BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No.7 of 2001

BETWEEN:

HAROLD GRAHAM PROVERBS

(Appellant/Husband)

AND

CHRISTINE ELIZABETH PROVERBS

(Respondent/Wife)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Frederick Waterman, Justice of Appeal, and the Hon. Lindsay Worrell, Justice of Appeal (Acting)

2002: March 20 and 21, May 28

Mrs. Beverley Walrond Q.C. and Mr. Malcolm Deane for the Appellant/Husband

Mr. Peter Williams Q.C. and Ms. Monique Brathwaite for the Respondent/Wife

JUDGMENT

SIMMONS CJ: In a very real sense this judgment may well be described as an "anniversary judgment". It concerns a "small money" case but it raises large issues of principle in Family Law. Twenty years ago, on February 1, 1982, the Family Law Act, ("the Act") Cap. 214, came into force. It was a direct consequence of certain of the recommendations contained in Chapter III of Volume I of the excellent and seminal Report of the National Commission on the Status of Women in Barbados of May 1978. The Commission, chaired by Miss Norma Monica Forde, then a Lecturer in Law at the University of the West Indies, made a total of 212 recommendations touching and concerning the status of women in Barbados. There were 46 recommendations relating to "Women and the Law". [1]

[2] The Barbados Family Law Act takes as its model the 1975 Family Law Act of Australia.

The Long Title of the Act proclaims it to be:

"An Act to reform the law relating to the dissolution and nullity of marriage, judicial separation and restitution of conjugal rights and to certain other related matters, and to provide for counselling with a view to facilitating reconciliation in matrimonial causes and, in relation thereto, for matters connected with the parental rights and the custody and guardianship of children."

[3] It is undoubted that the Act has radically reformed and fundamentally transformed Family Law in Barbados, sweeping away in its wake many traditional concepts, notions and practices. For example, divorce based on the concept of the matrimonial offence and the attribution of fault to a party has been consigned to the pages of legal history. The sole ground for dissolution of marriage is now irretrievable breakdown of the marriage. Gender imbalance in Family Law has been replaced by an all pervasive statutory philosophy of gender neutrality and the sociological reality of unions other than marriage, popularly called "common law marriages", is now firmly recognized and entrenched in our law.

[4] One fundamental aspect of the several reforms introduced by the Act was the establishment of a regime for the exercise of judicial discretion as it relates to the division of the property of the parties to a marriage or union other than marriage. The Court is now empowered to alter the interests of parties in such property by the application of an equitable discretion guided by specific statutory criteria.

[5] Counsel on both sides have invited us to re-state the law on the issues raised in this appeal for the guidance of the profession. In the past [2] twenty years, the Court of Appeal has not been much engaged in deciding the specific issues which fall for determination in this case.

[6] It is an appeal from a decision of Blackman J (Acting) in which he made the following orders on February 18, 2001.

(a) The husband was ordered to pay the wife $30, 000 on or before April 30, 2001 or, in default, interest on the said sum at 8% per annum from May 1, 2001 until payment.

(b) The wife was to transfer her interest in the matrimonial home “Amberley” on or before April 30, 2001 and to vacate the room or apartment which she occupied at “Amberley” on or before April 30, 2001.

(c) The husband was ordered to transfer a motor car to the wife.

(d) In addition, the husband was ordered to pay the wife’s costs in an amount of $2, 500 plus VAT.

[7] The marriage was of very short duration. The parties were married on May 25, 1996, after living together for about 20 months. The husband is now 39 and in good health; the wife is 38 and also in good health. For each of them it was a second marriage and the husband is the father of two boys, aged 12 and 16 from his previous marriage. The wife has no children.

[8] By January 1999, the marriage was breaking down and the parties began to live separate and apart in the same matrimonial home. They were divorced on May 18, 2000.

[9] During the pre-marital cohabitation, the parties had lived in a house at Ruby Plantation Yard which was the property of the husband’s family. The wife took certain of her personal household effects to this house and sold others for which she received about $2, 000. [3]

[10] Neither of the parties is wealthy. The husband’s annual income is shown as $67, 150 ($59, 650 as salary) and his annual expenses are $90, 538.21. The wife’s annual salary is $25, 000 and her expenses are $19, 260.76. The husband has been in steady employment over the last 20 years at a concrete-mixing company. He is the plant manager and can look forward to a pension.

He seems to be talented and industrious for he augments his salary by constructing recreational swings. The sales from this activity yield him additional annual income of $4, 000 and the building boom in Barbados during the last few years has ensured that his annual bonuses have been quite substantial. For instance, in 1998 his bonus was $18, 000; in 1999 it was $23, 000.

[11] The wife’s work history, however, has not been as stable as the husband’s. Prior to 1997 she had worked for 7 years as a ground tour operator with Sunshine Services but since then, she has had at least four other jobs of short duration until she finally landed a job as an Administrator at a gross monthly salary of $2, 500. During the marriage she was made redundant from one job but she received a severance payment of $6, 583.52.

What are the Assets?

[12] This is not a “big money case” and the assets which we shall have to examine are essentially two – the matrimonial home and the motor car. The circumstances of their acquisition are important.

[13] Some time early in the marriage, while driving around St. Philip basking no doubt in the euphoria and bliss of a newly-married couple, the parties saw a property advertised for sale. It was “Amberley” situated in Crane Terrace. They thought that they would buy it. But [4] they had little money. The husband was in expectation of an inheritance of $71, 000 from the estate of his deceased father. But the wife had no funds of her own to contribute to the purchase. They decided to apply to the Barbados Mutual Life Assurance Society, (“the Mutual”) for a mortgage to finance the purchase price of $200, 000.

[14] The husband had an existing insurance policy of $100, 000 with the Mutual and that insurance company lent him $140, 000 but required the wife also to take out a life policy with them for $40, 000, which she did. She was able to obtain a cheaper premium rate than her husband.

[15] At the date of hearing the husband’s assets were stated to be $566, 000. Of this total, the house “Amberley” was valued at $265, 000 and there were insurance policies worth $220, 000. His liabilities were shown as $2, 635.25. The wife filed her Statement of Financial Circumstances showing assets of $315, 000 including the house valued at $265, 000 and an insurance policy tied to the mortgage and worth $40, 000. Her liabilities were stated to be $2, 500 being legal fees.

Who paid what?

[16] During the existence of the marriage, the husband received the inheritance from his father’s estate. It was $71, 000. He customarily paid the mortgage instalments and all the legal and governmental expenses associated with the mortgage and kept the insurance premiums current. The wife paid the premium on her insurance policy. When it was decided to make additions and renovations to the home, the husband secured a bank loan to facilitate the improvements [5] to the property and he financed the repayment of the loan. As at April 2000, the balance due on that loan was $12, 234.68. Those improvements provided an apartment annex to the main house “Amberley” and, when the relationship soured, the wife moved into it on or about August 16, 1999.

[17] The payment of some of the other expenses was disputed. For example, the wife claimed that her full salary and earnings as a part-time hairdresser were spent on the household, buying food and paying a part-time domestic helper. On the other hand, the husband alleged that he made purchases and paid for supplies in bulk including food and toiletries. Indeed, his Statement of Financial Circumstances disclosed substantial annual payments by him on items such as food and household supplies ($18, 000), electricity and gas ($2, 158), laundry and cleaning ($6, 304), child care and education ($7, 735). One child is dyslexic. Nevertheless, the husband admitted in his affidavit (paragraph 21) that the wife contributed towards food and paid the part-time domestic helper. The wife’s Statement, on the contrary, speaks to two substantial outgoings, namely, food and household supplies ($9, 000) and maintenance of the car ($4, 300). She deposed that the severance payment of $6, 583.52 was used for the benefit of the household in 1997. At no time did the parties pool their incomes or operate joint bank accounts.

The Children

[18] The wife’s evidence was that she looked after the husband’s two children and treated them as if they were her natural offspring. After the

motor car was bought, she transported the children to and from school. The husband agreed that the car was bought "so that the [6] [wife] could assist me with transporting my children to and from school and have transport for herself for her job."

The Applications in the High Court

[19] The trial judge's orders mentioned at paragraph 6 were made in response to applications by both parties. The husband had sought a Declaration that he was solely entitled to the whole of the beneficial interest in "Amberley"; transfer by the wife of her share or interest in "Amberley" and delivery up of the motor car. The wife's applications were for a Declaration that "Amberley" was jointly owned with her husband or for such order as to the ownership thereof as might be just. Secondly, she asked the Court to make an order transferring her interest to the husband "on such terms as the Court deems just". Thirdly, she sought a lump sum payment by the husband in settlement of her interest in "Amberley" and of her right to maintenance under the Family Law Act. Finally, she wished the car transferred to her.

The Legal Estate in "Amberley"

[20] The conveyance of June 21, 1996 was taken in the names of the husband and wife as joint tenants for a consideration of $200, 000 and the joint tenancy existed until June 14, 1999 when it was severed by the husband and a declaration was made that the property should thereafter belong to the husband and wife as tenants-in-common. The effect of this transaction is to give the parties equal shares in the property. In his judgment, the trial judge, on the basis of the preponderance of authority in Wilson v. Wilson [1963] 2 All E.R. 447, Goodman v. Gallant [1986] 1 All E.R. 311, Pettitt v. Pettitt [1969] 2 All E.R. 385 and section 56 of the Family Law Act held that [7] the provision in the conveyances declaring the parties to be joint tenants was conclusive.

[21] Lord Upjohn in Pettitt had said at p. 407:

"In the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her but if he puts it into joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy."

The judge's declaration of a joint tenancy was pursuant to section 56 of the Act which is in these terms:

"56.(1) In proceedings between the parties to a marriage or union in respect of the existing title or rights to property, the court may declare the title or rights, if any, that a party has in respect of the property."

In so far as there has been no appeal against the judge's declaration we do not find it necessary to deal with this matter further.

We therefore come to the substance of the appeal from the orders made by Blackman J (Acting) and referred to at paragraph 6 supra.

The Grounds of Appeal

[22] Although drafted as four separate grounds of appeal, a careful construction of their language leads to the conclusion that, fundamentally, the complaints of the husband are that there was an erroneous exercise of judicial discretion as a result of which the judge's award of $30, 000 to the wife was excessive and the transfer to her of the motor car was unjust and inequitable. Additionally, the appellant husband appeals against the award of costs.

[23] As an appellate court our duties in this appeal are two-fold. First we must examine the basis for the exercise of the trial judge's discretion and, secondly, we must analyse his approach to his decision to [8] determine whether he proceeded in accordance with the Act and the several cases decided on the relevant provisions of the Act.

Appeals against the Exercise of Discretion

[24] There are many authorities throughout the Commonwealth establishing or reinforcing the proposition that an appellate court will not lightly interfere with the exercise of discretion of a judge in a court below. – See, for example, Evans v. Bartlam [1937] AC 473; G. v. G. [1985] 2 All.E.R. 225; Egerton v. Jones [1939] 3 All.E.R. 889 adjudicated in England. Here, in Barbados, the Court of Appeal in Bolden v. Bolden (Appeals Nos.7D and 8D of 1984 unreported) per Sir Denys Williams CJ, after citing passages from the Australian cases of House v. The King (1936) 55 C.L.R. 409 at 504 and Norbis v. Norbis (1986) FLC 91-712 at p.75, 165, concluded his judgment by pointedly referring to the principle that there will not be interference with the exercise of a discretion unless it has been shown that "there was error" or that "the order is unreasonable or plainly unjust". Sir Denys repeated the overriding principle in Maraj v. Straker (1984) 19 Barb.L.R.193.

[25] Earlier this year, this Court in Locke v. Bellingdon Limited (Civil Appeals Nos. 31 and 34 of 2001 unreported) cited with approval Dufour v. Helenair Corporation (1996) 52 W.I.R. 188 where Sir Vincent Floissac CJ explained that an appeal against a judgment given by a trial judge in the exercise of a judicial discretion will not be allowed unless the appellate court is satisfied:

"(i) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking [9] into account or being influenced by irrelevant factors and considerations; and

(ii) that, as a result of the error or degree of error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[26] Those two conditions were respectively explained by Viscount Simon LC in Charles Osenton and Co. v. Johnson [1941] 2 All.E.R.245 and by Asquith LJ in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All.E.R.343. In the latter case, Asquith LJ used words which are now part of the hallowed language of the law. His Lordship said at p.345:

“We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.”

[27] Counsel also cited to us cases from Australia including Mallet v. Mallet (1984) FLC 91-507, Norbis v. Norbis supra and Lynch v. Fitzpatrick (unreported October 26, 2000). The principles stated above have been constantly reiterated and applied by the High Court of Australia in family law cases.

[28] In order to understand how the trial judge’s discretion was exercised, it is necessary to consider the provisions of the statutory section that triggered the discretion. Following its model in Australia, section 57 of the Family Law Act is in pari materia with section 79 of the Australian Act. We reproduce it in full:

“57.(1) In proceedings in respect of the property of the parties to a marriage or union, or of either of them, the [10] court may make such order as it thinks fit altering the interests of the parties in the property, including –

(a) an order for a settlement of property in substitution for any interest in the property; and

(b) an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.

(2) 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.

(3) In considering what order should be made under this section, the court shall take into account the following:

(a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including [11] any contribution made in the capacity of home-maker or parent;

(c) the effect of any proposed order upon the earning capacity of either party;

(d) the matters referred to in section 53(2) in so far as they are relevant; and

(e) any other order that has been made under this Act in respect of a party.”

[29] Now since section 57(3) requires the court to take into account matters referred to in section 53(2), it is important also to examine the matters provided for in section 53(2). These are:

(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; (c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of 18 years; (d) the financial needs and obligations of each of the parties; (e) the responsibilities of either party to support any other person; (f) the eligibility of either party for a pension, allowance, or benefit under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to either party; (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable; (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish [12] himself or herself in a business or otherwise to obtain an adequate income; (i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; (j) the duration of the marriage or union other than a marriage, and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; (k) the need to protect the position of a woman who wishes only to continue her role as a wife and mother; (l) if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation; (m) the terms of any order made or proposed to be made under section 57 in relation to the property of the parties; and (n) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.

Those matters are also to be found in section 75(2) of the Australian Act and, in the cases, are commonly referred to as “the section 75(2) factors” in Australia.

[30] The core of the complaint against the trial judge is that he exercised his discretion under section 57(supra) on wrong principles or approached the case in the wrong way. We think that we should set out, by way of guidance, our understanding of the proper approach to the exercise of the section 57 discretion.

The Proper Approach under Section 57

[31] In the determination of a property application under Section 57, the proper approach involves a process of three steps.

(i) The net property of the parties must be identified and valued by the court. [13]

(ii) The respective contributions of the parties within the terms of section 57(3) must next be considered and evaluated.

(iii) The section 53(2) factors, so far as relevant, should then be considered.

[32] This is the approach approved by the courts in Australia in such cases as Pastrikos v. Pastrikos (1980) FLC 90-897; Lee Steere (1985) 91-626 and Ferraro v. Ferraro (1993) FLC 92-335. Some courts have explained it as a "dual exercise" combining steps 1 and 2. However expressed, a judge must consciously apply his mind to the constituent elements implicit in the "steps".

In Pastrikos, the parties married in 1960. There were three children of the marriage. It was dissolved in 1978. Prior to the marriage, the husband had amassed considerable assets and, during the marriage, had invested money in Greece over a long period. One of the assets of the parties was a motel and the trial judge found that the wife had contributed as a wife and mother indirectly to the acquisition of the family assets and directly by reason of her activities in the motel. He made no finding as to the value of the money in Greece and found it impossible to value the wife's contribution to the family assets.

[33] In allowing the appeal the Full Court determined that the judge had not made detailed findings about the manner in which the family assets had been built up or the extent of the parties' respective contributions to the accumulation of property. Their Honours found that the judge had in fact placed too much emphasis on the needs of the wife rather than taking account of the whole of the matters referred to in sections 79 and 75(2). [14]

[34] Evatt CJ at p. 75, 653 said:

"Under section 79, the Court has to embark on a dual exercise. The first part of the exercise is to determine the nature and, so far as possible, value of the property of the parties in issue in the proceedings. Usually, the whole of the property of the parties will be relevant. Then the Court proceeds to make some assessment of the extent of each party's contribution to those assets, within the meaning of paragraphs (a) and (b) of section 79(4). This assessment is sometimes quantified in terms of percentages or values. However it is expressed, the assessment is an important part of the exercise. It is not necessary that a party's contribution be tied down to a specific asset. It may be assessed as a general contribution to the property of the parties if the circumstances warrant.

The second part of the exercise is to consider the financial resources, means and needs of the parties and the other matters set out in section 75(2) so far as relevant. There is obviously a difference between those cases where the applicant can establish that he or she is entitled to be maintained by the other party and other cases."

[35] In Ferraro v. Ferraro (1993) FLC 92-335, the Full Court described the proper approach in words which are now widely accepted and recited. The Court said at p.79, 560:

"A now well established line of authority in this Court indicates the approach normally to be taken to the exercise of the discretion in section 79 proceedings. That approach is firstly to ascertain the property of the parties at the time of hearing, then to consider the 'contributions' of the parties within paragraphs (a) to (c) of section 79(4), and then to consider the matters in paragraphs (d) to (g), more especially paragraph (e) which takes up by reference the provisions of section 75(2) and which are generally referred to as the 'section 75(2) factors'….."

[36] When considering step 2 in the exercise and the assessment of the extent of each party's contributions under section 57, where a wife has primarily performed a role as home-maker and parent, her contribution is not to be taken as confined to the former matrimonial [15] home: it extends at least indirectly to the whole of the assets of the husband.

[37] When considering step 3 in the exercise, in a comparison of the financial resources of the parties, there must be a realistic assessment. Both accrued financial benefits and financial obligations to be met must be weighed.

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

How should Contribution as Parent or Home-maker be Assessed?

[39] This is a critical question in this appeal. The wife admits that she made no direct contribution to the acquisition of "Amberley" and its subsequent improvement. However, she said that she bought food, looked after the children and took them to school. It was her taking out an insurance policy for $40, 000 and agreeing to sign the conveyance as a joint owner that helped to facilitate the grant of the mortgage by the Mutual.

[40] The decision of the High Court of Australia in Mallet v. Mallet (supra) is authority for the proposition that the Court should not start off with any presumption or rule that equality of division is necessarily a just and equitable result. At the same time, the High Court did not decide that the contribution of a wife as home-maker and parent was necessarily inferior to that of the husband breadwinner. The contribution of such a wife must be assessed in a substantial and not merely a token way. [16]

[41] It will be possible in some cases to arrive at the conclusion that in a marriage there has been an equality of contribution by each of the parties within his or her own sphere: that of the wife as home-maker and parent and that of the husband as breadwinner.

[42] We must, at this point, say a word about inherited property. Such property brought to the marriage will make a contribution which cannot be matched by the party who brings few, if any, assets into the marriage. The cases of Antmann v. Antmann (1980) FLC 90-908 and Matthews v. Matthews (1980) FLC 90-887, both held that, in an appropriate case, where inherited property is applied to the marriage, that would be treated as a contribution by that party or at least as a factor to be taken into account under section 75(2) (section 53(2) Barbados Act).

Approach of the Trial Judge

[43] We now turn to consider how the trial judge came to the determination that a lump sum award of $30, 000 was a just and equitable order to make under section 57.

[44] The approach of the judge to the issue of the wife's interests was to set out section 57(1) and (2) and remind himself that the court must take into account "the financial contribution made directly or indirectly by or on behalf of a party to the acquisition, conservation or improvement of the property including any contribution made in the capacity of a home-maker or parent."

[45] Then, the learned judge identified the question for his decision as whether the husband, in the absence of any direct financial contribution towards the acquisition of the matrimonial home by the wife, is entitled to an order altering the interests of the parties. He [17] made it clear that, from the outset, the wife had conceded that she was not entitled to half of the value of the property even though it had been conveyed in joint names.

[46] The judge found that she made a contribution to the conservation and improvement of the property. He said:

"I accept her evidence that she assisted in the purchase of groceries, paid the home help and looked after the children as if they were her own. On these matters she was not challenged in cross-examination."

He therefore concluded that in all the circumstances, having made "a contribution to the conservation and improvement of the property, her contribution merits the making of an order under section 57 of the Act."

[47] Then, His Lordship cited two Barbadian cases where the marriages were of less than 5 years' duration and the property had been in the name of one spouse. The cases were Bartlett v. Bartlett (No.68 of 1983 unreported) and Lowe v. Lowe No.400 of 1989 unreported). In Bartlett the percentage of the equity awarded the wife was 10% and in Lowe it was 20%. In both of those cases the duration of the marriage was about 5 years.

[48] In concluding his decision, the learned judge purported to be guided by Williams CJ (Acting) in Moseley v. Moseley [1986] 21 Barb.L.R.14. He said that Sir Denys' approach "seems to be the appropriate method in resolving the matters in issue in this action." But he did not spell out that "approach". His Lordship merely contented himself by saying:

"As in Moseley, the parties had ceased to live together after a relatively short period; they are still relatively young and both are working. The husband will remain in the family home while the wife will have to move to [18] rented accommodation. Counsel has cited in support S. v. S. [1977] 1 All.E.R.56 in support of the factors to be borne in mind in making an order."

He straightaway proceeded to make an order "taking into account sections 57, 59 and 60" and, without more, made the order for payment by the husband of $30, 000 together with the other orders referred to in this judgment at paragraph 6.

[49] One has to read Moseley to understand the approach used by Williams CJ (Acting) sitting at first instance.

[50] In that case, the wife had applied for maintenance for herself and three children of the marriage, a declaration of her interest in the matrimonial home and a settlement and/or alteration of the interests of the parties pursuant to section 57 of the Act. The husband was the legal owner of the matrimonial home and was paying $300 per month towards the children's maintenance. The direct contributions of the wife to running the household and improvements were small, but she was mother and home-maker for about 4½ years.

[51] Williams CJ (Acting) ordered the maintenance to continue at $300 per month, awarded the wife no maintenance but made an adjustment under section 57 of the Act to include an element for maintenance and provide additional capital for the wife who wished to have separate accommodation for herself and the children. He therefore ordered the husband to pay her a lump sum of $25, 000.

[52] He first identified the property and valued it. Then he made findings as to the respective contributions of the parties. Thereafter he directed his mind to section 57(3)(b) and the section 53(2) factors in so far as they were of relevance in the case. He found that the wife had "made an indirect contribution to the improvement of the property by helping [19] to run the household, buying food and assisting in payment of the bills, thus enabling the husband to spend his earnings on the improvement of the property. She was mother and home-maker for about 4½ years…" Paying attention to the section 53(2) matters His Lordship thought that the most important consideration under that section was that the children were with the wife who would have to feed, clothe and shelter them for many years.

[53] The learned Acting Chief Justice took into account section 60 of the Act and sought to make an order such as would finally determine the financial relationship between the parties and avoid further proceedings. Following Menz v. Menz [1980] FLC 90-852, the Acting Chief Justice said he would "make an adjustment of the section 57 order so as to include a maintenance element and provide additional capital for the wife" in order to provide accommodation for herself and the children. He therefore ordered the husband to pay the wife $25, 000.

[54] It would have been more helpful in this case if the trial judge had set out his approach to the issues more clearly and with adequate detail rather than relying on a bald statement that the approach in Moseley seemed to be appropriate. Indeed Mr. Williams Q.C., for the wife, was forced to concede that the trial judge made no finding in regard to the wife's contribution as a home-maker. Moreover, his reasons for making the orders were also less than clear. It is to be remembered that an appeal court is not obliged to uphold a judgment merely because the result may be said to fall within the wide ambit of the judge's discretion. In general, an appeal court should be able to [20] discern either expressly or by implication the path by which the decision has been reached – Bennett v. Bennett (1991) FLC 92-191.

[55] In Merriman v. Merriman (1993) FLC 92-422 an appeal was allowed where the trial judge failed to approach the property settlement proceedings in accordance with the well-established approach and failed to give any appropriate explanation for his failure to take this approach. The Full Court of the Family Court of Australia found that the trial judge was in error in failing to give sufficient reasons for his

decision.

[56] Similarly in Horsley v. Horsley (1991) FLC 92-205, the Full Court upheld an appeal where it was unable to ascertain the reasoning upon which the decision in the court below was based. For the process of appeal to have any meaning at all, the appellate tribunal must be afforded some guidance as to the trial judge's thinking. Where that is not possible, the discretion will miscarry.

[57] Applying those principles of law, we find no evidence in the judgment that the trial judge valued the property of the parties, properly or at all in accordance with step 1 mentioned at paragraph 31 (supra). Unlike the former Chief Justice Williams in Moseley, the trial judge in this case simply did not value the property. So, the question must be asked: On what basis did he arrive at the sum of $30, 000? As Mr. Williams Q.C. correctly observed during the argument: "If the judgment is to be criticised, it is that the judge did not point out how he arrived at the figure of $30, 000." We agree. There is no finding whatsoever of the value of the property. There was no mention of the section 53(2) factors in the judgment and how he valued the respective contributions of the parties. To have omitted to make such [21] findings or evaluations of applicable statutory provisions are errors of law which satisfy the tests adverted to earlier in this judgment and, in the circumstances, would enable this Court to interfere with the exercise of the original discretion as a matter of law.

[58] In all the circumstances we feel able to substitute our own order to be made in accordance with the established approach.

(i) The value of "Amberley"

[59] Mrs. Walrond Q.C. invites us to accept that the equity in the matrimonial home is $59, 543.00. She computes it by taking the valuation at $265, 000 and then deducting therefrom: (a) the balance on the mortgage ($130, 000); (b) the balance on the bank loan ($10, 000); (c) payments by the husband towards the purchase price ($69, 307.00); and (d) the expenses of erecting a fence ($6, 150) – a total of $205, 457. Mr. Williams Q.C., on the other hand, submits that the net equity is $125, 000. He adopts the method traditional in this jurisdiction of taking the market valuation of the property ($265, 000) and subtracting outstanding debts thereon, namely, the balance due on the mortgage ($130, 000) and the bank loan ($10, 000) – a total of $140, 000.

We accept Mr. Williams' methodology and, taking "Amberley" as we find it, namely, subject to the mortgage and bank loan, we hold that the net value of the equity was, at the date of hearing, $125, 000.

(ii) The contributions of the parties

[60] The oral and affidavit evidence of the parties swore to the several matters which we have summarized at paragraphs 11 to 18. Unfortunately, the judgment of the trial judge did not condescend upon a detailed statement and evaluation of the evidence of the [23] respective contributions of the parties. In the paragraphs mentioned, we outlined the parties' contributions to the property and need not repeat them. However, we are constrained to emphasise that the wife's insurance policy of $40, 000 contributed to the acquisition of the property and she made a contribution as home-maker for the 4½ years of the marriage as step-parent and as an income-earner. The husband has made a significant and substantial financial contribution at the commencement of and during the marriage.

[61] The wife has made a contribution to the home and the family and the Act clearly intends that her contribution "should be recognized not in a token way but in a substantial way". – per Evatt CJ in Rolfe v. Rolfe (1979) FLC 90-629 at p. 78, 272.

[62] "What the Act requires is that in considering an order that is just and equitable the court shall take into account any contribution made by a party in the capacity of home-maker or parent. It is a wide discretion requiring this Court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of a particular case" – per Wilson J in Mallet v. Mallet (supra at p. 79, 126).

The respective values of the contributions made by the parties must depend entirely on the facts of the case.

[63] This is not a case where the wife was exclusively a home-maker doing only domestic chores daily in the home. She was a working wife whose small salary went towards the household expenses and a stepmother who assisted with the rearing and transportation of the children. Fully conscious that we must not undervalue the home-maker role, we accept that the wife made an important contribution during the short duration of the marriage.

[64] The key issue in this appeal is how to measure the quantum of the wife's indirect contribution in a marriage of short duration where she will no longer have responsibility for any children; that is to say, trying to quantify contributions which, by their very nature, are non-financial. This must necessarily be a value judgment.

[65] In a consideration of the section 53(2) factors in a property settlement claim care must be exercised not to confuse spousal maintenance and the factors enumerated in that section. Applications for spousal maintenance are made under section 52 of the Act and are separate and distinct from property settlement applications under section 57. Confusion has arisen, however, because the court is empowered to take into account section 53(2) factors in a maintenance application and those same factors are to be taken into account, so far as relevant, in a section 57 application.

[66] In Collins v. Collins (1990) FLC 92-149, the Full Court identified the source of the confusion and sought to explain it thus at p.78, 043-5:

"Section 79(4)(e) incorporates in the consideration of a property order under section 79 'matters referred to in section 75(2) so far as they are relevant'. Section 75(2) sets out in 15 paragraphs various matters which are required to be taken into account. They are of considerable diversity; some are likely to have little to do with the general run of property applications; some are likely to have more significance in one case than they would in another. Section 75(2) is part of section 75 which is a section related to 'matters to be taken into consideration in relation to spousal maintenance'. Consequently, some of the matters set out in section 75(2) may be more appropriate to spousal maintenance than they may be to a property order, and the use of a common subsection in the disparate responsibilities under section 74 and section 79 can produce

confusion and the risk of overlapping."

[67] We are of the view that, in practice, a trial judge, on a property settlement application, should have regard to each of the factors in [24] section 53(2) only so far as they are relevant to the particular circumstances of a case and attach such weight to them as his discretion determines. At the end of the day the overriding principle is to be found in section 57(2) in that the order made must be just and equitable as between the parties.

[68] (iii) The Section 53(2) Factors

The wife has no continuing responsibility for the care and control of the children. That will be the husband's lot. Taking into account the section 53(2) factors, especially those at paragraphs (a), (b), (c), (d), (g), (j) and (m), and, eschewing any attempt to apply a percentage assessment in this "small money case", and bearing in mind also the wholly inappropriate way in which the trial judge approached this matter, we are of opinion that an order for a lump sum payment of $20, 000 would be just and equitable. We apportion $5, 000 of that sum to the section 53(2) factors. We repeat that it is the order that must be just and equitable, and not just an underlying percentage division – See Lynch v. Fitzpatrick (cited supra).

The Car

[69] We turn now to the order transferring the car to the wife. In the appellant's Amended Notice of Appeal it was alleged that the trial judge had failed to take into account or properly weigh the contribution made by the husband to the purchase of the motor car. On appeal, however, this contention was not vigorously argued. Mrs. Walrond Q.C., for the appellant, pointed out that the husband had contributed $28, 672.50 towards the purchase of the car of which $21, 672.50 came from the inheritance under his father's estate. The wife herself had put up $9, 500 towards the purchase of the car. [25]

[70] In the appellant's skeleton arguments it is represented that the husband has always been willing to transfer his share in the motor car (estimated at $10, 000) to the wife "on condition that she transfer her interest or share in the matrimonial home to him and make no claim for maintenance against him". This does not seem to us to be either a fair or just offer even in the circumstances of a short marriage in which both parties contributed to the car and the matrimonial home.

At the date of hearing, the value of the car was about $15, 000. In the context of the rather light arguments and submissions made before us and, seeking to be fair to both parties, we see no reason to vary the trial judge's order in respect of this asset.

Costs

[71] The appellant contends that the trial judge in exercising his discretion to award costs failed to take into account the fact that the award of costs was less than that demanded by the wife and he seeks an order from this Court setting aside the costs order.

This is not an inconsequential matter. Section 94 of the Act provides as follows:

"94.(1) Each party to proceedings under this Act shall, subject to subsection (2) and section 95, bear his or her own costs.

(2) Where the court is of the opinion that the circumstances in any case are such as to justify it in so doing, it may, subject to the rules of court, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise, as it thinks fit."

[72] Section 95 deals with frivolous or vexatious proceedings and is not applicable to this case. However, rule 125 of the Family Law Rules is certainly applicable. It enacts so far as relevant: [26]

"125.(1) Where a court proposes to make an order for costs under section 94(2) of the Act, it may, in making the order

(a) take into account the financial circumstances of the person against whom the order is to be made;……

(e) consider the conduct of all parties at the hearing and determination of the proceedings, including their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admission of facts, production of documents and like matters; and…….

(f) take into account all the relevant matters."

Rule 2 authorises the court to fix the amount of costs without recourse to taxation.

[73] The trial judge departed from the general rule in section 94(1), relying upon Robinson v. Higginbotham (1991) FLC 92-209 where an order for costs was made by the Full Court of the Family Court in favour of a wife who had been denied costs by the trial judge. The difficulty which this Court would have in following Robinson v. Higginbotham is that that case was decided under a section of the Australian Family Act as amended after the enactment of the original 1975 Act on which the Barbados Act is based.

[74] The particular section was section 117 (2A) paragraph (f). There is no corresponding section in the Barbados Act or Rules (supra). Indeed paragraph (f) of section 117 (2A) of the Australian Act as amended has a clear purpose. In the words of Nygh J at p.78, 417:

"It is quite clear that the purpose of that provision is to ensure that offers to settle, if made seriously, are considered seriously, to ensure that the cost of litigation is avoided, the workload of this Court is lightened, and one other consideration is certainly that a party with [27] greater wealth is not placed in a position whereby he or she can wear out the other by simple attrition."

[75] Section 117 (2A)(f) is in these terms:

"In considering what order (if any) should be made under subsection (2), the court shall have regard to (a) whether either party to the proceedings has, in accordance with section 117 C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer."

Douglas CJ had approved the making of an open offer of settlement of a claim as being not only "permissible but eminently useful" in Franklin v. Franklin (No.24D of 1982 unreported).

[76] For our part, we only desire to add that settlement is a healthy process and is to be encouraged. Admittedly, the adversarial culture to which all of us, judges and attorneys-at-law alike, have been accustomed has conduced to unnecessary and rancourous litigation in many family law cases.

Fortunately, the prospect of alternative dispute resolution procedures and the expectation of new Rules of Court, hold out a promise that the day may be near at hand when the court itself will be able to promote the settlement of differences between the parties and assist them in reaching an acceptable conclusion. Family Law is a fertile field of law well worthy of testing the cultivation of techniques other than full-blown litigation.

[77] The reason advanced by the trial judge for his order was "the general intransigence of the Applicant (husband) in terms of the application made, and as evidenced during the hearing, the approach of the Respondent Wife, in seeking a settlement, before those proceedings were instituted…" [28]

[78] The trial judge's discretion to award a party costs under section 94(2) and rule 125 is wide in the light of the paragraphs of the rule cited at paragraph [67] (supra). Blackman J (Acting) seemed to have been persuaded not only by Robinson v. Higginbotham but also by correspondence passing between Counsel in which the wife made an open offer on March 15, 2000 to settle for $40, 000 plus the car. The husband's application was filed on April 17, 2000 and he claimed the entire beneficial interest in the property and the car. At the hearing he made an offer only with respect to the car. We suspect that those were the circumstances which the judge had in mind in the passage of the judgment quoted at paragraph [71] hereof. He saw and heard the parties in the High Court and, notwithstanding that he wrongly applied an Australian case based on a statutory provision dissimilar to any in the Barbados legislation, in all the circumstances of this particular case, we are not of opinion that the costs order should be varied.

The Applicability of Precedents

[79] Counsel have invited us to give guidance on the relevant case law to be followed in applications under the Family Law Act of Barbados. They agree that trial judges should first look to local cases for guidance and then to Australian cases since our Act is almost an exact replica of the Australian 1975 Act prior to its subsequent amendment. However, Mrs. Walrond Q.C. submits that English cases are only helpful on section 56 of our Act but have no applicability to section 57 applications. Indeed she submits that the trial judge had been in error to cite S. v. S. (supra) and apparently rely on it in making the lump sum order in favour of the wife. [29]

[80] Mr. Williams Q.C., on the other hand, argued that English decisions are useful in section 57 cases. Our attention was directed to section 25 of the English Matrimonial Causes Act, 1973, and English decisions where Australian precedents were cited.

The case of S. v. S. was one of a marriage of a mere two years' duration. Both parties had been married before and were in their late fifties. It was quite different from the average run of cases under section 25 such as Wachtel v. Wachtel [1973] 1 All.E.R. 829. In S. v. S. the husband, a doctor, had his own home and was supporting one child who was at University. The wife, a small earner, sold her house on marriage and gave most of the money she received to her son to help him set up house. The Registrar and the trial judge used a formula of fractions and awarded the wife £7, 000 to provide herself with a small house or flat.

[81] On appeal to the Court of Appeal, it was held that the primary consideration in that type of case was the needs of the wife. The parties' resources and obligations should be ascertained and balanced against each other in relation to all the circumstances of the marriage. "It was not appropriate to vary the one-third rule." The Court of Appeal therefore awarded her a lump sum of £11, 000 on trust until her death or re-marriage, £2, 000 to cover the costs of moving and furniture and periodical payments of £2, 000 per annum less tax.

[82] The judgment of Ormrod LJ is instructive as to the approach of the English Court and is to be contrasted with that recommended in this judgment on the authority of the long line of Australian cases. At page 60 His Lordship said: [30]

"In my view it is much easier, and better in these cases, to follow section 25 of the Matrimonial Causes Act 1973 and to perform the exercise there required, namely to ascertain the means of the parties and their resources and the charges and obligations that they have to meet; and also to take into account the needs of the parties and then to have regard to such other matters as are set out there, such as contribution to the family welfare….The length of the marriage has to be taken into account…"

[83] "So it seems to me that the primary consideration is to look at the needs of the wife first of all; and having made some assessment of the needs, then to check the resulting figure that emerges against the resources of the husband and then to see what the ratio of the one to the other is and to consider….how the parties will stand in relation one to the other, and relate that to all the circumstances of the case….If attention is concentrated primarily on need in this type of case, the consequent calculations become very much easier…"

[84] It is clear that the approach of the English courts is different from that of the Australian courts which have constantly stressed the necessity of a proper approach under section 79 to ensure that the statutory discretion is judicially exercised. For the English courts, needs are the primary concern. For the Australians, needs are to be considered in the third step under section 75(2).

[85] We are obliged to set out section 25(2) of the English Act in extenso. It is similar to but not identical with our Act. The Court shall have regard in particular to:

"(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire; (b) the financial needs, obligations and responsibilities which each of the parities to the marriage has or is likely to have in the foreseeable future; (c) the [31] 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 parities to the marriage; (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family; (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; (h)…the value to each of the parities to the marriage of any benefit…which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

[86] What is critically important is the approach to an evaluation of the statutory requirements in sections 57 and 53(2) of the Family Law Act. Moreover, two previous Chief Justices, Sir William Douglas and Sir Denys Williams, have followed the Australian precedents and we see no reason to depart from the view of those distinguished and learned judges. – See Franklin v. Franklin (No.24D of 1982 unreported), Bartlett v. Bartlett (supra), Moseley v. Moseley (supra). A little more than a year after the commencement of the Family Law Act, Douglas CJ offered sage words of advice in Franklin. He observed:

"In dealing with cases under the Family Law Act, English cases can provide little guidance because the Act closely follows Australian legislation which represents a new departure requiring a different approach from that required by the repealed Matrimonial Causes Act."

[87] Recently, the House of Lords in White v. White [2000] 3 WLR 1571 (per Lord Cooke) did refer to leading Australian cases by way of an examination and comparison of the historical approaches under English and Australian legislation. Their Lordships held that there was no legal presumption of equal division when awarding ancillary relief, but a judge exercising his statutory discretion pursuant to [31] section 25 of the English Act should, before making his final decision, check his tentative views against the yardstick of equality of division and depart from equality only if, and to the extent that, there was good reason for doing so. A claimant's financial needs or reasonable requirements should not be determinative in arriving at the amount of an award. S. v. S. was not referred to.

[88] Our reading of White impels us to the view that the House of Lords was grappling with the presumption, at one time strenuously held, that in property settlement matters the starting point was equality of division. It was a view held in Australia in the early days of their Family Law Act but was rejected firmly by the High Court of Australia in Mallet v. Mallet and cases thereafter. There is no presumption of equal division.

[89] Lord Cooke of Thorndon explained that, during the argument, attention was focused on Mallet "since the Australian statutory regime is similar in pattern to the English one." His Lordship explained that, the issue on which Mallet was cited, centred around the need to balance the merit of flexibility in a wide discretionary power against the need for reasonable consistency.

[90] In his judgment, Lord Nicholls (who delivered the principal judgment) at p.1579 et seq was at pains to clarify the law in England relating to financial needs and resources. He described it as being in a "not altogether satisfactory" state. He pointed out that paragraph (b) of section 25(2) is concerned with the "financial needs, obligations and responsibilities" of each of the parties but it appears that, over the years, the paragraph seems to have become subsumed into a "wider, judicially-developed concept of reasonable requirements. This wider [33] concept appears, in turn, to have displaced consideration of the parties' available resources as a factor in its own right." Ormrod LJ in the era of the seventies seems to have been the chief proponent of the trend.

[91] Lord Nicholls admitted that there was confusion in the English law "because the courts have departed from the statutory provisions. [They] lend no support to the idea that a claimant's financial needs are to be regarded as determinative". We leave White v. White with the observation that, significantly, the leading judgment of Lord Nicholls with whom his other brethren agreed, did not refer to or analyse the Australian cases.

[92] Since White v. White, the English Court of Appeal has had occasion to explain that decision further – See Cowan v. Cowan [2001] 3 WLR 684 where Thorpe LJ, in an illuminating judgment, pointed out that over the last 30 years, there has been criticism of the way in which English judges construed and applied section 25 of the Matrimonial Causes Act. He has actually called for legislative reform. He, however, explained that White v. White did not introduce a rule of equality. Of note also in the judgment of Thorpe LJ is the absence of any evaluation of Australian precedents.

[93] Having regard to the similarity of the legislation in Australia and Barbados and the wealth of precedents and authority in Australia, it is our opinion that English cases, as a general rule, will hardly be of relevance and assistance in section 57 applications.

However, it may be otherwise upon section 56 applications. There, the Gissing and Pettitt line of cases may indeed be relevant and useful. [34]

[94] Before we conclude this judgment, we must thank Counsel on both sides for the quality of the skeleton arguments, the skill and intensity of their arguments and the vast array of relevant legal materials submitted for our consideration. The "principle of orality" of which Sir Robert Megarry (formerly the Vice-Chancellor) wrote in his 1962 Hamlyn Lectures Lawyer and Litigant in England, was well exemplified in this appeal.

[95] The appeal is allowed in part. In so far as we feel able to exercise the discretion afresh, the orders which we now make are as follows:

(i) The sum of $30, 000 ordered by the trial judge to be paid by the husband to the wife is hereby varied to $20, 000 together with interest thereon at the rate of 8% per annum with effect from the date of this judgment until payment.

(ii) The order transferring the motor car to the wife is not varied.

(iii) The order that the husband pay the wife the sum of $2, 500 towards her costs plus the Value Added Tax thereon is not varied.

(iv) Each party to this appeal shall bear his or her own costs.

Chief Justice

Justice of Appeal Justice of Appeal (Acting)