her role as parent does indirectly contribute to the matrimonial assets, I do not accept that it was 'immense' when compared to the Husband. He in the opinion of the Court, did the best he could within the limits of his financial resources. It is in my view that the Wife's greater initial contribution has been eroded over time particularly by the circumstances of the separation period.

[115] It is my finding on a review of the circumstances that their respective contributions to the matrimonial property is in the proportion 50/50.

[116] Next it must be determined whether the relevant section 53 matters earlier adverted to earlier are such as to cause this Court to make a further adjustment.

[117] **Williams CJ (Ag) in Cox v Cox** made the following observations in approaching this self-same task and also in an effort to reach a 'just and equitable' order:

> "In view of the husband's age and health, there should be a fair apportionment between an amount that will provide adequately for his future needs **and one that will not unfairly enhance his estate at the expense of the wife's legitimate entitlement."**

[118] The facts of this case lends themselves to a similar addressing of the future needs of the parties. The Husband is 61 years and has enjoyed a particular standard of living in the matrimonial home for 29 years. It would not be just and equitable to evict him in these

circumstances giving him 30% of its value as submitted by the Wife. This would effectively deny him a reasonable standard of living. The Wife is younger and her future prospects are more attractive than his. She has a home of significant value and prospective employment for a further twelve years or more.

[119] It is my finding in view of these factors that it 'is just and equitable' to make a further adjustment in favour of the Husband.

**DISPOSAL**

[120] In light of the foregoing, it is ordered as follows:

1. That pursuant to section 57 of the **Family Law Act, Cap 214** the interest of the parties in the property situate at Ellerton Park in the parish of St. George is altered so as to vest 35% thereof in the Applicant/wife and 65% thereof in the Respondent/Husband;

2. It is just and equitable that the Respondent/Husband be given the option to purchase the share and interest of the Applicant/Wife in the matrimonial property;

3. The Respondent/Husband shall purchase the share and interest of the Wife in the sum of $195,000 on or by the 1st day of March 2012 and on receipt of the said sum the Applicant/Wife shall transfer all her right title and interest in the said property to the Husband;

4. In default of such payment, interest shall accrue on the said sum at the rate of 6% from March 1st 2012 until payment;

5. Should the Respondent/Husband be unable to purchase the said interest within one year of the date of this Order, the Applicant/Wife shall have the option of purchasing the Respondent/Husband's share;

6. In the event that either party shall fail to execute or endorse all necessary documents to effect the Order the Registrar of the Supreme is hereby authorized and required to execute or endorse such documents in the name of and on behalf of the defaulting party upon being satisfied by affidavit that such failure has occurred;

7. The Respondent/Husband shall account to the Applicant/Wife for all income received from the two apartments for the period January 1st 2011 to the date of receipt by the Applicant/Wife of her share and interest. Such amounts shall be divided between the parties in the proportions declared, after allowance for the payment of land taxes and house insurance;

8. Each party shall bear his or her own costs;

9. Liberty of either party to apply to this Court to give further directions relative to the implementation of this Order.

**Margaret A. Reifer**

Judge of the High Court