

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Claim No. FL 379 of 2015**

**BETWEEN:**

**HAZEL PAMELA CLARKE**

**APPLICANT/WIFE**

**AND**

**HAROLD HUMPHREY CLARKE**

**RESPONDENT/HUSBAND**

*Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court*

**Date of Decision: 2021 January 29**

**Appearances:**

**Ms. Cicely P. Chase QC and Mr. Shaquille Newton for the Applicant/Wife**

**Ms. Margot Greene QC and Ms. Peta-Gay Lee-Brace for the Respondent/Husband**

**DECISION**

**INTRODUCTION AND FACTUAL BACKGROUND**

[1] The applicant, Hazel Pamela Clarke (“the wife”) and the respondent, Harold Humphrey Clarke (“the husband”) met in London, sometime in or around

the year 1977. They lived together for about a year or so prior to their marriage on the 2 June 1979 in Wandsworth, England.

- [2] At the date of the marriage the wife was 29 years old, having been born on the 23 March 1950. She is now 70 years old. At the date of marriage the husband was 54 years of age, having been born on the 8<sup>th</sup> November 1926. He is now 94 years old.
- [3] The parties moved to Barbados in 1980 and initially resided in a house situate at Chancery Lane, Christ Church (“the Chancery Lane property”), which had been purchased solely by the husband in 1977 for the sum of \$78,000.00.
- [4] In 1991, the parties moved to a property situate at Dayrells Road, Rockely, Christ Church, known as “The Nook”, which was purchased by the husband. “The Nook” consisted of a cottage and several apartments, which were tenanted for a period in excess of twenty years for various periods during each year.
- [5] It is this property, which was both a matrimonial home and a business property, that is the main focus of these proceedings.
- [6] Both parties were born in Guyana but later acquired Barbadian citizenship.

- [7] It appears that for the first 24 years of the marriage the parties were happy and enjoyed a good relationship.
- [8] The husband suffered a stroke in 2003 and gradually thereafter, the relationship began to unravel before breaking down to the point where the wife commenced proceedings in 2015 for dissolution of marriage and for ancillary relief. The wife's application for ancillary relief was met by a similar application by the husband.

## **THE APPLICATIONS**

- [9] The wife's application seeks the following relief:

- “1. *A declaration that the property known as “The Nook”, Dayrells Road, Rockley, Christ Church in this Island is owned by the Respondent/Husband.*
2. *An Order that the share and interest of the Respondent/Husband in the said property known as “The Nook” aforesaid be altered and varied so as to vest a one-half share and interest or such greater share therein in the Applicant/Wife pursuant to Section 57 of the Family Law Act Cap 214 of the Laws of Barbados.*
3. *That the said property be valued by a competent valuer to be agreed between the parties and the costs of such valuation be share equally between the parties.*
4. *That the Applicant/Wife shall be at liberty to reside in the said property known as “The Nook” and further be at liberty to manage the business known as “The Nook Apartments” without interruption or interference from the Respondent/Husband.*
5. *That the Respondent/Husband be restrained whether by himself, his servants and agents including any relative of the Respondent/Husband from excluding the*

*Applicant/Wife from the property or from restricting her access on the property at any time.*

6. *That the Respondent/Husband be restrained whether by himself, his servants and agents including any relative of his from managing the business of “The Nook Apartments” to the exclusion of the Applicant/Wife.*
7. *That the Respondent/Husband be restrained whether by himself, his servants and agents including any relative of his from removing, transferring, assigning, handing over passing on to or dissipating the financial assets regarding his accounts at [named banks].*
8. *That the Respondent/Husband be restrained whether by himself or by his servants and/or agents and any relative of his from dissipating, transferring, conveying, releasing on to, assigning any assets including investments in the form of stocks, bonds, shares, negotiable instruments on to any person on the basis that the same form matrimonial property of the parties herein.*
9. *That the Respondent/Husband produce all statements, deposit slips and withdrawal slips, all other financial records relative to his said Bank accounts.*
10. *That the Respondent/Husband produce financial statements of the business known as “The Nook Apartments” for the years 1995-2015 inclusive.*
11. *That the business known as “The Nook Apartments” be valued by a competent valuer and that the valuations of the property be submitted to the Court.*
12. *That the Respondent/Husband be restrained from verbally abusing, insulting verbally and physically assaulting or threatening the Applicant/Wife.*
13. *That the Applicant/Wife be at liberty to continue to conduct business as the Business Manager of “The Nook Apartments” without interference from the Respondent/Husband, his servants and/or his agents including the relatives of the Respondent/Husband and that the business continue pending resolution for this matter.”*

[10] The husband's counter-application seeks the following orders:-

- “(a) An Order pursuant to Section 57 of the Family Law Act transferring to the Applicant/Wife one-half share of the property known as “The Nook”, Dayrells Road, Christ Church.*
- “(b) That the said property be valued by an appraiser to be agreed by the parties or in default as fixed by the Court and that the cost of such valuation be shared equally by the parties.*
- “(c) That the Respondent/Husband be at liberty to pay the Applicant/Wife such sum as represents her half share and/or interest in the said property situate at “The Nook” aforesaid.*
- “(d) That the Applicant/Wife do vacate the said property situate at “The Nook” Dayrells Road immediately.*
- “(e) That the Applicant/Wife be restrained from cursing, abusing, threatening, physically assaulting or in any way molesting the Respondent/Husband and/or his family.*
- “(f) That the business known as “The Nook Apartments” be discontinued until the Applications of the Applicant/Wife have been fully disposed of.*
- “(g) That the Applicant/Wife ceases all operations as the business manager of the business known as “The Nook Apartments” with immediate effect.*
- “(h) That the Applicant/Wife is entitled to a twenty-five per cent (25%) share and or interest in the business known as “the Nook Apartments”.*
- “(i) That the Applicant/Wife do account to the Respondent/Husband for all monies which she has collected since she assumed full and total responsibility for the business known as “The Nook Apartments” to the present date.*
- “(j) That the Applicant/Wife do account fully for the income and expenditure and all other dealings related to the business known as “The Nook Apartments” to date.*

- (k) *That the Applicant/Wife do produce all financial records related to the business known as “The Nook” from February 2016 until the present date.*
- (l) *That the Respondent/Husband produce all records of all accounts held by her whether by herself or joint with any other person or persons.*
- (m) *That the Applicant/Wife be restrained from going into the personal property of the Respondent/Husband including his wallet, briefcases, suitcases, safe and any such places where his personal property is stored.”*

[11] Both parties accept that the marriage has broken down irretrievably and both agree that the year of separation was 2013. The wife, being more specific, identifies the 15 December 2013 as the date of separation. Though both parties agree that the marriage has ended, they both continue to reside in the matrimonial home, but separately and apart.

[12] The matters before the Court are those set out in the applications; however, the main issue relates to the matrimonial property at “The Nook” and the interests that each party has in it and the business associated with it.

[13] This matter was dealt with by no less than five judges before it came before me, and it was felt that the matter ought to have been resolved amicably. However, discussions between the parties fell through and I commenced hearing evidence in the matter on 29 November 2018. Oral evidence was concluded in early 2019 and the last of the written submissions was filed on the 6 July 2019.

[14] At the first oral hearing of evidence, it was agreed by the parties that Mr. Arthur Ramsay would be asked to conduct a valuation of the property at “The Nook” and submit it to the Court by 14 December 2018. The Court made an order in those terms and a valuation was provided to the Court.

[15] No valuation was made of the business. I have, therefore, decided to defer consideration of the aspects of the application that touch and concern the business, and in this judgment will only make final orders relating to the division of the property. This decision will therefore focus on the application for alteration of interests in the property at “The Nook”.

## **THE EVIDENCE**

[16] The parties filed several affidavits in the proceedings as follows:

- (1) On 2 October 2015, the wife filed an affidavit in support of her application for ancillary relief;
- (2) On 24 June 2016, the husband filed an affidavit in response;
- (3) On 24 April 2017, the wife filed an affidavit in response to the husband’s affidavit;
- (4) On 8 June 2017, the husband filed a response to the wife’s affidavit of 24 April 2017.

(5) On 3 November 2017, the husband filed an affidavit along with an application;

(6) On 8 May 2018, the wife filed an affidavit in response to husband's affidavit of 3 November 2017.

[17] Oral evidence was given by the parties on the 28 November 2018; 3 December 2018; 6 December 2018; 13 December 2018; 1 December 2019; and 13 March 2019.

### **Evidence of the Parties**

[18] The Court heard oral evidence from the wife and husband along with the affidavit evidence mentioned at paragraph 16 hereof.

[19] Having carefully listened to the oral testimony by the parties, I am of the view that the husband has been more candid in his evidence before the court, but it was also clear that his memory of specific events has faded somewhat.

[20] On the other hand, the wife on occasions appeared to be conscious of transmitting a narrative which overstated her contribution to the marriage and at times underrepresented the husband's contribution. It was also notable that her memory for certain events was very long and for other events, sometimes nearer in time, was unreliable, and she would not be able to recall those matters.

- [21] Both parties were to some extent not always frank with the Court and did not provide the documentary evidence relating to their finances that would have been useful to the court. In the paragraphs immediately following, I set out the material findings of the court based on the evidence written and oral.
- [22] The parties met in London in the 1970s and lived together for a period of about one or two years before they got married on 2 June 1979. For this period the husband spent about £3000.00 renovating the property. He also paid the rent and utilities while the wife provided the food and other household items and undertook the role of homemaker.
- [23] The husband had accumulated significant savings from his work as a civil servant and his private work as an optician and he purchased a property at Chancery Lane, Christ Church, Barbados in 1977. While he resided in London, this property was rented and would have earned income for a period of one year to eighteen months prior to his taking up residence in Barbados.
- [24] After residing at Cromford Road, London the parties relocated to a flat in Medway Street, where they lived together before leaving for Barbados in October 1980.

- [25] The residence at Chancery Lane became the matrimonial home until about 1994 when they moved to their current residence at “The Nook”, Dayrells Road, Rockley, Christ Church.
- [26] Sometime during 1991, the husband had purchased the property known as “The Nook” at Dayrells Road, Rockley in the parish of Christ Church (“The Nook”). The husband obtained a loan from the CIBC bank in the sum of \$262,500.00. The wife was a guarantor to this loan. The husband also took out a second mortgage in the sum of \$36,000.00 from Ms. Beryl Prasad, who was the vendor of “The Nook”.
- [27] Sometime around 1994, the husband decided to sell the Chancery Lane property as it had become increasingly difficult to manage the rental of “The Nook” apartments at Dayrells Road whilst not being present on location at the property. The cottage at “The Nook” was renovated and soon after the parties relocated from Chancery Lane to “The Nook” at Dayrells Road. After the purchase, there was construction of two 2-bedroom apartments, one studio apartment and a laundry room.
- [28] In 1994, at a time when the apartments were empty, the parties stored all of their personal belongings in one apartment at “The Nook” and lived in another, while repairs and renovations were done to the property. From the

years 1994 to 2015, “The Nook” apartments were tenanted to overseas guests on a continuous basis in seasonal months and those rentals were used to cover the expenses related to the house and would have permitted both parties to accumulate savings from the sources of their respective earnings.

[29] The parties agreed that the marriage broke down in the year 2013 but the wife and the husband continued to live at “The Nook”. The husband continued to pay for the utilities and land taxes while the wife continued to pay for groceries and to cook for the husband until sometime in 2018.

[30] From the earliest beginnings of their relationship, it was clear that the husband provided the financial resources that contributed to the standard of living that the parties enjoyed. The husband purchased the properties. He paid for all of the outgoings relating to the property. He repaid all the loans. In this regard, it can be said that he contributed directly to the acquisition, conservation and improvement of the matrimonial home. On the other hand, the wife, throughout the marriage, did the shopping, paid for the groceries and looked after the upkeep of the home. The housekeeping was done through paid help who would be employed for a day or two per week because the wife was employed continuously throughout the marriage.

[31] The husband suffered a stroke in 2003 (the wife alleges that he had suffered another stroke earlier, the husband denies this). However, what is clear is that the wife did make a special effort when the husband was ill and played a significant part in assisting with his rehabilitation.

[32] There are some aspects of the evidence that require special attention because there was substantial conflict in the testimony before the Court.

[33] First, the wife alleged that from 1981 - 2003 she made substantial contributions to the household by giving the husband more than half of her 'take home pay'. This allegation is contained in her affidavit filed 2 October 2015 as well as in her oral testimony. Paragraphs 10 and 11 of the affidavit read as follows:

*"10. I commenced work with the Barbados Mutual starting on the 6<sup>th</sup> day of April 1981. My starting take home pay was about \$1,200.00 per month, out of which I gave the Respondent/Husband the sum of \$700.00 every month to pay bills and household expense. I spent the remaining sum of money from my salary on personal things like grooming and I also saved for holidays.*

*11. I eventually left Barbados Mutual on or about the year 1985 to join Texaco after their Head Office relocated from Trinidad to Barbados. My take home pay increased to about \$1,700.00 per month and I gave the Respondent/Husband the sum of \$1,000.00 per month to pay household bills and expenses. At this time, we acquired a maid, who came two days a week and I paid her and once again I looked after my personal needs. As I earned more I gave the Respondent/Husband more money. I ended up giving him about the sum of \$1,500.00 per month up to the month of December 1999. I joined JP Morgan Chase in March 2000, managing their Off-shore office 'Chase Trade' at which time my salary increased, and I started giving \$2,500.00 per month, and when I was promoted to manage*

*'Chase Trade' in the BVI and USVI, I gave him \$3,000.00 per month until he suffered a serious stroke in early August 2003.'*

[34] The husband categorically denies this both in his affidavit of 24 June 2016 and in his viva voce evidence. At paragraph 27 of his affidavit he says:

*"I deny that she gave me any money. She did not give me \$1500 per month or any sum thereof."*

[35] According to the wife, the husband worked for 14 years at Harcourt Carter for the sum of between \$3,000.00 to \$4,500.00. Additionally, he received a pension of Bds (\$1800.00) per month from England. It is difficult to understand why it would have been necessary to receive those sums of money from the wife. Having seen the two witnesses, I accept the husband's evidence and view the wife's evidence as a concoction.

[36] The wife contends that she was the manager of the "Nook Apartments". She advertised the apartments, she welcomed the guests, and she set the rates, among other things.

[37] The husband also deposed that he managed the apartments. It was clear that the husband kept the financial records; he employed an accountant, he filed the tax returns and would have taken decisions with respect to the repair and renovation of the apartments. He also collected the funds from the guests,

either himself or through the wife and used them for payment of the outgoings in respect of the entire property.

[38] Ms. Greene QC spent a significant amount of time trying to extract from the wife, what were the earnings from the apartments. For the period up to 2015 inclusive, she could not give any figures and for the period in 2016 in which she was solely in charge, she eventually gave the figure of \$60,000.00 for that period without providing any supporting documents.

[39] The husband produced books for most of the period which showed that the apartments did not generate significant profits. Indeed, there were more losses than profits. However, when one considers that the monies from the apartments were used to pay the household expenses such as utilities and land taxes it is reasonable to conclude that they would have contributed to the freeing up of the income from other sources for both parties.

[40] The records kept by the husband would have been accumulated long before the relationship between the parties had broken down and I can see no reason to choose the speculation of the wife over the records of the husband. What is especially significant is that the husband made the entries relating to the receipts and expenditure, while the totals were done by the wife. Both parties agreed to this.

[41] Another area of contention relates to significant sums of money transferred by the husband to his relatives in 2013 and 2014. The wife's affidavit alleges that these sums were part of the earnings from the business of "The Nook" rental properties. The husband vehemently denies this and says that they were from his savings. The evidence before the court in my view shows that the monies were in fact those held in the savings of the husband.

### **The Wife's Submissions**

[42] Ms. Cicely P. Chase QC, counsel for the wife, submitted that the wife should be given a share in excess of one-half of the value of the matrimonial property at "The Nook". She also submitted that the wife be given a share of the monies collected from the rental of "The Nook Apartments" and that the monies standing to the husband's account at the bank should be taken into account. Ms. Chase QC also contended that the monies given to relatives were an effort by the husband to dissipate his funds to avoid having to pay for her share in the matrimonial property.

[43] Ms. Chase accepts that "The Nook" was purchased by the husband alone but she submits that the wife purchased supplies and materials and invested in the repairs and upkeep of "The Nook".

- [44] Ms. Chase QC submitted that the wife paid the sum of \$12,500.00 towards the furnishing of “The Nook”. She also referred to the wife’s evidence that her mother had sent the sum of US\$10,000.00 to pay the building contractor for renovations to “The Nook”, which in law amounts to a contribution from the wife.
- [45] Furthermore, Ms. Chase QC points out that the wife was never paid as an employee of “The Nook”, and she argues that the wife ought to have been rewarded for her work and therefore should be compensated for the period that she worked in the business.
- [46] Ms. Chase QC also submitted that the wife purchased furniture, fabric and upholstery for “The Nook” and generally looked after the maintenance and upkeep of “The Nook”.
- [47] Ms. Chase referenced the occasions where the wife rendered assistance throughout the period of ill-health of the husband. She argued that this amounted to performing domestic services under difficult circumstances and the wife should be given special credit for it on the ground that it would be just and equitable.
- [48] Counsel submits that the wife has made substantial financial and non-financial contributions to the maintenance, preservation and upkeep of “The

Nook”; and that she also played an integral role in the management of the business. She contends that the wife, based on these factors and what she refers to as the husband’s dissipation of assets, warranted that the wife be granted more than one-half share of “The Nook”.

### **The Husband’s Submissions**

[49] Counsel for the husband, Ms. Margot Greene QC submitted that the wife should be given a share of up to a half-share of “The Nook” even though her contributions entitle her to about 30% of the property. The core of Ms. Greene’s submissions is found at pages 46 to 48 of her written submissions and an extract from those submissions is set out below:

*“In determining how property acquired during a marriage is to be distributed the Court must approach the exercise in a twofold manner – a look back at how the property was acquired and a look forward to assess the parties’ future needs and the manner in which the marriage has affected their future prospects.*

*The look back involves the consideration of what contribution was made to the acquisition conservation and preservation of the property, whether the contribution was direct or whether financial or non-financial consideration set out in Section 57 of the Family Law Act.*

*In this case no direct contribution was made by Mrs. Clarke to the acquisition of the property – first the Chancery Lane property and later the property at “The Nook”, Daryells Road, Rockley.*

*Nor did she make an indirect financial contribution to those assets which were purchased by Mr. Clarke with cash, his cash.*

*It can also be said that she made no non-financial contribution to the acquisition of the properties. It could be argued that she made a contribution as a homemaker – cleaning and cooking and even gardening but it is submitted that does not equate to the direct financial contribution made by Mr. Clarke.*

*The couple had no children that Mrs. Clarke had to care for so her contribution to the welfare of the family would have been as extensive as that of a wife who also had to rear and care for children born in the marriage. Her non-financial contribution would therefore not have been as significant as well.*

*Taking all of this into consideration one might be inclined to believe that her contribution would entitle her to at least a thirty (30%) share and/or interest in the property or a share that is less than one-half share of the property.*

*But the parties have been married for a long time and Mr. Clarke is prepared to share the property on an equal basis, Mrs. Clarke's contribution or lack thereof notwithstanding.*

*If any of the parties to this marriage is entitled to a larger share or the assets acquired during the marriage it is Mr. Clarke, not Mrs. Clarke. Her contribution was so minimal as to be negligible and it would not be just or equitable to give her a share that is larger than fifty percent (50%) of the property acquired during the marriage.”*

[50] Ms. Greene QC contends that on the evidence the wife should be given no more than a 50% share of the property.

[51] Ms. Greene QC argues that the wife has no right to her client's savings since those are moneys earned by the husband for his several years of work.

## **The Law**

[52] The relevant statute law is found in sections 56 and 57 of the Family Law Act, Cap. 214.

Those sections provide:

- “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 to rights, if any, that a party has in respect of the property.*
- (2) *Where a court makes a declaration under subsection(1), it may make consequential orders to the effect to the declaration, including orders as to sale or partition, and interim or permanent orders as to possession.*
- (3) *An order under this section is binding on the parties to the marriage or union, but not on any other person.*
57. (1) *In proceedings in respect of the property of the parties to a marriage of union, or of either of them, the 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 in account the following:*
- (a) *the financial contribution made directly or indirectly by or on behalf of a party or 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 contribution made in the capacity of homemaker or parent, to the welfare of the family which constitutes*

- (i) the parties to the marriage or union, and*
- (ii) where applicable, any child of that marriage or union;*
- (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.”*

[53] The considerations set out in section 53(2) of the Act 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 the parties and the physical and mental capacity of each of them appropriate gainful employment;*
- c. whether either party has care and control of a child of the marriage or union other than marriage, who has not attained the age of eighteen years;*
- d. the financial needs and obligations of each or 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 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 circumstances is reasonable;*

- h. the extent to which the payment of maintenance to 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 to continue her role as a wife and mother;*
- l. if the party to 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;*
- n. any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.”*

[54] There is no dispute concerning the existing title to “The Nook”. The title is in the husband’s name alone, having been conveyed into his sole name at the time of the purchase. Therefore, pursuant to section 56 of the Family Law Act, it is the husband that is the legal owner of the said property.

[55] The main aspect of the application before the court is the application under section 57 of the Act for the alteration of interests in the said property.

[56] In the case of **Proverbs v Proverbs (2002) 61 WIR, (Barbados CA)** the Court identified three steps a court must follow when determining a property application under S.57 of the Act:

(i) *the net property of the parties must be identified and valued by the court;*

(ii) *the respective contributions of the parties within the terms of section 57(3) must be considered and evaluated; and*

(iii) *the Section 53(2) factors, so far as relevant, should then be considered.*

[57] It is important to identify and value the assets of the marriage and then determine their net value before awarding a sum of money altering a party's interest in the matrimonial property.

[58] In **Proverbs**, the Court arrived at the net value of the matrimonial home by first establishing the market value of the property and then subtracting outstanding debts thereon, namely the balance due on the mortgage and the bank loan.

[59] In this case, at the date of hearing, the property at "the Nook" was unencumbered and, therefore, there is no need to consider the effect of outstanding loans or debts.

[60] A valuation report prepared by G Arthur Ramsay, dated 10 December 2018 was filed with the Court. That valuation assessed the market value of the land and property at "The Nook" to be \$950,000.00.

### **Assessment of Contributions of the parties to the property**

[61] Before considering the respective contributions to the property, it is convenient to make the following observations:

1. By section 8(b) of the Family Law (Amendment) Act, 2014-15, the Family Law Act was amended in December, 2014 to embrace a party's contribution "*made in the capacity of homemaker or parent, to the welfare of the family which constitutes*
  - (i) *the parties to the marriage or the union, and*
  - (ii) *where applicable, any child of the marriage or union*".

The effect of the above provisions will be examined later in more detail but on the face of it, it seems clear that it is wider in scope than the previous provisions which seem to restrict the interpretation to the contribution to acquisition, conservation or improvement of the property.

2. Even though the parties were married for 34 years there is no presumption of equality as a starting point or otherwise, in respect of the contributions of the parties to the marriage. This has been established in the celebrated decision in the High Court of Australia case of **Mallett v Mallett [1984] 1 CLR 605** and adopted in our

leading decision: **Proverbs v Proverbs, supra** at paragraph 62 of the judgment of the Court.

3. In **Proverbs**, Sir David Simmons C.J cited with approval the following passage from Wilson J. in **Mallett v Mallett 91984) FLC 91-507 at p. 79 126:**

*“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 the court to assess the value of the contribution in terms of what is just and equitable in all the circumstance of a particular case.”*

Sir David Simmons C.J then added the following:

*“The respective values of the contributions made by the parties must depend entirely on the facts of the case.” (see paragraph 62 of Proverbs)*

4. It is also relevant to consider to what extent an initial financial contribution is offset by other relevant contributions during the course of a long marriage. In this regard the approach of the Full Court in **Pierce v Pierce 1999 FLC 92-844** is worth bearing in mind. The Full Court said at paragraph 28 of the judgment:

*“28. In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the*

*parties of that contribution. In the present case that use was a substantial contribution to the purchase price of the matrimonial home: See also Campo and Camp (unreported, Full Court (Ellis, Lindenmayer and Finn JJ), Sydney, delivered 19 May Sydney, delivered 3 October 1996, per Ellis J. at page 10).”*

Therefore, in this case even though it is a very long marriage, in quantifying the contribution as homemaker, consideration must be given to the fact that the parties had no children and the wife, according to her evidence, would have worked outside of the home for the duration of the marriage.

[62] I also considered the fact that the husband suffered a stroke in 2003 and the wife would have cared for him during his period of rehabilitation. However, it must be noted that the husband was able to continue his role of managing “The Nook” and recording the bookkeeping entries up until 2015. The wife’s contribution in this regard, in my view, is a fact or circumstance of this case that the justice of the of the case requires to be taken into account under section 53(2)(n) of the Family Law Act, above.

[63] Section 57 of the Act empowers the Court in proceedings with respect to property to “make such order as it thinks fit – altering the interests of the parties in the property”. An order under section 57 must not be made unless it is just and equitable to make the order (section 57(2)).

- [64] Section 57(3) of the Act prescribes the “contributions” that the court shall take into account. Those contributions can be financial or non-financial and they may be direct or indirect.
- [65] Considering firstly the financial contributions, the evidence reveals that the husband would have made solely the financial contributions to the acquisition of the Chancery Lane property, which was purchased in 1977 and provided the matrimonial home of the parties for about 14 years. The husband would also have purchased the property at “The Nook” in 1991 using a combination of cash resources and loans in the sum of \$300,000.00 (approx.) which were repaid solely by the husband.
- [66] The wife made no financial contributions to the acquisitions of the Chancery Lane property or “The Nook”. However, her role as guarantor for the loan of \$262,500.00 would in my view, be a non-financial contribution to the acquisition of that property.
- [67] With respect to the purchase of furniture for “The Nook”, the wife deposed that she contributed \$12,500.00 to the cost of the furniture. She also alleged that her mother contributed \$20,000.00 to the renovation and expansion of “The Nook”.

[68] Both of the above allegations have been denied by the husband. Having seen and heard the testimony of both witnesses I am persuaded by the evidence of the husband on this point. It appears to me that the husband considered that it was his role to pay for the properties and to repay the loans associated with them. This, in my view, explains why the wife was not a mortgagor in respect of the loan from the bank nor from Mrs. Prasad, even though she was working.

[69] The wife also made a claim of spending \$11,000.00 for reupholstering furniture and purchasing bits and pieces to keep the apartments looking good. The husband in his affidavit deposed that he did not recall these payments. In respect of those items, I accept the wife's evidence and therefore, regard them as a modest but necessary financial contribution to the maintenance and ambiance of the apartments at "The Nook".

### **Contribution to the Welfare of the Family**

[70] In **Rolfe v. Rolfe [1979] FLC 90-629** the Family Court of Australia examined the scope and purpose of the then provision of the Australian Family Law Act which enjoined the Court to consider the contribution to the property of a party to the marriage in the role of "homemaker and parent". This provision was identical to the Barbados stipulations prior to the 2014

amendments. The Court expressed the view that the contribution as homemaker was to ensure the just and equitable treatment of a wife who had not earned income during the marriage but who had performed the role and contributed as a homemaker and parent. This role would free the husband to earn income and look after the financial aspects of the relationship.

[71] Ms. Chase QC in her written submissions felt that **Rolfe** was appropriate to the facts of this case. However, one must bear in mind that there were no children of the marriage in that case.

[72] Moreover, in the instant case the wife has worked full-time for the duration of the marriage and still continues to work. Therefore, even though she did play the role of a homemaker it surely would have been a modest role in comparison with the contrasting role of the husband as money earner.

[73] The current legislative provisions require the Court to consider the contribution of a party to the marriage to the welfare of the family. Anthony Dickey at pages 582-584 of his authoritative text: Family Law 5<sup>th</sup> Edn. discusses section 79 (4)(c), which is the corresponding Australian provision to section 57 (3)(b) of the Family Law Act, above.

[74] According to Dickey, “[t]he primary purpose of para. c. is to enable the court to take into account under this paragraph the contribution of a spouse to the family’s welfare by cooking for the family, caring for the children and providing the family with encouragement and support”.

[75] Dickey endorses the view of Strauss J. in *In the Marriage of Ashton* that the scope of the provision is wider than non-economic contributions. Strauss J. had made this observation:

*“The words including any contribution made in the capacity of homemaker and parent do not mean that the homemaker and parent contribution is the only one to be considered under para. C. On the contrary, all contributions to the welfare of the family, including financial contributions, must be brought into account and evaluated.”*

[76] Section 57(3) (b) (as amended) specifically defines “welfare of the family” as embracing “the parties to the marriage or union”. Therefore, family need not include children.

[77] The wife’s contribution in the role of entertaining her husband and his friends, of providing a clean and tidy home environment either by herself or through paid help, and her attention to the ambiance of the home are all part of her contribution under this head. However, in a marriage such as this, the absence of children would be one of the factors that would dictate that this contribution though of significant value ‘would not have had a hugely material effect on the distribution of the interests in the property.

[78] In assessing the contributions of the parties under section 57 it is my view that even though the marriage had lasted for 34 years, having regard to the significant financial contribution of the husband to the acquisition and

improvement of the property, his contribution significantly outweighed the wife's contribution.

### **The section 53(2) considerations**

[79] I now examine the section 53(2) factors relevant to this case. Those considerations are:

- “(a) The age and state of health 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) the financial needs and obligations of each of the parties;*
- (d) where the parties have separated or the marriage has been dissolved a standard of living that in all the circumstances is reasonable;*
- (e) the duration of the marriage and the extremes to which it has affected the parties' earning capacity;*
- (f) any fact or circumstance that the justice of the case requires to be taken into account.”*

### **The Age and State of Health of the Parties**

[80] The wife is 70 years old and the husband is 94. The wife appears to be in very good health. On the other hand, the husband is now a very old man and is exhibiting the frailties of old age. He has had a stroke and a serious fall that required hospitalization. No evidence has been introduced in respect of the health of the wife. However, she continues to work and her monthly

take home pay in 2018 was approximately \$4,000.00. The husband worked until well in the eighties when one considers his work at “The Nook”. In paid employment he worked until he was about 75 years old.

In the context of this marriage, although one would expect the wife would survive the husband, I do not regard this factor as one that should result in the alteration of interests in the property.

### **The Income, Property and Financial Reserves of Each Party and the Physical and Mental Capacity for Appropriate Gainful Employment**

[81] It is not entirely clear what are the current financial resources of the parties.

What is clear is that both receive income that is adequate to maintain themselves adequately. The husband gets two pensions which amount to about \$4000.00 monthly. The wife earns a net month salary of about \$4,000.00. The husband alleged that the wife gets a pension but there has been no response or disclosure from the wife about it. There is evidence in the case that the husband has disposed of about \$500,000 in favour of his relatives out of savings during the marriage. The wife has sought out the husband’s financial information but has not been forthcoming with hers. Her evidence is that for a substantial period she was giving the husband sums ranging from \$1,500.00 to \$3,000.00 per month and that she stopped in 2003. If this is true it would mean that she would have accumulated

significant savings during the later part of the marriage. It is my considered opinion that the wife has significant resources if the evidence she gave the Court is true.

### **The Financial Needs and Obligations of Each of the Parties**

[82] Neither party seems to be in financial need and both are able to support themselves from their own resources. I therefore find that the facts do not support an alteration of the interests of the parties under this head.

### **Where the Parties have Separated or the Marriage has been Dissolved**

[83] Both parties continue to reside in the matrimonial home. Given the age of the husband (he is 94), it does not seem reasonable to sell the property and have him removed from the premises. He has expressed a wish to stay in the matrimonial home for the remainder of his life. Given his toil over a period of over 50 years, it seems a very reasonable request. Based on the evidence before the court, it is not self-evident that either party is able to pay the other out. At the current age of the husband, and given his immobility, I do not see him as a dire threat to the wife's enjoyment of the property. Given the nature of the property, the wife may wish to consider occupying one of the apartments for the time being. If it is so, then this should be facilitated. Given the savings that both parties have accumulated, I am of the view that

each of them can enjoy a reasonable standard of living without the assistance of the other.

### **The Duration of the Marriage and the Extent to Which it Has Affected the Parties' Earning Capacity**

[84] This has been a very long marriage, but it has been one in which both parties have worked throughout the marriage. In the case of the wife, she continues to work. The duration of the marriage has not interfered with the earning capacity of the parties. Indeed, it may have had the opposite effect.

[85] In this regard, I wish to remind the parties of the duty of full and frank disclosure which is an obligation under the Family Law Rules and generally with respect to the practice of family law.

[86] In **Briese v Briese (1986) FLC 92-713** Smithers J. at paragraph 2 of his judgment reflects on the duty of disclosure in these words:

*“I believe that a person in the position of the husband in this case has a positive obligation to set out at an early stage his financial position in a clear and comprehensive manner. The Regulations, and now the Rules, are not intended as a vehicle to mask the true position, or as an aid to confusion, complexity or uncertainty. They are not intended as the outer limits of the obligation of financial disclosure, but as providing avenues towards disclosure. The need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance.”*

[87] This duty has been emphasized in local cases from time to time. For example, in **Jordan v Jordan Suit No: 505 of 2002** (date of decision, 5 April 2005), Kentish J. at paragraph 63 of her judgment observed:

*“Under Rules 68 and 69 of the Family Law Rules (1982) both parties are required to make a full disclosure of their income, property and financial resources on an application for property alteration.”*

[88] In *Edwards v. Edwards* Suit No. 743 of 2004, (date of decision, 18 July 2013) Alleyne J. discusses the effect of non-disclosure.

[89] Finally, on non-disclosure, I refer to the words of the Court of Appeal (Waterman JA; Williams JA; Connell JA) in *Wilson v. Wilson* Civ. Appeal no. 5 of 2003 (date of decision, 22 March 2007) at paragraph 47 and 48 of the judgment of the Court as follows:

[47] *“This appeal illustrates the importance of the parties placing before the Court the full and frank affidavits. The point was made by the Full Court of the Family Court of Australia in the Marriage of Stay (1997) FLC 92-751 at 84, 130 as follows:*

*“There is a positive obligation on a party in proceedings for property settlement to make a full and frank disclosure of all relevant financial affairs. Once it is clear that there has been a non-disclosure, the Court should not be unduly cautious in making findings in favour of the innocent party. Black v. Kellner (1992) FLC 92-287 and Weir and Weir FLC 92-338.”*

*In Tate v. Tate (2000) FLC 93-047 at paras. 50 to 53 the duty to make full and frank disclosure of all relevant financial circumstances was reiterated by the Full Court, which regarded the requirement as fundamental to the whole purpose of the Family Law Act in financial cases.*

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

*especially in favour of an untruthful party or a party who fails to make full and frank disclosure of all material facts and documents.”*

[90] It is my view that both parties have been guilty of failing to uphold this obligation.

[91] In this case, however, it seems quite clear that the arrangement has been that each party kept his or her finances separate. The wife looked after the shopping, groceries and upkeep of the home, while the husband provided the finances for purchases of the property, paying the mortgage, the utilities and other outings such as land taxes.

This arrangement has worked during the course of the marriage. There seems to be no compelling case for the interests of the parties to be further altered pursuant to section 53(2), once the facts are considered as a whole.

[92] I have considered all the 53 (2) factors, but I consider that there is one factor that is more significant than the others. This factor, I think, falls under 53(2) (n):-

*“any fact or circumstance that, in the opinion of the Court, the justice of the case requires to be taken into account.”*

[93] In 2003, the husband suffered a stroke. Although the marital oath speaks about in “sickness and in health”, the relations of the marriage have meant that the wife has had to undertake a significant role in caring for the

husband. This was endured for about five years post-separation. The husband has been almost totally dependent on his wife for his care and for his food. It is my view that this is a special factor that the justice of the case requires to be taken into account in arriving at an alteration of the interests in the property. I regard it as in the region of 10%.

[94] Based on the facts and circumstances of this case, I consider that the interests of the parties in the property should be altered to give effect to the distribution in the ratio of 60:40 in favour of the husband.

[95] Having regard however, to the fact that the husband has offered a 50% share to the wife, as well as the dissipation of the financial resources by the husband, I am of the view that it is just and equitable to divide the interests in the property at "The Nook" 50:50.

## **CONCLUSION**

[96] I have considered the fact that the parties have had a very long marriage. In doing so I have considered several cases, but in my view, the predominant consideration in the cases where the wife has applied under section 57 for alteration of interests in the property, is the presence of children who would have been looked after and cared for by the wife, who would invariably also have a future role as homemaker and parent.

[97] The instant case is very unusual in that, not only has the marriage endured for over 30 years, but there are no children of the marriage.

[98] Perhaps the case that most resembles the facts here is the decision of the Federal Magistrates Court of Australia: **Hiette v. Hiette** [2010] FAMCfam, 379.

[99] In **Hiette**, the marital relationship lasted 25 years. There were no children of the marriage, the parties had both retired, the husband was 76 years old and the wife, 63. The husband brought substantial assets into the marriage at the beginning of the relationship. The assets included property, two motor cars and a very large amount of cash. The husband operated a livestock farming business, which provided the sole source of income for the family. The wife worked every day in the business and performed all the household tasks within the home and was the bookkeeper for the business. The wife's financial contribution to the business was not substantial. The court assessed the contributions of the parties as 59 per cent to the husband and 41 per cent to the wife.

[100] I also found the case of **Branch v Branch** suit 178 of 2005 (date of decision, 9 June 2015), a decision of Worrell J, very useful. In that case, which involved a period of cohabitation of 17 years, the court awarded the wife a

20 per cent share of the matrimonial property because her contributions were assessed to be insignificant.

[101] What these cases illustrate is the fact that the courts have long moved away from the starting point of equality, which was overturned in **Mallett** to the current situation, where the court must make a thorough assessment based on the provisions of the Family Law Act and the facts and circumstances of the case.

[102] On the facts of this case, not only were there no children, but the husband provided the financial resources required for the acquisition, conservation and improvement of the matrimonial property. Additionally, he worked until about age 88. In such circumstances it would need extra special contributions to permit the other party to claim a share of the property in excess of 50 per cent. Having considered all the factors in sections 57 and 53(2) respectively of the Family Law Act, I have judged that those extra special circumstances do not exist in this case.

## **DISPOSAL**

[103] Counsel for the parties are invited to meet to consider whether an agreement can be reached concerning the interests of the parties in the business of “The Nook”. In the absence of agreement, the parties are requested to make

proposals with respect to valuation of the business of “The Nook” at the adjourned date of 21 March 2021.

[104] Based on the foregoing discussion, I make the following orders:

1. The issue of the interests of the parties in the business of “The Nook” is deferred for further consideration on 21 March 2021.
2. The husband is declared to be the legal owner of the matrimonial property at “The Nook” pursuant to Section 56 of the Family Law Act.
3. Pursuant to section 57 of the Family Law Act, the interest of the parties in the matrimonial property at “The Nook”, Dayrells Road, Rockley, Christ Church are altered so as to vest a one-half share in the wife.
4. The husband is ordered to execute or sign all documents required to effect the transfer of the one-half share in the said property at “The Nook” to the wife on or before 15<sup>th</sup> March 2021, failing which the Registrar of the Supreme Court is directed to execute or sign the said documents.
5. The wife and husband shall bear equally the expenses related to the transfer of the property.

6. Each party shall bear his or her own cost with respect to these proceedings.
7. Either party shall have liberty to apply.

**Cecil N. McCarthy**  
**Judge of the High Court**