

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
FAMILY DIVISION**

**No. 491 of 2003**

**IN THE MARRIAGE OF:**

**EDWARD ALBECKER**

**APPLICANT/HUSBAND**

**AND**

**DONNA MARIA ALBECKER**

**RESPONDENT/WIFE**

**Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court**

**2004: December 10;**

**2005: March 9; June 7 and 8;**

**2006: March 30; June 19 and 20; November 8 – 9 and 28**

**2007: May 21 – 23; July 11;**

**2008: January 3, 7, 8, 9, 10; June 5 – 6 and 11;**

**2010: May 3 – 4 and 31**

**2015: February 18**

**Miss Cicely P. Chase Q.C., for the Applicant/Husband**

**Mrs. Beverly J. Walrond Q.C., for the Respondent/Wife**

**DECISION**

[1] This matter involves two applications:

- (1) The Applicant/Husband's application filed 12<sup>th</sup> July 2004 and supported by affidavit filed on even date by which he seeks the following relief:

- (a) A declaration that the Respondent/Wife is entitled to a 20% share and interest in the matrimonial property situate at Lot 9C Durants, Christ Church;
- (b) Alternatively, that the shares and interest of the parties in the said matrimonial property be varied and altered so as to vest in her a 20% share and interest in the said matrimonial property;
- (c) That the Applicant/Husband be at liberty to purchase the share and interest of the Respondent/Wife in the matrimonial property at fair market value;
- (d) That the Respondent/Wife be granted two months to vacate the matrimonial property so as to facilitate the completion of sale of the property, and.

(2) The Respondent/Wife's counter-application in which she asks the Court to grant the following orders:

- (e) A declaration that she is the owner of the Land Rover motor vehicle bearing registration number XF-56 and currently registered in the parties' joint names;
- (f) An alteration of the interest in the matrimonial home so as to vest such interest in her as the Court deems just;
- (g) An alteration of the business interest of the Applicant/Husband in the business known as K & E Farms so as to vest in the Respondent/Wife such share and interest as to this Court may seem just;
- (h) An order for future maintenance by means of a lump sum to be secured on the property at Lot 9C Durants, Christ Church;
- (i) An order that the Respondent/Wife be permitted three months after the grant of the order to vacate the matrimonial home to do so.

## **BACKGROUND**

[2] Edward Albecker, the Applicant, and Donna Maria Albecker, the Respondent, met sometime in December 1991. They began living together

in June of the following year and on 19<sup>th</sup> June 1993 they were joined in marriage at Reid's Restaurant in Derricks, Saint James. Immediately after their marriage they continued to reside in rented accommodation in Atlantic Shores, Christ Church where they had already been living.

- [3] Sometime in 1995 the parties moved into their own home, situate at Lot 9C Durants, Christ Church. This home, it is agreed, had been built using the Applicant/Husband's savings, as well as the proceeds of a mortgage obtained by both parties and repaid by the Applicant/Husband.
- [4] The Applicant/Husband was, and remains, employed as the General Manager of Chickmont Foods and also sits on its Board of Directors. He is also a Director of K & E Farms Ltd. in which he owns a one-half (1/2) share, as well as an advisor to a company known as Monterey Farms that is now partially owned by K & E Farms Ltd.
- [5] The Respondent/Wife, on the other hand, was at the beginning of the marriage, the office manager at Lashley Enterprises Ltd. She resigned in July 1998 in order to become a homemaker but returned to the world of work in 2004. She is currently employed by Brydens Xpress.
- [6] The relationship between the parties fell apart and in September 2002, the Applicant/Husband left the matrimonial home. They had been married for a period of just over nine years and had cohabited for one year

previously, making a total of ten years together. There are three children of the marriage – Alyssa Maria born on 19<sup>th</sup> April 1995, Brittany Kirsten born on 14<sup>th</sup> October 1999 and Chantelle Kirsten born on 28<sup>th</sup> June 2001. After the parties separated, the children continued to reside with their mother in the matrimonial home. The eldest child has recently turned nineteen. Her younger sister is fourteen while the youngest child is now thirteen.

- [7] An Application for the Dissolution of Marriage was filed on 5 September 2003 by the Applicant/Husband on the ground that the marriage had broken down irretrievably and there was no reasonable likelihood of reconciliation. The *decree nisi* and *decree absolute* were granted on 2<sup>nd</sup> February 2004 and 12<sup>th</sup> August 2007 respectively.
- [8] On 2<sup>nd</sup> February 2004, the Court also ordered, by consent, that the parties were to have joint custody of the children with care and control to the Respondent and access to the Applicant. The Applicant/Husband was also ordered to pay \$3,000.00 in maintenance monthly together with all medical, dental, ophthalmic and educational expenses and reasonable extracurricular expenses. He has complied with this Order. On 11<sup>th</sup> July 2007, I ordered that the Interim Order as to maintenance was to continue until further Order. Accordingly, all that remains to be determined are the applications for property settlement and for final maintenance orders set out above. The issue

of costs arises also for determination consequent upon the outcome of the applications referenced above.

## ISSUES

- [9] The issues to be determined by this Court in this application are as follows:
- 1) What, if any, is the Respondent/Wife's share and interest in the matrimonial property?
  - 2) What, if any, is the Respondent/Wife's share and interest in the business of the Applicant/Husband known as K & E Farms Ltd; and
  - 3) What, if any, is the amount of final maintenance to be granted to the Respondent/Wife and children of the marriage?
  - 4) Should the Court order the Applicant/Husband to pay the wife's costs of the application or part thereof?

## THE APPROACH TO THE APPLICATION

- [10] The approach to be taken by the Court in applications under **section 57** of the *Family Law Act Cap. 214 of the Laws of Barbados (FLA)* by which one party seeks to alter interests in matrimonial property was set out by the Court of Appeal of Barbados in **Proverbs v. Proverbs (2002) 61 WIR 91 ("Proverbs")**. At paragraph [32] of that decision, **Sir David Simmons CJ** stated that in determining such an application the Court was required to undertake a three step process:

- (a) Identify the matrimonial property of the parties and its net value;

- (b) Determine the respective contributions of the parties within the terms of **section 57(3)**; and
- (c) Consider the **section 53(2)** factors, in so far as relevant.

[11] **Section 57(2)** provides that a Court, hearing an application under **section 57** shall not make any order “unless it is satisfied that, in all the circumstances, it is just and equitable to make the order”. **Section 57(2)** does not set out a further step to be added to the three steps listed above, as some cases have suggested, but emphasizes that the principles of justice and equity are to underlie the entire process and be reflected in any order that the court makes.

### **THE PROPERTY OF THE PARTIES**

[12] **Section 2(1)** of the *FLA* provides that “property in relation to a marriage or union other than marriage or either of them, means property in which those parties are, or that party is, as the case may be, entitled in possession or reversion”. The Court is required to take into account and assess all the property of both parties. No property is exempt from consideration, regardless of whether it was acquired before, during or after the marriage, although the circumstances surrounding its acquisition may be relevant in relation to the second step. Specifically, however, as the Court stressed in **In the Marriage of Lee Steere [1985] FLC 91-626 (Lee Steere)**, it applies to all assets including business assets.

[13] The following have been identified as matrimonial property by the parties and must be considered by this Court:

- (a) The matrimonial home situate at Lot 9C Durants, Christ Church;
- (b) The contents of the said matrimonial home;
- (c) A Land Rover motor vehicle bearing the registration number XF-56; and
- (d) The Husband's interest in the company known as K & E Farms Ltd (K & E Farms) and its assets, which include specifically a yacht.

The respective contributions of the parties will be analysed when I come to discuss the section 57(3) factors.

#### **VALUE OF THE PROPERTY**

[14] Following the guidance provided by the Court in **Proverbs**, I am first required to consider the financial value of the matrimonial property identified. According to Australian jurisprudence, the Court, as a general rule, examines the value, not at the time of separation but at the date of hearing except where factors in a particular case justify the use of an alternative date: See **In the Marriage of Omacini [2005] FLC 93-218 at 79,616** and **Anthony Dickey, Family Law (Fifth Edition) at pp 527-8**. This practice has been followed in our jurisdiction (see **Proverbs**). I am of the view that the interests of justice and equity are best served by using the most recent valuation report available at the time of making the Order.

*The Matrimonial Home*

- [15] The matrimonial home, “Casa Blanca”, is a three bedroom, two bathroom house situate at Lot 9C, Durants in the parish of Christ Church. The property includes a two-storey concrete home, a garage and landscaped gardens all enclosed with a chain linked fence and automatic gates. It is well-maintained. The title deeds for the land on which the property stands are in the Applicant/Husband’s name only.
- [16] The valuation reports submitted to this Court in relation to that property are as follows:
- (i) Valuation report of Mr. George Ramsay dated 14 September 2006 and submitted by the Respondent in which Mr. Ramsay assigned a value of \$1.6 million to the property at that date.
  - (ii) Valuation report of Mr. Stephen Wiltshire of Felicity Limited dated 13 November 2006 and submitted by the Applicant. At that date Mr. Wiltshire valued the property at \$1.3 million.
  - (iii) Valuation report of Mr. Alkins Kirton dated 3 March 2008 which valued the property at \$1.4 million
- [17] The traditional method of valuing property in this jurisdiction is to take the market value of the property and subtract the outstanding debts thereon. A mortgage was taken out by both parties but this was fully repaid by the Applicant/Husband. In the circumstances, I find, and it is agreed by both parties that there are no outstanding debts on the matrimonial home. The

value, therefore, can be taken as the value which the Court finds taking into account its various valuations.

- [18] An analysis of the three valuations shows that there is a discrepancy of some \$200,000.00 to \$300,000.00 between the three valuation reports all of which were prepared between September 2006 and March 2008. The Court cannot disregard the fact that all of these reports were prepared some five to seven years ago. Mr. Stephen Wiltshire of Felicity Limited gave evidence that a valuation report is only valid for a period of six months. The Court of Appeal in **Proverbs** recommended that a current valuation report be used. Mrs Walrond Q.C., in her written submissions, suggested that up to date valuations be obtained. Accordingly, a recent valuation report will have to be obtained before the parties' respective interests in the matrimonial home can be fairly quantified. That however is no bar to the Court assessing the shares or interests of the parties in the various properties.

*K & E Farms Ltd*

- [19] The Applicant/Husband has a 50% share and interest in the company K & E Farms Ltd. The remaining shares and interests are owned by Kenneth Pestano with whom he started the business. K & Farms commenced operation in 1986 as a partnership between Mr. Pestano and the Applicant. It was incorporated on 18<sup>th</sup> March 1988. According to the Auditor's Report

of 25<sup>th</sup> May 2002, the company's principal activity is "the contract growing of broiler chickens and fishing" whilst the Applicant/Husband described the business as "poultry farming operators growing chicken on contract for Chickmont Foods".

[20] The business owns several valuable assets, namely, 7.7 acres of land and buildings at Balls Plantation, Christ Church, a fishing boat, furniture and farming equipment. K & E Farms also has a 10% share and investment in Monterey Farms Ltd which itself owns 9.03 acres of land at Gibbons Christ Church valued at over three million dollars. Like K & E Farms Ltd., Monterey Farms Ltd. is also in the business of raising chickens under contract. Its majority shareholder, however, is not K & E Farms Ltd, but Mr. Peter DeFreitas, a close friend of the Applicant/Husband.

[21] The Court had the benefit of receiving evidence from Mr. Ayub Kola, an Accountant and Managing Partner of the accounting firm Ayub Kola & Co. Chartered Accountants. Mr. Kola was called as a witness for the Applicant/Husband. He deposed that he had been the Accountant for K & E Farms for several years. He was responsible for producing the company's financial reports for the years 2001-2004. The Court also had the benefit of hearing the evidence of Mr. Douglas Skeete, of Skeete, Best & Co., Chartered Accountants, who like Mr. Kola, is a qualified accountant. He

reviewed the financial statements prepared by Mr. Kola in relation to K & E Farms Ltd on behalf of the Respondent/Wife.

- [22] Mr. Kola, in the report dated 24<sup>th</sup> January 2007 and annexed to his affidavit filed 6<sup>th</sup> February 2007, valued the business at \$703,113.00 as at 31<sup>st</sup> October 2005 and the Applicant's 50% share and interest at \$351,557.00. He also provided a valuation of Monterey Farms Ltd, calculating its total value as at 31<sup>st</sup> October 2005 to be \$2,661,089.00 and the 10% share and investment of K & E Farms Ltd as \$266,108.00. Mr. Skeete took objection to the method used by Mr. Kola and, by extension, to the figures presented.

*Other Property*

- [23] The other assets identified as matrimonial property include the Land Rover registration number XF 56 and the household furniture and effects. The Land Rover was bought in the year 2000 for \$98,000.00. There is no evidence before the Court as to its current value.
- [24] No current value has been given for the household furniture and effects. Except for those articles of household furniture identified later in this discussion, the bulk of the household furniture and effects have not been identified.

## THE LAW

[25] The principles of law applicable to an application under **sections 56 and 57** of the *FLA* have been settled by the Court of Appeal in *Proverbs v Proverbs* where the court identified the three step process previously outlined in this decision. It is necessary to repeat it here.

[26] I will now discuss the contributions of the respective parties pursuant to **section 57 (3)** of the *FLA*.

### CONTRIBUTIONS UNDER S 57(3)

[27] **Section 57(3)** provides that:

“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 any contribution made in the capacity of homemaker 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.”

## **SUBMISSIONS OF COUNSEL**

### **The Applicant/Husband's Submissions**

- [28] Ms. Chase submitted that the application of the Respondent/Wife is essentially a claim under the home maker provision to a share and interest in the former matrimonial property of the parties. There was some evidence of indirect financial contribution during the marriage but the facts did not support the Respondent/Wife's claim that this contribution was substantial.
- [29] It is settled law that a party's contribution under the homemaker's provision ought to be considered significant and can extend to business assets of the marriage even in circumstances where the party claiming an interest played no active part in the said business. It was however submitted that this contribution also had to be weighed both qualitatively and quantitatively to determine the extent to which a party's contribution inured to the benefit of the entire household.
- [30] In the circumstances, she submitted that the Applicant/Husband's offer to the Respondent/Wife of a 20% share and interest in the former matrimonial home was just and equitable and accorded with the evidence presented in this case. The Applicant/Husband was prepared however to increase his original offer to one third in the interest of amicably resolving all claims of the Respondent/Wife.

[31] Counsel submitted that it was undeniable, that the Respondent/Wife made a significant contribution in her role as a wife and mother. However, she did not fulfill her role as a homemaker alone, those responsibilities were shared by a loving and supportive husband and father.

[32] The Court she submitted, should consider the factors outlined in **section 53 (2)** of the **Act**, the most significant of which were:-

The need for maintenance in the first instance and what was a good or acceptable standard of living to uphold for the Respondent/ Wife; her average age; her relatively good health and positive prospects for continued gainful employment; and the Respondent/Wife's failure to play any role in the development of the business enterprises of the Applicant/Husband throughout the nine years of marriage.

[33] She submitted also that the needs of the children of the marriage were not in issue since the Applicant/Husband has undertaken to continue to be responsible for them. The fact that the Respondent/Wife was therefore not completely burdened with these expenses, and was therefore free to manage her own expenses for her benefit, was also a factor to be taken into account. The relatively short duration of the marriage and the absence of any negative effect on either party's earning capacity were additional factors to be considered by the Court. The economic effect of the serious relationship of some permanence between the Respondent/Wife and her present common law partner was also to be taken into account.

[34] It was submitted that a key issue was not whether the Applicant/Husband can afford to contribute to the maintenance of the Respondent/Wife but whether, through her evidence and after considering all the relevant circumstances, the Respondent/Wife has proven an entitlement to an inflated share and interest in the former matrimonial property.

[35] Counsel submitted that the additional claim for a lump sum in maintenance was not supported by the weight of the Respondent/Wife's evidence. The onus rests on the Respondent/Wife to establish an actual present need and inability, at the time of filing the application, to support herself adequately for the various reasons outlined in **section 50 FLA**. The Respondent/Wife had failed to provide sufficient proof of her inability to support herself "adequately" for any "adequate reason". Consequently, she had failed to prove her entitlement to an award of maintenance under the provisions of **section 50**.

[36] Applying the rule in the decision **Biddulph [1977] FLC 90-243** it was asserted that it was unreasonable"... to expect to be 'kept' for life at the expense of the former spouse in the manner to which .... or she might have expected to continue had the marriage continued".

[37] Counsel relied upon the following authorities:-

**Biddulph v Biddulph [1977] FLC 90-243, Cox v Cox [2005] Civil Appeal No. 19 of 2005; Gates v Gates [1976] 11 ALR 111; Kelly v Kelly (No.2)**

**[1981] FLC 91-108; Lyall v Lyall [1977] FLC 90-223, Proverbs, Murkin v Murkin [1980] FLC 90-806, Soblusky v Soblusky [1976] FLC 90-124 and Stacy v Stacy [1977] FLC 90-324.**

### **The Respondent/Wife's Submissions**

- [38] Mrs Walrond Q.C., counsel for the Respondent/Wife filed written submissions on 28th May 2010. She heavily criticized the Applicant/Husband's statement of financial circumstances and accused him of grossly understating his income and emoluments from the companies with which he was associated. She submitted that services paid for by K & E Farms such as gardening, a maid and a yacht were not factored into his income and that bonuses were paid directly to his travel agent for overseas family trips and the difference returned to him. His salary, she averred, was 10 times that of the Respondent/Wife.
- [39] With respect to the boats, she urged the court to find that they were "tax dodges" and were really pleasure yachts used by the Applicant/Husband for his hobbies of diving and fishing.
- [40] She submitted that the Applicant/Husband maintained a pension plan with his company and would be entitled to a National Insurance (NIS) pension and asked the court to take into account that he would have recourse to it and to the benefits from his farm in his old age. The Respondent/Wife was grossly underfunded and the children of the marriage required a greater level

of maintenance than that currently being provided. Counsel also submitted that the cost of living had risen exponentially since the order of court some 6 years prior to the filing of the submissions in justification of the increase sought.

[41] It was her submission that the Respondent/Wife would, in the future, have to pay for her housing, though she currently paid for electricity, security and other outgoings on the matrimonial home.

[42] She stated that under **section 57** of *FLA* all contributions of the parties had to be taken into account and that further consideration ought to be given to the future needs of the parties, she cited **Proverbs, Lee Steere and Clauson v Clauson (1995) FLC 92-595**.

[43] It was further submitted that the Applicant/Husband had failed in his duty to produce up to date valuations and that the court should invoke **Rule 70** of the **Family Law Rules** to appoint a valuer to value K & E farms and to pay the attendant expenses.

[44] With respect to the children's maintenance, she referred to **sections 50, 51, 52, 53(2) and 57** of the **FLA** and to the fact that each party ought to maintain the children of the marriage according to their respective means: **Bevan v Bevan (1995) FLC 92-6001A** and **Mitchell v Mitchell (1995) FLC 92-6101**.

- [45] In respect to the matrimonial home, counsel asked the Court to consider awarding the Respondent/ Wife a sum representing the entire value of the matrimonial home so as to allow the Respondent/Wife to purchase and properly furnish a smaller home. She would also have monies to assist with her future maintenance together with such sum as the Court might award as maintenance by way of a lump sum or periodic payments. She also submitted that the Court should award the Respondent/Wife a sufficient sum to allow her to replace her ten year old car.
- [46] The Respondent/Wife's relationship with Mr. Jose Torres "Mr. Torres" was irrelevant to the matter before the Court.
- [47] Counsel submitted that the Court should grant the Respondent/Wife the costs of the Applicant/Husband's application and her client's costs of the counter application relying on **section 97** of the *FLA* and **Rule 125 (1)** of the *Family Law Rules* relying on **Penfold v Penfold (1980) FLC 90-800**; the rationale being the Respondent/Wife was partially successful on contested issues, the Applicant/Husband had misled the Court about his financial position and he had consented to some of the matters proposed by the Respondent/Wife after the proceedings had commenced. The sheer disparity in the parties' earnings, property and assets, coupled with the fact that the Respondent/Wife would not have qualified for Legal Aid justified,

in her view, an Order that the Applicant/Husband should pay the costs of the suit: (**Towner v Towner CV No. 1 of 2009 delivered April 15<sup>th</sup>, 2010**). She submitted that the Respondent/Wife would submit her estimated Bill of Costs.

## **DISCUSSION**

### ***The Matrimonial Home***

[48] The parties each filed a number of affidavits and also gave *viva voce* evidence at trial. They were extensively cross-examined by Counsel. From the evidence before the Court, it is clear that there are very few areas of dispute between the parties as to their respective contributions to the matrimonial home.

#### *(i) Acquisition of the Matrimonial Home*

[49] Both parties agree that the land on which the matrimonial home was built was purchased for the sum of \$110,000.00 some nine months after the parties had been married. The conveyance dated the 28<sup>th</sup> March 1994 is made between Bruce Christopher Lashley and Rita Annette Lashley as vendors and the Applicant/Husband as purchaser.

[50] The parties agree that the Respondent/Wife did not contribute any monies to the purchase of the land. It was purchased solely by the Husband using cash from his own resources and the conveyance for the land is in his name alone.

The Respondent, however, deposed that she made a small non-financial contribution to the acquisition of the land as she helped to select the lot. It has not been disputed by the Applicant that she helped to select the lot.

[51] The Applicant/Husband contended that he purchased the land from savings acquired prior to the marriage. The Respondent/Wife, on the other hand, contended that the land had been purchased partly with the Applicant/Husband's savings and partly by a personal loan to the Applicant/Husband from Mr. Peter Defreitas. She alleged that this loan had been repaid during the course of the marriage.

[52] Mr. Peter Defreitas was called as a witness for the Applicant/Husband. In his evidence, he firmly denied that he had loaned the Applicant/Husband money to purchase the land. Mr. Defreitas is not a party to this dispute. I saw and heard him give his evidence in chief and under cross-examination. He was unshaken and I found him to be highly credible. I accept his evidence as true and I therefore find that the land was purchased by the Applicant/Husband using only his savings and personal financial resources.

[53] Both parties also agree that the matrimonial home was built partly with funds of \$465,000.00 saved by the Applicant/Husband and partly by a mortgage in the sum of \$285,000.00 secured on the said land and by the life insurance policies of both the Applicant/Husband and the Respondent/Wife.

This mortgage was obtained from Barclays Finance Corporation of Barbados Limited on the 25<sup>th</sup> January 1995. In the mortgage the Applicant/Husband is described as the Mortgagor and the Respondent/Wife as the Surety. The conveyance and mortgage were exhibited to the Applicant/Husband's affidavit filed 12<sup>th</sup> July 2004. Both parties agree, however, that the mortgage was repaid by the Applicant/Husband alone and that the Respondent/Wife made no financial contribution to its repayment.

[54] They also agree that the Respondent/Wife paid the premiums for her life insurance policy which was used to secure the mortgage and that she maintained that policy for the duration of the mortgage. The Respondent/Wife was employed until July 1998 and, up until that date, used her salary to pay her life insurance premiums. The mortgage was discharged in April 2001 by which time she had been unemployed for a period of approximately two years and nine months. After she resigned her position, her only source of income was an allowance of \$1,200.00 given to her by the Applicant/Husband. Therefore, for a period of two years and nine months, the monies used by the Respondent/Wife to pay her insurance premiums were taken from the allowance given by the Applicant/Husband.

[55] The extent of her financial contribution would have been the payment of the premiums for the life insurance policy used to secure the mortgage. In her

Statement of Financial Circumstances filed 12<sup>th</sup> November 2004, a figure of \$1,973.75 is given as her annual life insurance premiums. In her 2006 Statement she gives a figure of \$666.90. No evidence has been given to explain the difference or to link any of these sums to the policy assigned to the mortgage company.

[56] The matrimonial home was built by the Applicant/Husband without employing the services of a contractor. He himself acted as the contractor, supervising the building works with the help of a foreman. He also participated in the physical building of the house.

[57] The Applicant/Husband paid the land taxes and house insurance premiums for the matrimonial home. He continues to pay the home insurance policy at a cost of \$8,000.00 per annum. He paid all the utility bills, except for the Respondent/Wife's international calls to Australia.

[58] Given the fact that the evidence of direct contributions is largely uncontested, I find that the Respondent/Wife made very little direct financial contribution to the acquisition of the matrimonial home. She made an indirect financial contribution to its acquisition by maintaining a life insurance policy which was used to secure the mortgage acquired to construct the matrimonial home. Her indirect financial contribution to the acquisition of the home is overshadowed by that of the Applicant/Husband

who purchased the land on which the matrimonial home stands, used his savings to pay for part of its construction and serviced the mortgage used to pay for the remainder of the construction. I am of the opinion that the Respondent wife's assertion that by helping to select the lot she made a small indirect contribution to the acquisition is unsustainable in law. No authority for that proposition was cited.

*Conservation and Improvement of the Matrimonial Home*

[59] The Respondent/Wife gave evidence, that whilst she was working, she bought the groceries for the household. She stated that she alone bought the groceries and that, in fact, the bulk of her salary went towards groceries. However, she also stated that once she had resigned her job she was unable to contribute to the household as she received only \$1,200.00 monthly in allowance from the Applicant/Husband's company, K & E Farms. Whilst the Applicant/Husband admitted that the Respondent/Wife contributed to groceries, he denied that she alone purchased them. He gave evidence that they bought groceries on alternate weeks.

[60] I saw and heard both parties give evidence in chief and under cross-examination. Given the paucity of moneys given to the Wife and her Statement of Financial Circumstances filed in 2004, which gives a figure of \$15,445.00 as her expenses for food and household supplies coupled with

her other expenses, I am more inclined to believe the Applicant/Husband's evidence with respect to the purchase of food. I therefore find that whilst the Respondent/Wife did contribute to the groceries, she did not do so alone. I find that the Applicant/Husband also contributed to the purchase of same.

[61] I also find that, by using some of her salary to purchase groceries, the Respondent/Wife also contributed indirectly to the acquisition, conservation and improvement of the matrimonial home. The use of her salary for that purpose would have allowed the Applicant/Husband's earnings to be used in the acquisition, conservation and improvement of the property.

[62] The Respondent/Wife stated that, before they moved into the matrimonial home, she grew plants that were ultimately used in the landscaping of the matrimonial home. She gave evidence that she chose the plants and nurtured them for use in the landscaping of the matrimonial home. This was never directly contradicted by the Applicant/Husband. In any event, having heard both parties, I accept her evidence on this matter. This is a small contribution towards the improvement of the matrimonial home.

### **Contribution as Homemaker**

[63] Whilst the contribution of the Applicant/Husband to the acquisition, conservation and improvement of the matrimonial home was substantial and

significant, I am required by **section 57 (3) (b)** to consider the Respondent/Wife's indirect contribution as a parent and homemaker.

[64] **Section 57 (3) (b)** requires the court to assess the contribution made directly or indirectly to the acquisition, conservation or improvement **of the property (emphasis mine)** by either party, including any contribution made in the capacity of homemaker or parent.

[65] **The Family Law Act** of Barbados is based largely on the **Family Law Act** of Australia. Australia, however, has added a third sub-section requiring the Court to look at the contribution of a homemaker or parent to the **welfare of the family (emphasis mine)** as opposed to the acquisition, conservation or improvement of the property. It is clear why the Australian Legislature would have found it necessary to add this sub-section which speaks to contribution to the welfare of the family. A strict interpretation would prejudice housewives whose duties within the household may not, in the strict sense, contribute to the acquisition, conservation or improvement of the property.

[66] As such, the Courts have adopted a broad approach to the interpretation of direct or indirect contributions to the acquisition, conservation or improvement of the property. A homemaker can contribute directly to the acquisition, conservation or improvement of the property by keeping the

home tidy, etc and indirectly by freeing the time of the other party to earn for the household.

[67] In **Proverbs**, the Court of Appeal had to determine how the contribution of a parent or homemaker was to be assessed. That Court made it clear that “the contribution of a wife as a homemaker and parent was not 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 (at paragraph [40] of **Proverbs**). The Court further stated that “It will be possible in some cases to arrive at the conclusion that in a marriage there has been equality of contribution by each of the parties within his or her own sphere: that of the wife as homemaker and parent and that of the husband as breadwinner” (See **Proverbs** at paragraph [41]).

[68] So what, the Court asks itself, is a homemaker? It was said in the Australian case of **Black v Black [1991] DFC 35-113** that homemaking is more than simply housekeeping. The term is not synonymous with a domestic servant. It was further stated in **In the Marriage of Aroney [1979] FLC 90** (“**Aroney**”) that the wife “is not disqualified as a homemaker because she had domestic help and did little physical work around the house”.

[69] In **Proverbs**, the Court did not elaborate on this terminology. **Simmons CJ** quoted approvingly the decision of **Williams CJ** (ag) in **Moseley v Moseley**

[1986] 21 Barb. L.R. 14 when directing his mind to the **section 53 (3) (b)** and **section 53 (2) (b)** factors in so far as they were relevant to Moseley's case. **Willams CJ** (ag) found that the Wife had "made an indirect contribution to the improvement of the property by helping 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 homemaker for about 4 1/2 years..." **Simmons CJ** went on to say "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."

[70] This decision, as well the judgment of **Williams JA** in **Cox v Cox (unreported) Civil Appeal No. 19 of 2005, decision of 21<sup>st</sup> June 2007 Supreme Court of Barbados** demonstrate that the limitation in the statutory provision of **section 57 (3) (2)** of contributions as a homemaker or parent to the acquisition, conservation or improvement of the matrimonial property has not prevented the local court from evaluating the contribution of a party as homemaker and parent to the welfare of the family.

[71] When the parties were married, the Respondent/Wife was employed as an Office Manager at Lashley's Enterprises. She resigned approximately five

years later, in July 1998, to assume the role of homemaker. It is her evidence that she resigned at the insistence of the Applicant/Husband. He, however, maintained that the decision to resign was the Respondent/Wife's alone.

[72] The Applicant/Husband is a shrewd businessman. The evidence shows that the he made arrangements to have the gardener and domestic help paid by companies in which he had an interest. The Applicant/Husband explained in his oral evidence that he employed a Mr. Fenty at \$300.00 per month to do the maintenance of the gardens, cutting of the grass and trimming of the hedges which the Applicant/Husband had previously done. Mr. Fenty was paid either by the Applicant/Husband or by K & E Farms. The Applicant/Husband considered the payment of Mr. Fenty's salary by K & E Farms to be a fair exchange since it allowed him to spend more time working on the farm. He stated that "In my mind, it was a fair exchange, right or wrong."

[73] He also arranged to have the Respondent/Wife paid the salary of a former domestic servant as her allowance. As General Manager of Chick Mount Foods and as one of the owner of K & E Farms, he was making far more money than she was at the time that she was employed. The money that the Respondent/Wife made in her job would have only allowed her to make an

insignificant contribution to the household when compared to the contribution made by the Applicant/Husband having regard to his financial resources.

[74] I find the evidence of the Respondent/Wife that she resigned at the insistence of the Applicant/Husband to be more believable. There can be no doubt as to this when one looks at his terse response of “Certainly not” when asked whether he performed domestic duties. It appears to me to be a reasonable inference from the facts that he wanted her to stay at home with their young family.

[75] By the time of her resignation, the marriage had produced one daughter, Alyssa Maria. The marriage produced two more children, Brittany Kirsten and Chantelle Kristen, respectively, after the Respondent/Wife became a housewife.

[76] Prior to her resignation, the Applicant/Husband employed a part-time housekeeper who assisted them on weekends. At some point the housekeeper was retained on a full-time basis and a second housekeeper employed to give assistance with the children. The Applicant/Husband paid the wages of the two housekeepers. He also paid the salary for a nanny after the birth of their first child until February 2004, after which the Respondent/Wife paid the salary for the nanny. The Applicant/Husband

employed a gardener as well as a car washer who also washed the dogs. He paid the wages for those persons.

[77] The Respondent/Wife therefore had much domestic assistance from the household help. She was not required to undertake the raising of the children and managing of the household on her own, nor was she required to undertake the physical responsibilities of being a homemaker. Nonetheless, the case of **Aroney** (*supra*), makes it clear that this fact does not disqualify the Respondent/Wife from being considered a homemaker.

[78] I find and hold that the Respondent/Wife contributed directly by maintaining a life insurance policy used as security for the mortgage and indirectly to the acquisition, conservation and improvement of the matrimonial home as a homemaker and parent. It can be reasonably inferred from the evidence that she managed the household with its staff and took care of the children. It also seems a fair inference from the facts that she was the custodial parent with responsibility for the day to day management of the children. In this regard, her contribution to the household cannot be discounted.

[79] In evidence-in-chief, the Applicant/Husband accepted that the Respondent/Wife had made an indirect contribution to the property. He valued his contribution at 66% of the value of the completed house based upon the fact that he had cashed in or shifted investments which were then

injected into the property. The remaining 33% he considered to be the equity in the house which was paid off during the marriage. He valued the Respondent/Wife's share of the equity at half of the 33%, which he rounded off to 20%.

[80] I find and hold that the Respondent/Wife's contribution to the property, through indirect and non-financial means, was substantial.

*K & E Farms*

[81] K & E Farms was formed and incorporated by the Applicant/Husband and his business partner before the parties began cohabitating.

[82] **Simmons C.J** opined at paragraph 36 of **Proverbs** that "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 confined to the former matrimonial home: it extends as least indirectly to the whole of the assets of the husband.".

[83] There can be no dispute that the Respondent/Wife did not make any direct financial contribution to the business. She has not contended otherwise. The only issue is therefore whether she has made an indirect contribution to the same.

[84] The Applicant/Husband stated in an Affidavit that for the duration of the marriage, the Respondent/Wife had only gone to the farm twice. Whilst the Respondent/Wife described it as an “extreme exaggeration” that she only went to the farm on two occasions, she did not say how many times she went, stating only that she did “on many occasions” when she was shown the pens and how things worked. She never gave evidence that she assisted in any way with the operations of the farm. In fact, she went on to justify why she could not visit the farm more often by explaining that she had a broken elbow and young children to look after. By her own evidence, therefore, she made no contribution, financial or otherwise, towards K & E Farms Ltd. K & E Farms Ltd was established in 1986 and incorporated in 1988, some 5 and 3 years respectively before the Applicant/Husband and the Respondent/Wife met.

[85] The Applicant/Husband gave evidence that by employing Mr. Fenty, he was relieved of certain domestic chores which enabled him to concentrate on the operations of the Farm. The Applicant/Husband has, throughout the marriage, shown his industry and commitment to his business. Having regard to the Respondent/Wife’s evidence, it is difficult to find that her contribution as a homemaker and parent made any significant contribution to the acquisition, improvement or conservation of K & E Farms Ltd. I find

and hold, therefore, that the Respondent/Wife made no contribution, direct or otherwise, financial or otherwise, to the acquisition, improvement or conservation of K & E Farms Ltd.

*The Land Rover*

- [86] The Applicant/Husband deposed that the Respondent/Wife owned a vehicle before marriage which was sold two years after the marriage for \$10,000.00 and the proceeds of sale used to assist in the purchase a new vehicle for \$42,000.00. He also deposed that he paid the difference of the cost of the new vehicle in cash and paid the motor insurance save and except for the sum of \$1,500.00. In 2000 the vehicle was replaced with a Land Rover Discovery purchased for \$98,000.00. He borrowed \$65,000.00 from Barclays Bank and was solely responsible for the repayment of that loan by monthly instalments of \$1,284.81. He repaid the loan in sixteen greater instalments. He deposed that he was prepared to transfer the vehicle to the Respondent/Wife and have the value of the vehicle taken into consideration with respect to her share and interest in the matrimonial home. The vehicle was registered in joint names. He further deposed that he did all the maintenance and service work on the vehicle.
- [87] The Respondent/Wife deposed that the Applicant/Husband gave her the motor car as a gift in 2000. He had claimed that her vehicle was no longer

safe to drive around his three children and wanted her to have a bigger vehicle.

[88] I saw and heard the parties during examination in chief and under cross-examination. The Husband is a businessman who appears to have carried his business acumen into the marriage. The Wife is a woman who follows her husband. She appears to me to have been satisfied with the husband taking control of the affairs of the family as well as the business. I am of the opinion and hold that, though the wife had exclusive use of the vehicle, it was not a gift to her by the husband. Nevertheless it is matrimonial property to be taken into account in this matter.

[89] I am of the view that the Respondent/Wife made a direct financial contribution to the acquisition of the Land Rover motor car through the application of the proceeds of sale of her old car to the deposit on and eventual acquisition of the vehicle purchased before the Land Rover and the Land Rover itself. The Applicant/Husband contributed to the acquisition by injecting cash and paying off the loan and, by doing the servicing and maintenance on the vehicle, he contributed to its conservation. Here again the disparity in contribution is stark. However, the vehicle was used for the transportation of the children of the marriage to and from school and other activities consistent with the Respondent/Wife's contribution as a

homemaker and parent. This indirect contribution is substantial and entitles her to a greater share in the vehicle. This must be seen as a contribution to the family as I have above opined in relation to **section 57 (3) (b)** of the *FLA*.

[90] I am of the view that I must take into consideration not only the direct and indirect contributions of both parties to the acquisition, conservation and improvement, but the role played by the Respondent/Wife's use of this vehicle and the impact thereof on the children of the marriage. This vehicle is not only the Respondent/Wife's sole means of transportation but that of the children when under her care and control. It is integral to the maintaining of a reasonable standard of living for them. On the other hand, the Applicant/Husband has the use of a fully maintained vehicle. He has so arranged his financial affairs that this is of minimal or no cost to him.

[91] Whilst I am of the opinion and hold that her interest in the vehicle is to be quantified at 40% given her direct and indirect contributions, it would not be just and equitable to make her pay the Applicant/Husband for his share or set off against any sum he might have to pay her if he decides to purchase the matrimonial home. I am more inclined to the view that the vehicle was purchased with the safety and comfort of the Respondent/Wife and the children of the marriage in mind and that this shall continue. Applying

**section 57 (2) (1) (n)** of the *FLA* and in the exercise of my discretion to do what is just and equitable, I vary the interest of the parties in the Land Rover vehicle so as to vest the entirety of the Land Rover in the Respondent/Wife pursuant to **section 57** of the *FLA*.

Household Furniture and effects

*The Applicant/Husband's Affidavit*

[92] The Applicant/Husband deposed that the Respondent did not contribute to the acquisition of the furniture. He was prepared to relinquish his share and interest in the living room and dining room suites, the children's beds, double bed in the basement, washing machine and dryer, deep freezer, white refrigerator in the garage, all kitchen utensils, bed linens, towels and patio furniture. He also deposed that he purchased customized furniture for the master bedroom which was unique to the décor and shape of the home which could not be removed since to do so would detract from or diminish the value of the property. He also deposed that the furniture in the master bedroom was designed specifically by Darren Rhapsom: namely one king size bed, chest of drawers, 2 side tables, one credenza, and two hand carved lamps. These, he opined, were built to fit specific spaces and ought not to be separated from the home.

*The Respondent/Wife's Affidavit*

- [93] The Respondent/Wife deposed that she had owned a refrigerator and a stove which were sold and the monies retained by the Applicant/Husband. She also had a black and white rug, glasses, ornaments, paintings and ceramics which were used in the home as well as appliances which were given to them as wedding presents.
- [94] The Respondent/Wife also deposed that she wanted to retain the matrimonial bed, side table and lamps (which she had chosen), the children's beds and toys and a DVD player for the children. She did not wish to retain the living or dining suites or patio furniture.
- [95] I have no doubt that the Applicant/Husband was largely responsible for the purchase and commissioning of the furniture which entered the matrimonial home. This is consistent with my finding as to the inequality of their earnings and hence the disparity in their direct financial contributions to the acquisition of the household furniture. Given the fact that the Respondent/Wife had a life of her own prior to cohabiting with the Applicant/Husband, it is reasonable to infer that she had acquired household furniture of her own. In this regard, I accept her evidence on this matter. The Applicant/Husband did not suggest otherwise. There is no evidence as to the value of what was sold or how much was fetched from the sale but the proceeds of sale of her household furniture represented her financial input into the new furniture.

Similarly, her contribution as a homemaker and parent is to be considered as part of her indirect contribution. I therefore find her direct and indirect contribution to the acquisition of the household furniture and effects to be substantial.

[96] Having regard to the affidavit evidence, I consider it just and equitable for the Applicant/Husband to retain the matrimonial bed and the customized furniture in the master bedroom since he has expressed a desire to retain the matrimonial home and the Respondent/Wife retain all the other furniture and appliances.

#### **Section 53(2) Factors**

[97] The factors listed under **section 53(2)** are to be taken into consideration in proceedings with respect to maintenance. However, these factors have been “incorporated as factors also to be taken into account in altering property interests so far as they are relevant” (*Noel* at para [14]). It has been said that “when the maintenance factors are considered in the context of alteration of property interests, they have a more general function and are to be considered broadly... and not restricted to the topic of spousal maintenance or support” (*Family Law* by **Anthony Dickey 4<sup>th</sup> Edition (2002)** as quoted in para [14] of *Noel*).

[98] The factors listed in **section 53(2)** are as follows:

- (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 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 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.

(a) Age and State of Health

[99] The Applicant/Husband was born on 6<sup>th</sup> October 1961 and is currently 53 years of age. The Respondent/Wife was born four years later on the 18 May 1965 and is now 49 years old. There is no evidence before the Court that either party enjoys anything but good health save and except that the Respondent/Wife was involved in an accident on 21<sup>st</sup> October 1994. No evidence was given, however, as to whether this accident still impacts upon the state of her health.

(b) Income, Financial Resources and Physical and Mental Capacity

[100] Each party filed a Statement of Financial Circumstances. The parties also submitted into evidence their respective pay slips and income tax returns.

[101] According to the Statement of Financial Circumstances filed by the Applicant/Husband, his annual income is the sum of \$291,030.29, comprised of \$231,030.29 earned as General Manager of Chickmont Foods and \$60,000.00 in dividends on shares in K & E Farms Ltd. Mrs. Walrond has challenged this figure, contending that his income is greater than the figure disclosed, pointing out that the disclosed figure does not include what is earned from his consultancy services to Monterey Farms Ltd, his bonus from K & E Farms or the perquisites he enjoyed from both K & E Farms and Chickmont Ltd. She contends that it is reasonable to assume that his salary

from Chickmont, Monterey Farms and K & E Farms Ltd exceeds \$400,000.00 annually and his benefits exceed \$60,000.00. The Court accepts that the Applicant/Husband has downplayed his income. It finds that the accounting evidence of Mr. Kola was not of a standard upon which the Court could place any great reliance whilst the evidence of Mr. Skeete could not assist with arriving at a figure for the Applicant/Husband's income. It was confined mainly to a criticism of the methodologies employed by Mr. Kola. It is for the parties to prove the figures on a balance of probabilities; the Court cannot guess as to a party's income.

[102] In addition to his salary, the Applicant/Husband disclosed other financial resources including his half-share in K & E Farms Ltd valued at \$159,132.00 and shares in Sagikor, Fortress and Barbados National Bank valued at \$17,500.00, \$32,500.00 and \$20,000.00 respectively. He also claimed credit of \$164,000.00 in a savings account, an insurance policy having a surrender value of \$20,000.00 and cash of \$15,000.00.

[103] The Respondent/Wife resumed employment after the parties' separation. She is employed by Brydens Xpress and in her Statement of Financial Circumstances filed 7<sup>th</sup> November 2006, gave her annual income from that employment as \$41,600.00. She also disclosed an additional \$36,000.00

received in maintenance from the Applicant/Husband for the children of the marriage.

[104] As to her financial resources, she listed shares and debentures in Sagikor valued at \$8,992.50, cash of \$200.00 and an insurance policy with a surrender value of \$15,826.80. The only other assets that she has disclosed are the 1999 Land Rover and her share or interest in the matrimonial home.

[105] Whilst the parties have not commented directly on their physical and mental capacity, it appears clear to this Court, in the absence of any evidence to the contrary, that both parties are physically and mentally capable of employment. In fact, the Respondent/Wife, as stated before, resumed employment while the Applicant/Husband never ceased. The Court is also satisfied that the Applicant/Husband has a much higher income earning capacity than the Respondent/Wife. It is also clear to the Court that the Applicant/Husband has significantly greater financial resources than the Respondent/Wife.

(c) Care and Control of the Children

[106] The Respondent/Wife has primary care and control of the children of the marriage; the ages having previously been stated. She will, therefore, have to care for and house the children of the marriage for at least another 3 to 5 years. The Applicant/Husband, however, bears the full costs of the

children's educational and medical expenses and has given oral evidence that he is prepared to continue to do so. The Respondent/Wife will therefore be relieved of the obligation to pay one-half of these expenses.

[107] The eldest child is now an adult. Given the ages of the younger children and the present financial arrangements previously ordered by this Court, I find that care and control of the younger children of the marriage in this particular case is not an impediment to the Respondent/Wife working or being able to financially support herself.

(d) The Financial Needs of the Parties

[108] The Statements of Financial Circumstances filed by the parties give an insight into their financial obligations. In his Statement of Financial Circumstances filed 8<sup>th</sup> November 2006, the Applicant/Husband revealed that his total annual personal expenses were \$159,321.47. His personal expenses included, *inter alia*, income tax (\$80,576.19), rent (\$26,400.00), food and household supplies (\$12,000.00) and pension (\$11,185.74). The Applicant/Husband alleged that he also expended \$108,290.00 on his children (inclusive of the \$36,000.00) in maintenance and \$16,450.00 on the land taxes, insurance and electricity levied on the matrimonial home. His total annual expenses were therefore \$287,661.47.

[109] By contrast, in her Statement of Financial Circumstances, filed 7<sup>th</sup> November 2006, the Respondent/Wife disclosed expenses totalling \$90,343.00. These expenses include: Child care/housekeeper - \$11,220.00; Gardeners - \$3,236.10; Yacht club - \$926.90; Entertainment - \$4,379.00; Gifts, parties and supplies - \$2,576.58.

[110] These Statements of Financial Circumstances highlight the disparity in income and consequent disparity in expenditure of the parties.

(e) Responsibilities to other persons

[111] There was no evidence before the Court that either of the parties had responsibility for any other person, other than the children of their marriage. An issue was raised with respect to one Jose Torres, the Respondent/Wife's alleged boyfriend. This is an issue that the Court shall return to.

(f) Eligibility to Pension, allowance

[112] As to their eligibility for pension or allowance, the Applicant/Husband has included in his listed expenses contributions to a pension fund. This is the only evidence before the Court in relation to either party's eligibility to a pension fund or allowance. It is to be reasonably inferred that the Respondent/Wife will be entitled to a contributory National Insurance pension given that she is in paid employment.

(g) Reasonable standard of Living

[113] This consideration requires this Court to compare the present standard of living of the parties to that which they enjoyed during their marriage and also to compare the current standard of living of the Applicant/Husband against that of the Respondent/Wife.

[114] Standard of living comprises, *inter alia*, the quality and sufficiency of food, the adequacy and quality of clothing, the sufficiency and comfort of accommodation and the availability and adequacy of health care.

[115] Counsel for the Applicant/Husband, Ms. Chase Q.C., in her written submissions to the Court referred to the case of *Mallet v Mallet (1984) FLC 91-507* in which it was said:

“Parties have to accept that in most cases the standard of living of both parties as well as that of the children deteriorates since *inter alia* the resources available to maintain one household must now be deployed to maintain two separate households. The children, even though they may not enjoy the same standard of living to which they have been accustomed cannot be expected to fall below a certain minimum standard”.

[116] During the marriage, both parties enjoyed a good standard of living. The Respondent/Wife was able to dedicate her time and efforts to the home and the earnings of the Applicant/Husband covered all of their expenses. They were able to employ household staff. They took trips abroad paid for by the Applicant/Husband.

[117] The Respondent/Wife, it appears, has maintained a fairly good standard of living. Despite her income of \$41,600.00 annually, or \$3,466.66 monthly, she is able to maintain a membership at the Barbados Yacht Club and has the services of a gardener, housekeeper/nanny and babysitter. She spends thousands of dollars annually on gifts, parties and entertainment.

[118] The Respondent/Wife is entitled to a *reasonable* standard of living, not the precise standard which she enjoyed during the course of the marriage.

(h) Increase in earning capacity of Respondent/Wife

[119] The Respondent/Wife is now 49 years old. She was a housewife prior to the separation and has been resourceful enough to secure gainful employment. There is no evidence before the Court that any award to her would be used to increase her earning capacity. She has not expressed any need or intention to engage in further education or training.

(i) Contribution of one part to the income, earning capacity, property and financial resources of the other

[120] The Respondent/Wife has not contributed significantly to the income or earning capacity of the Applicant/Husband. For the duration of their cohabitation and marriage, the Applicant/Husband was the General Manager of Chickmont Foods and part-owner of K & E Farms Ltd. As found above, the Respondent/Wife did not directly participate in either business. The

Court is satisfied, however, that by assuming responsibility for the household as she did, she allowed the Applicant/Husband a greater time to devote to his own employment.

(j) The duration of the marriage;

[121] By **section 53 (2) (j)** I am obliged to consider the duration of the marriage and the extent to which it has affected the earning capacity of the Respondent/Wife.

[122] The parties were married in 1993. However, before their marriage they cohabited for one year. This one year cannot be ignored. It must be included when calculating the length of the parties' union. In totality, therefore, the Applicant and the Respondent were together for 10 years, making their marriage a long one in duration. The effect of the marriage upon the parties' respective earning capacities has already been explored in this decision.

(k) Protection of the position of a woman who wishes only to continue her role as a wife and mother;

[123] Following the separation of the parties, the Respondent/Wife resumed employment. She has not expressed any interest in remaining a homemaker and, indeed, has elected not to do so. It seems evident to the Court that she cannot and has not indicated a willingness not to continue her role as a

mother. Both parties impressed me as caring and nurturing parents. As such, this consideration is not, on the facts, relevant. There is no indication that the Respondent/ Wife wants to continue her role as a wife. To the contrary, the indications are that she has moved on with her life through her association with Mr. Torres.

(l) Cohabitation and the financial circumstances relating to it;

[124] Whether the boyfriend of the Respondent/Wife had been residing with her in the matrimonial home after the parties' separation was the subject of much evidence and argument, instigated by the Applicant/Husband. The Respondent/Wife has accused him of hypocrisy and jealousy in raising this issue.

[125] The Applicant/Husband alleged that Mr. Torres, the Respondent's boyfriend, was living in the matrimonial home. He relied on the affidavit evidence of Michelle Harris, who had been previously employed at the matrimonial home as a maid but left the Applicant/Husband's employment, and that of Mr. Sherwin Clarke, who was employed to wash the Land Rover and perform odd jobs. Both of these witnesses reported seeing Mr. Torres in the home on numerous occasions and suggested that he either slept over or resided there.

[126] The Respondent/Wife responded to these allegations in her affidavit filed 28<sup>th</sup> November 2006, deposing that, while her boyfriend did sometimes sleep over, he lived elsewhere. This was confirmed by the evidence of Mr. Richard King who leased an apartment to Mr. Torres at the time in question. More importantly, for the purpose of this application, the Respondent/Wife maintained that “Jose Torres [was] not responsible for my maintenance and I [was] not responsible for his”. This evidence is unchallenged.

[127] Although much evidence was produced about the alleged cohabitation of the Respondent/Wife with Mr. Torres, almost all of this evidence is entirely irrelevant. **Section 53 (2) (1)** does not require the Court to take into account the fact that one party is cohabitating with another person; each party is entitled to move on with his or her personal life. The Court is only concerned under **section 53 (2)** with the financial circumstances relating to that cohabitation. There is no evidence at all as to the financial circumstances of the Respondent/Wife’s alleged cohabitation with Mr. Torres. The Applicant/Husband has not shown, or even alleged, that Mr. Torres financially supports the Respondent/Wife in any way. Such financial support cannot be simply presumed from their relationship or, should the evidence of the Applicant/Husband be accepted, their cohabitation. In any event, the Applicant/Husband has failed to establish, on a balance of

probabilities, that Mr. Torres cohabits with the Respondent/Wife in the matrimonial home. Accordingly, the Court finds that this is an irrelevant consideration not meriting the time and attention expended upon it.

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

[128] Under **section 53 (2) (n)**, the Court has a wide discretion to consider any relevant factor or circumstances not already set out in **section 53 (2)** whose consideration it believes necessary to achieve justice between the parties. The fact or circumstance may be broadly economic in character but there is no restriction on the factors that can be taken into account. No factors, other than those in **section 53(2)**, have been drawn to the Court's attention.

*The effect of the section 53 (2) factors*

[129] As it relates to the application of **section 53 (2)**, I am guided by the Court of Appeal which stated in paragraph 38 of **Proverbs** that:

“The section 53(2) factors come into play in situations where there is 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.”

[130] It is clear, and the Court accepts, that there is a large disparity in the financial resources of the parties. The Applicant/Husband earns five times as much as the Respondent/Wife and also owns far greater financial

resources than the Respondent/Wife. More importantly, he also has a much greater potential to earn money (given his experience and his ownership of K & E Farms) than the Respondent/Wife. She had ceased employment during the marriage in order to take care of the children and had only resumed employment after the divorce. I have found that the Applicant/Husband persuaded her to do so, but even if he had not done so, it was to their mutual benefit. However, these circumstances adversely impacted upon the Respondent/Wife's earning capacity and due regard must be given to that fact. Despite this, she, of course, still has needs and care and control of the children of the marriage. She herself is entitled to maintain a reasonable standard of living.

[131] On a review of the applicable **section 53 (2)** considerations, I am satisfied that it would be just and equitable in this case to vary the respective interests of the parties in the matrimonial home in favour of the Respondent/Wife. There is a large disparity between the Applicant/Husband and the Respondent/Wife's income and financial resources. While such a disparity on its own does not entitle the Respondent/Wife to a variation, I am satisfied that without a variation of the parties' interests in the property, the Respondent/Wife, and her children, would not be able to achieve a reasonable and comfortable standard of living. I am of the view, and find,

that it is just and equitable, in all the circumstances, to make an alteration of the parties' respective interests in the property.

[132] The conveyance of the property is in the name of the Applicant/Husband only. Applying **section 56** of the *FLA*, it would be appropriate to make a declaration that the legal interest in the matrimonial home is owned by the Applicant/Husband solely. Having regard to my findings in relation to the Respondent/Wife's direct and indirect contributions to its acquisition, conservation and improvement, I find that is just and equitable to vary the respective interest of the parties in the matrimonial home under **section 57** of the *FLA* so as to vest a 40% share, estate and interest in the Respondent/Wife.

[133] I, therefore, find and hold that the interest of the Respondent/Wife in the matrimonial home be varied to 40%.

### **SPOUSAL MAINTENANCE**

[134] The Applicant has claimed spousal maintenance under **section 50** of the *FLA* which is set out below:

“(1) A party to a marriage...is, subject to subsection (2), liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so.

(2) The liability of a party under subsection (1) arises only where the other party is unable to support herself or himself adequately, whether by reason of having the care and control of a child of the marriage... who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for

appropriate gainful employment, or for any other adequate reason, having regard to any relevant matter set out in section 53(2).” (Emphasis Added)

[135] It is clear from **section 50** that, before the Court can grant an order for spousal maintenance, it must first be satisfied that, on the evidence before it, the spouse seeking maintenance (in this case the Respondent/Wife) is (i) “unable to support herself adequately” for one of the reasons set out in subsection (2); and (ii) the other spouse (in this case the Applicant/Husband) is “reasonably able” to maintain her. Both of these conditions must be met before the Court will order one spouse to maintain the other.

[136] The Respondent/Wife will be unable to support herself adequately for the purposes of **section 50** where she is unable to “generate funds from her own resources or earning capacity to supply her own needs” but must instead depend on social security payments or the support of family and friends: See **Murkin and Murkin (1980) FLC 90-806 at 75-081**. A spouse may also be unable to support himself or herself adequately by reason of having care and control of minor children of the marriage (**section 50 (2)** of the Act).

[137] There is no evidence to suggest that the Respondent/Wife does not earn enough to support herself. She is not unfit for employment by reason of her age or physical or mental capacity, but is instead gainfully employed. It is true that she earns considerably less than that of the Applicant/Husband. It

is also true that she has care and control of children under the age of eighteen and that it would be difficult for her to maintain these children on her own. However, not only does the Applicant/Husband pay maintenance for these children, he expends considerable other sums on their health care but taking into account, *inter alia*, her care and control of the children, the Court has increased her share in the matrimonial property. Most importantly, however, there is no evidence to suggest that she cannot reasonably live on what she earns. Her evidence is simply that she does not earn enough to maintain the matrimonial home on her own and that does not in any way entitle her to spousal maintenance. By virtue of this order, she will be relieved of the obligation to maintain the matrimonial home.

[138] In these circumstances, the application made by the Respondent/Wife for spousal maintenance from the Applicant/Husband is hereby dismissed.

#### Maintenance of the Children of the Marriage

[139] The Applicant/Husband has by consent order agreed to pay all of the medical, dental, educational, pharmaceutical, ophthalmic and other expenses of the children of the marriage thus relieving the Respondent/Wife of the need to make any contribution thereto. The eldest child is 19 years old, and the other are 16 years old and 13 years old respectively. Since the making of the orders, no evidence has been tendered by affidavit or otherwise as to the

current expenses or the impact of them upon the Applicant/Husband's disposable income.

[140] The decision as to whether to increase the maintenance of the children must be substantiated by an evidential base; it is also to be decided upon practical financial considerations set out in the *FLA*. Whilst I am of the opinion that the increase in the cost of living is one such factor, I require the information in relation to their practical expenses before deciding whether to increase the maintenance. In the circumstances, I cannot now make such an order until the relevant documents are before the Court.

### **COSTS**

[141] In her written submissions, counsel for the Respondent/ Wife urged the Court to award her the costs of both the Application and the counter application. The normal rule in relation to costs is that each side will bear their own costs. It is acknowledged that the Court may depart from this position in appropriate cases (see **Penfold v Penfold 1980 FLC 90-800**). Counsel referred to **Towner** and submitted that the Respondent/ Wife would submit her estimated Bill of Costs. That has not yet been filed. I consider that it would have been prudent to have the estimated Bill of Costs before the Court so that the submissions could be received from both sides as to the figures before any determination is made as to the issue of costs.

## DISPOSAL

[142] In light of the foregoing, I hereby declare, pursuant to **section 56 FLA** that the legal estate in the matrimonial home is vested in the Applicant/Husband, and it is ordered pursuant to **section 57** of the *FLA* that:

- (i) The interests of the parties in the matrimonial home is varied so as to vest a forty per-cent (40%) share, estate and interest in the said property in the Respondent/Wife.
- (ii) The matrimonial home situate at Durants, Christ Church be valued within two (2) months of the date of this decision by a valuer to be decided by the parties or in the alternative, each party shall have their own valuation prepared and filed with the Court. The costs of the valuation to be paid as the Court shall decide on the next date of hearing;
- (iii) The Applicant/Husband to pay to the Respondent/Wife a sum equivalent to forty per cent (40%) of the value of the matrimonial home when that value is determined;
- (iv) The Respondent/Wife to vacate the matrimonial home within three (3) months of payment;
- (v) In the event that the Applicant/Husband does not purchase the Respondent/Wife's interest as hereby ordered, the matrimonial home to be set up for sale by public auction or private treaty and the net proceeds of sale be distributed in the proportions sixty per cent (60%) to the Applicant/Husband and forty per cent (40%) to the Respondent/Wife;
- (vi) The Applicant/husband shall be entitled to and retain the matrimonial bed, chest of drawers, credenza and two hand carved lamps in the master bedroom and the Respondent/Wife shall be entitled to and retain as her own separate property all the other furniture and appliances in the matrimonial home.
- (vii) The Respondent/Wife's claim for a share and/or interest in K & E Farms is dismissed.
- (viii) The interest of the parties in the Land Rover vehicle is varied so as to vest the entirety of the property in the Respondent/Wife;

- (ix) The Respondent/Wife's claim for spousal maintenance from the Applicant/Husband is dismissed;
- (x) Each party to file a new Statement of Financial Circumstances within fourteen (14) days of this order
- (xi) The Respondent/Wife is at liberty to file and serve an affidavit in support of the application for increased maintenance of the children within fourteen (14) days of the date of decision;
- (xii) The Applicant/Husband to file and serve an affidavit setting out particulars of his expenditure in respect of the educational, dental, pharmaceutical, ophthalmic, medical, vacation and any other relevant expenses reasonably incurred by him on the children's behalf and setting out whether or not the first born child is attending a tertiary institution and the attendant expenses;
- (xiii) The Respondent/Wife is to file and serve her estimated Bill of Costs within fourteen (14) days of the date of this Order together with any submissions thereon; and
- (xiv) The Applicant/Husband is to file and serve his submissions with respect to costs within fourteen (14) days of service of the Respondent/Wife's estimated Bill of Costs on him.
- (xv) The further hearing of this matter is adjourned until 19<sup>th</sup> May, 2015.

**WILLIAM J. CHANDLER**  
**JUDGE OF THE HIGH COURT**