

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION

3 CAUSE NO. FAM 0125 OF 2017

4
5 BETWEEN:

SM

PETITIONER

6
7 AND:

8 AM

RESPONDENT



9
10
11 Appearances:

Mr. John Meghoo for the Petitioner

12 Ms. Natahsa Bodden for the Respondent

13
14 Before:

The Hon. Justice Cheryll Richards Q.C.

15
16 Hearing:

15th May 2019

17 Respondent's Further Submissions:

17th May 2019

18 Draft Judgment Circulated:

26th June 2019

19
20 **HEADNOTE**

21 *Family Law – Final Ancillaries – Sharing of Matrimonial Assets -*
22 *Debt between Spouses*

23
24
25 **JUDGMENT**

1 INTRODUCTION

2 1. This is an application by the Petitioner for final ancillary orders pursuant to s.21 of the
3 *Matrimonial Causes Law* (2005 Revision).

4
5 2. The Parties were married on the 30th July 2010 in Grand Cayman. This is the second
6 marriage for both; their first marriages having ended in divorces. The Petitioner SM ('the
7 Wife') was 55 years old and the Respondent AM ('the Husband') 50 years old at the
8 time of their marriage. There are no children of the marriage. Both parties separated for
9 six months in the first half of 2012 and ceased cohabiting in May 2016. The Wife filed
10 a Petition for divorce from the Husband on the 9th June 2017. The Husband
11 acknowledged service on the 26th June 2017 and indicated that he did not intend to
12 defend the matter. The Petition was ordered proved on the 17th July 2017.

13
14 3. Pursuant to directions given by Williams J on the 4th September 2018, both parties filed
15 Affidavits on the 5th October 2018 for this hearing. The Wife filed a further Affidavit in
16 response to the Husband's on the 9th April 2019. This matter came before me on the 15th
17 May 2019 for a final ancillary hearing and I heard oral evidence from both parties.

18
19 4. The parties are professionals each with their own companies. The Wife is an accountant
20 and the Husband is in the diving industry. Neither party seeks or appears to need ongoing
21 assistance from the other. They are almost at the stage of a clean break and on the road
22 to independent living. They have indicated through their Attorneys that they agree and
23 have made it clear that there are only two outstanding issues between them which require
24 the Court's determination. These are whether the Husband had an interest in the
25 matrimonial home in Prospect, Grand Cayman and whether the sum of \$54,750.00 which



1 was loaned by the Wife to the Husband amounts to a matrimonial debt or was a corporate
2 loan to his company. This sum is agreed between the parties as being the amount loaned
3 by the Wife which remains outstanding.

4
5 5. The first issue arises in this way. Following their marriage in 2010 the couple resided at
6 the home in Prospect, Grand Cayman. This home was then registered in the sole name
7 of the Wife. She and her first husband acquired the property which is a strata lot, with
8 the aid of a mortgage from a local bank in 1999. That marriage ended by a separation
9 during which the first husband had left the Island and finally in divorce in 2010. This
10 was shortly before the Wife's re-marriage to the Respondent Husband in July 2010. The
11 Husband had been living in the home from 2009, about a year prior to the marriage.
12 Following their separation in May 2016, the Wife sold the home and did not share the
13 proceeds of the sale with the Husband. It is the evidence of the Wife that upon their
14 marriage, the Husband's name was not added to the title for that property and that there
15 were no discussions between them that he should own a part of the home.

16
17 6. The Husband's position is that he is entitled to a share of the proceeds of the home and
18 that the Court should take into account the contribution which he made to the home by
19 way of labour, maintenance and payment of household bills. The Wife's position is that
20 any contribution which he made was non-financial and insignificant and that the
21 proceeds from the sale of the house are solely hers.

22
23 7. As to the second issue, about one year prior to the commencement of the marriage, the
24 Parties each began their own self-employed businesses under the umbrella of two
25 companies. The Wife's company was an accounting business, and the Husband's
26 company operated a dive training school. In the latter company the Wife who is

1 Caymanian held 60 % of the shares and the Husband, a non-Caymanian held 40 % of
2 the shares.

3
4 8. By all accounts, this dive company was not a success. Not only was it never profitable
5 enough to be able to provide dividends to shareholders, it was unable to discharge its
6 ongoing expenses on a regular basis. The Husband says that during the course of the
7 marriage, the Wife provided several cash injections in order for that business to remain
8 open. The Wife said that she was able to lend him money by increasing her working
9 hours as an accountant. There is no documentation evidencing or recording the fact and
10 terms of these loans. From about September 2011, the Parties began to experience
11 personal difficulties, with a significant contributing factor, according to the Wife, being
12 the financial difficulties, of the Husband's failing business. In March 2017, the Wife
13 transferred her shares in the dive company for a nominal payment of \$1.00 to another
14 shareholder and resigned as a director and shareholder at that time.

15
16 9. The Husband's position is that the loans made by the Wife over time were loans to her
17 own company. Further that these were cash injections into the company as their shared
18 business, as directors and shareholders would usually do, and were not to him personally.
19 Alternatively he says that they were loans to herself as part of the matrimonial unit which
20 is a single entity, and thus cannot be recouped by her. The Wife's position is that the
21 Husband's claim that this is a corporate debt lent to his company which claim he first
22 made during the directions hearing in September 2018 is not true. Further that this is a
23 recent invention of his in an attempt to be difficult and to avoid repaying her what he
24 owes. She says that many times during their marriage they discussed the loan of these



monies and not once was it discussed or agreed that it was a corporate debt between their respective companies.

THE STATUTORY PROVISIONS

10. The Court's powers in respect of these ancillary proceedings are contained in sections 19 and 21 of the *Matrimonial Causes Law* (2005 Revision).

11. Section 19 provides that in dealing with all ancillary matters arising under this Law, the Court shall have regard, first of all, to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.

12. Section 21 provides that at the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for:

- (a) *the custody, care and control of the children of the marriage;*
- (b) *the disposition of matrimonial property, including the matrimonial home;*
- (c) *varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage.*
- (d) *varying any other settlement of matrimonial property;*
- (e) *making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
- (f) *providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and*
- (g) *costs."*

13. The subsections which are most relevant to this application are sections 21 (b) and (e).



1 14. There is guidance from the Cayman Islands Court of Appeal in the case of *McTaggart*
2 *v. McTaggart*¹ as to the interrelationship between these two provisions of the Law and
3 their application. This includes that a court will need to consider whether having regard
4 to the s.19 factors, an order under s.21(b) of the Law for the disposition of matrimonial
5 property will make appropriate provision for the relevant party with regard to their needs,
6 the level of compensation and sharing. If disposition of matrimonial property will not
7 allow for the appropriate provision to be made, then the court should go on to consider
8 whether to make an order under s.21(e) that financial provision be made from the
9 property of either spouse. A court should not make an order for periodic payments under
10 s. 21(f) without good reason. Such good reason would arise where the combination of
11 orders under s.21(b) and (e) are insufficient to satisfy the three strands of need,
12 compensation and sharing.²

13
14 15. Additionally the appellate Court made it clear that although the s.19 factors are less
15 extensive than those in England and Wales, in the *Matrimonial Cause Act 1973* as
16 amended by the *Matrimonial and Family Proceedings Act 1984*, the approach in the
17 Cayman Islands should be the same as in that jurisdiction.³ A court in exercising its
18 powers under the statutory provisions should therefore consider all the circumstances of
19 a case to include the following:

20
21 “(a) *the income, earning capacity, property and other financial resources which*
22 *each of the parties to the marriage has or is likely to have in the foreseeable*
23 *future, including in the case of earning capacity any increase in that*
24 *capacity which it would in the opinion of the court be reasonable to expect*
25 *a party to the marriage to take steps to acquire;*

¹ *McTaggart v. McTaggart* [2011] (2) CILR 390

² *McTaggart v. McTaggart* [2011] (2) CILR 390 - Paragraphs 42 and 43

³ *McTaggart v. McTaggart* [2011] (2) CILR 390 - Paragraph 39





- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce . . . the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”⁴

APPLICABLE PRINCIPLES

16. In considering the division of matrimonial property pursuant to s.21 of the *Matrimonial Causes Law* (2005 Revision) a court should first determine what constitutes matrimonial property.⁵

17. The leading cases from England and Wales which have been cited with approval in this jurisdiction are the cases of *White and White* ⁶ and *Miller v. Miller, McFarlane v. McFarlane*.⁷ In *White and White*, Lord Nicholls of Birkenhead in considering inherited money or property and property owned by one spouse before the marriage said this:

“In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered.”

⁴ Statutory Factors in England and Wales

⁵ See *Wight v. Wight* [2010] CILR 60 and *McTaggart v. McTaggart* [2011] (2) CILR 390 – paragraph 34, *B-H v. H.* [2009] CILR 185

⁶ [2000] UKHL J1026-3

⁷ [2006] UKHL 24



1 18. The guidance from the case of *Miller v. Miller, McFarlane v. McFarlane* includes that
2 in considering division of financial property, there is no place for discrimination between
3 a husband and wife and their respective roles. The homemaker role should be given equal
4 weight. A court should consider the three strands of need, compensation and sharing
5 which should guide the court in arriving at a fair division of property on the dissolution
6 of a marriage.

7
8 19. I note also from the case that, the third strand, sharing - which is the important factor
9 for consideration in the instant case, applies to a short marriage just as it does to a long
10 marriage, although for the former, this may have an impact on the quantum to be shared.

11
12 20. In his judgment in the case, Lord Nicholls stated that fairness requires that when a
13 partnership ends, each partner is entitled to an equal share of the assets of the partnership
14 unless there is good reason to depart from equality. The Learned Judge emphasized that
15 the yardstick of equality is not a rule but an aid.⁸

16
17 21. The Learned Judge further stated that there is a real difference between matrimonial
18 property and non-matrimonial property and pointed to the difference being the source
19 of the acquisition. Property which is acquired during the marriage otherwise than by
20 inheritance or gift would usually be matrimonial property. Matrimonial property is the
21 “financial product of the parties’ common endeavor.” As to the matrimonial home, the
22 Learned Judge said this:

23 *“The parties’ matrimonial home even if this was brought into the marriage at the*
24 *outset by one of the parties, usually has a central place in any marriage. So it should*
25 *normally be treated as matrimonial property for this purpose. As already noted, in*
26 *principle the entitlement of each party to a share of the matrimonial property is the*
27 *same however long or short the marriage may have been.”*

⁸ Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - Paragraphs 16 and 17



1 22. The Learned Judge went on to say that the position is different with regard to non-
2 matrimonial property. This is property which the parties bring with them into the
3 marriage or acquire by inheritance or gift during the marriage. With respect to such
4 property, the duration of the marriage may well be relevant although this may take
5 second place to the needs of the parties.
6

7 23. In discussing the import of the duration of the marriage, Baroness Hale of Richmond in
8 her judgment in the said case stated that it is recognized that where the starting premise
9 is separate property, there is still some scope for one party to acquire and retain separate
10 property which is not to be shared equally between them. The Learned Judge said that
11 in such cases, the nature and source of the property and the way in which the couple
12 have run their lives may be considered in deciding how property should be shared.⁹
13

14 24. In *McTaggart v. McTaggart*¹⁰, the appellate Court provided guidance as to the way in
15 which a Court should approach the issue of what is matrimonial property under s.21 of
16 the Law:

17 *"It can be seen that the section gives recognition to the concept of "matrimonial*
18 *property." That concept is not defined in the Matrimonial Causes Law, but it is*
19 *generally understood in the sense described by Lord Nicholls of Birkenhead in*
20 *Miller v. Miller (5), that is to say, it comprises "property acquired during the*
21 *marriage otherwise than by inheritance or gift" ([2006] 2 A.C. 618, at para. 22). Its*
22 *distinguishing feature is that it is "the financial product of the parties' common*
23 *endeavour"*¹¹
24

25 The Court further stated:-

26 *"It is necessary therefore to identify those assets which are owned or under the*
27 *control of one or other (or both) of the parties as at the date when the order is made*

⁹ Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - paragraph 153

¹⁰ [2011] 2 CILR 377

¹¹ McTaggart v. McTaggart, Supra at Page 376

1 and then to identify which of those available assets are matrimonial property and so
2 capable of being the subject of an order under s.21(b).¹²

3 "There may be cases (of which, as I shall explain, the present provides an example
4 in relation to the husband's potential retirement benefits) where an asset which did
5 exist at the date of final separation does not exist—or does not exist in the same
6 form—at the date of the hearing. In such cases it will be necessary to consider
7 whether the former asset can be traced into an after-acquired asset which can itself
8 be treated (in whole or in part) as matrimonial property; and, if not, whether some
9 other order (say, under s.21(e)) should be made to reflect the fact that the former
10 asset has ceased to exist.

11 The power conferred under s.21(b) of the Law is a power "to make an order for the
12 disposition of matrimonial property." There is no requirement under the Law that
13 the disposition should give effect to an equal division of the matrimonial property
14 as between the parties; and there is no invariable rule that the power should be
15 exercised in a manner which achieves that effect. The requirement—imposed by s.19
16 of the Law—is that, in exercising the power, the court shall have regard to "the
17 responsibilities, needs, financial and other resources, actual or potential earning
18 power and the deserts of the parties." It is plainly open to the court—if, having
19 regard to those factors, it thinks it appropriate to do so—to make an order which
20 effects an unequal division of the matrimonial property as between the parties. The
21 order made in *Wight v. Wight* (11)—and upheld in this court—provides an example
22 of such a case. In *Miller* (5) ([2006] 2 A.C. 618 at para. 16), Lord Nicholls observed
23 that "the yardstick of equality is to be applied as an aid, not a rule." But, as Lord
24 Nicholls had pointed out in *White v. White* (10) ([2001] 1 A.C. 596, at 605)—in a
25 passage expressly adopted by Lord Cooke of Thorndon (*ibid.*, at 615)—"as a
26 general guide, equality should be departed from only if, and to the extent that, there
27 is good reason for doing so."
28

29 25. In *Valerie Gordon v. Jefferson Watler*¹³, the Appellate Court stated:

30 "The correct approach, as I have indicated, was to ask what provision should be
31 made for the wife in order to recognise the three strands of need, compensation and
32 sharing. If a division of the matrimonial property could meet those needs, then it
33 was unnecessary to go further. But if and so far as a division of the matrimonial
34 property could not meet those needs, then it would be necessary to consider whether
35 to make an order under section 21 (e) in respect of the husband's other assets."
36

37 26. In the case of *B-H v. H*¹⁴, the parties had been married for 12 ½ years and had two
38 children. The issue for the Court was to identify what was matrimonial property in
39 circumstances where each party had brought properties of their own into the marriage

¹² McTaggart v. McTaggart, Supra - Page 390

¹³ CICA Civil 13/2014- 22nd August 2014

¹⁴ [2009] CILR 185

1 and had acquired more thereafter. They had maintained separate financial affairs during
2 the course of the marriage. Foster J. (Actg.) reviewed a number of local and English
3 cases and said this:

4 *"In my opinion, it is clear, both from the remarks made in the various authorities*
5 *and as a matter of common sense, that in determining whether particular property*
6 *is to be considered matrimonial property or the separate property of one of the*
7 *spouses for these purposes, the court must have regard to all the circumstances*
8 *relating to the property concerned. Such circumstances include but are not confined*
9 *to, the circumstances and timing of its initial acquisition, the party by whom and*
10 *how it was acquired, the apparent intentions of the parties with regard to and the*
11 *use of the property during the marriage, amongst other factors. For example, it does*
12 *not, in my opinion, automatically follow that just because the property concerned*
13 *was acquired solely by one spouse prior to the marriage, whether by purchase, gift*
14 *or inheritance, and the title remained throughout the marriage in the name of that*
15 *spouse, the property may not nonetheless in some circumstances be considered to*
16 *have become matrimonial property—"put into the melting pot of the marriage" (see*
17 *Levers, J. at first instance in Wight v. Wight (10) (2006 CILR 1, at para. 55))."*
18

19 27. Foster J. (Actg.) held that the parties had seen their relationship as a partnership and that
20 viewed in that light the three properties brought into the marriage would be categorized
21 as matrimonial assets *"since they had both benefitted from them as matrimonial homes*
22 *and used them to raise money to finance purchase of other property and spent money on*
23 *them and generally treated them as assets for the benefit of both of them."*

24
25 28. In the case of *Billes v. Anco*¹⁵, the sole issue was whether the husband had an interest in
26 the matrimonial home which had been purchased by the wife with her own funds and
27 was registered in her sole name. She contended that the husband had made no financial
28 contribution towards the purchase and that it had not been acquired by the common
29 endeavor of the parties. Smith J (Actg.) considered that although it had been purchased

¹⁵ [2011] 2 CILR 74

1 with the inherited wealth of the wife, it was acquired during the marriage for the welfare
2 the family. Additionally there was evidence from a pre-nuptial agreement that the parties
3 intended as at the date of separation to share the matrimonial home equally. The Court
4 noted also that the husband encountered restrictions on his ability to work in
5 circumstances where he had disposed of his assets in Canada and moved to the Cayman
6 Islands as a result of the marriage.

7
8 29. In the more recent case of *Ebanks v Ebanks and Smith*¹⁶, the husband's case was that
9 he had brought the marital home into the marriage and there should be a departure from
10 the yardstick of equality. By reference to the cases of *McTaggart v. McTaggart* and
11 *Miller v. Miller, McFarlane v. McFarlane*, Mangatal J. thought it plain that given the
12 fact that the parties lived at the property as their matrimonial home, the property was to
13 be treated as matrimonial property and stated:

14
15 "96. In my judgment, the Court has to look at all the circumstances of the case.
16 The Property was property brought into the marriage by the Husband. On
17 the facts it is plain that the Wife made no significant improvement or
18 alteration to the Property. However as stated in *Miller v Miller* the parties'
19 matrimonial home, even if this was brought into the marriage at the outset
20 by one of the parties, usually has a central place in any marriage. So it
21 should normally be treated as matrimonial property for this purpose. It was
22 also noted that in principle, the entitlement of each party to a share of the
23 matrimonial property is the same however long or short the marriage may
24 have been."

25 97. However as recognized in *White v White*, the source of the assets may be a
26 reason for departing from equality. In this case, there is also a need to take
27 into account that both parties had been married previously, and indeed, the
28 Property was owned by the Husband prior even to his second marriage to
29 Eileen."
30

¹⁶ Fam 83 of 2013, 31st October 2016



1 30. I now turn to consider the issues and facts in the instant case with the general principles
2 in mind while being mindful that each case must be decided on its own facts with the
3 objective being to arrive at financial arrangements which are fair to both parties.

4 **THE EVIDENCE IN THE CASE**

5 **i) Matrimonial Home**

6

7 31. In his Affidavit, the Husband asserts that he had an equitable interest in the matrimonial
8 home which the Wife sold without his knowledge or consent. He says that during the
9 marriage he maintained the home for them to live in, and either carried out or paid for
10 repairs to be carried out to that home. These included installation of hardware such as
11 shelving, repainting the home and landscaping. He says that he contributed to the
12 marriage by the paying of the cleaning lady/helper and the health insurance for the Wife
13 and himself, and he purchased all the groceries for the home and cooked meals very
14 often for them. He also cleaned up the pots and dishes every evening after the Wife ate.

15

16 32. The general maintenance on the home which he says that he did included repainting the
17 entire kitchen ceiling after it was repaired following a ceiling leak. The Wife paid to
18 repair the ceiling leak. He assisted with putting in flower beds to the front and back yards
19 of the home which areas were not maintained by the Strata. They had a very nice yard
20 which he seeded with grass and watered it and he raked the lawn all the time.

21

22 33. He accepted that the deck to the home on which he had worked, sanding it down, power
23 washing and staining it, was in fact common property which was also used by their
24 neighbors and which was to have been maintained by the Strata.





1 34. In his oral evidence he agreed that his wife might have paid the cleaning lady once or
2 twice and said that on one occasion in 2014 when he added up the bills, which he had
3 paid for that year to include payment for the cleaning lady, regular bills, groceries, food
4 and entertainment bills, it came up to about \$27,000. 00.

5
6 35. He said that the wages for the cleaning lady and everything else was on his company's
7 books, the Wife had set it up that way. He used his company's business account as his
8 personal account. He had a personal account but never used it. He never received a
9 paycheck and had never been paid by the company.

10
11 36. The Wife takes issue with a number of his assertions and does not agree that he made
12 any contributions of significance to the home during the marriage. In her responsive
13 Affidavit filed 9th April 2019, she states that he did not pay for any repairs or
14 maintenance of the home. She says, further, that the repairs of the home to which he
15 refers were the resurfacing of existing metal shelving in a small bathroom closet using
16 material left over from the remodeling of the kitchen in order, she says, to make them
17 look a little nicer. It was her oral evidence that she does not believe that he even did this
18 himself. He in turn in his oral evidence agreed that he did hire help to assist him with
19 this shelving.

20
21 37. As to the painting, the Wife said that she purchased the paint for the re-painting of the
22 interior of the house and the Husband's nephew volunteered to do the work as a thank
23 you. She also said that before the wedding, without her permission, the Husband painted
24 two walls of the home bright red which she hated. He did re-paint them in a different
25 colour at a later date using paint which she bought.



1 38. As to the landscaping: She paid for this twice per month through the Strata. On occasion
2 she would purchase small plants which they planted together and on two occasions when
3 friends were coming over to visit, the Husband raked the leaves on the grass.

4
5 39. Her evidence was that, they had agreed that they would share the expenses of the home.
6 She would pay, electricity, water, cable, land line, and strata fee, and he was to pay for
7 the helper, their health insurance and food. She said this was not a fifty-fifty arrangement
8 between them and moreover that there were numerous occasions when the Husband said
9 that he had no money and she had to pay the helper. She said that their health insurance
10 was cancelled on occasion due to non-payment for three months. She then had to pay it
11 together with the insurance for his employees. Many of the loans to him were to ensure
12 that the health insurance got paid. She paid his phone bill for his business and personal
13 use for two years. She says also that he would buy the least expensive food for the home
14 and often they would have grilled cheese sandwiches and a can of soup for dinner. The
15 cleaning-up which he did after they ate was to put the dishes into the dishwasher.

16
17 40. She said that he had made no mortgage payments towards the home as she had completed
18 mortgage payments on the home before their marriage. She said further, that she paid
19 for everything - any repairs, replacement of items needed for the home, including the
20 replacement, delivery and installation of a new washer and dryer, new oven, new
21 dishwasher, new refrigerator and vent hood, as well as for any ongoing maintenance
22 needed such as air conditioning service every six months.

23
24 41. In her oral evidence she denied selling the house without his knowledge and consent.
25 She said that he knew the house was for sale. She had told him that it was and they had

1 viewed properties together to buy a new home. The Husband in his evidence accepted
2 this and said that the Wife told him that she wanted to move closer to town but before
3 the sale and new purchase was effected, they parted ways.

4
5 **ii) Loans**
6

7 42. It was the Husband's evidence that the idea of the diving business came from the Wife
8 who had the initial idea in 2006, when she was visiting the Dominican Republic. She
9 changed her mind about this but later in 2009 she encouraged him to move to the Cayman
10 Islands from Canada and to start the business, which he did. The agreed amount of
11 \$54,750.00 is the amount owing for all the years of running the business. This amount
12 is made up of loans from the Wife's company to the dive company. Whenever the dive
13 company was in financial need, he would go to her and she would sometimes agree to
14 move money over.

15
16 43. He gave evidence that she was very involved in the administration side of his dive
17 business. She had one of her own employees doing the company books on a weekly basis
18 and whenever they negotiated new leases at different hotels and different properties, she
19 was always involved and knew what was happening all the time. She would attend
20 company functions and assist if they were trying to take out any company loans. For
21 example, they had tried, without success, to get a car loan for his company, and she was
22 involved with that.

23
24 44. While he said that he did not think that there was any company income or expenses that
25 she was not aware of, he did say that she did not have access to his company banking.

1 He was the signing authority on his company bank account and he did not believe that
2 she could go on line and see the company finances. He also said that she was not involved
3 in the diving aspects of the business. Of the quantum of the loan he said this:-

4 *"Between the two of us that is what we hashed it out.*

5 *It is over years and different things. Neither of us is real clear on what it was for.*

6 *We hashed it out down to that number."*

7
8 45. It was the Wife's oral evidence that the loans were made to the Husband personally and
9 were not to his company. She said there were no discussions to characterize them as a
10 capital contribution. They were several payments over a period of time which had started
11 before they were married, and initially he had always paid her back. They had always
12 had an agreement that if she loaned him money, he would pay her back. She thought that
13 this outstanding sum was from monies loaned over an 18-month period between 2014
14 and 2016. She knew that he struggled with money. She said this in oral evidence:-

15
16 *"On occasion he rowed with me that I should be investing money into his business.*
17 *I reminded him of our agreement when we got married, that I start my business and*
18 *you start your business and we would not interfere with either one. That was our*
19 *agreement. You run yours and I run mine."*
20

21 46. She said that when she loaned him money it was for him to use it to live and this had
22 always been the case. He could use it as he wished. He denied this and said that all his
23 expenses were on his debit card.

24 47. In her Affidavit of 5th October 2018, she stated that he had begun to pay her back slowly
25 by paying several small payments of \$100.00 into her company account from his



1 company account. She asserted that the fact of these payments rebuts the presumption
2 of 'a gift' and indicates that this was a personal debt¹⁷.

3
4 48. She also produced bank statements for her accounting company for the period October
5 2017 to March 2018. There are fourteen (14) deposits of \$100.00 into the company's
6 account each from the dive company. Each bears the description, "*car loan*."

7
8 49. In cross examination during her oral evidence, she sought to explain this by saying that
9 the reference to car loan was because of a bank template document which if used once
10 would then continue to give this designation if not changed. The Husband's evidence
11 was that this was for repayment of a car loan and not an error and that the reference could
12 be changed each time a payment was being made.

13
14 50. The Wife did also say that she had loaned him money to buy a personal motor vehicle
15 and when asked about what the \$100 payments were for, she said that she could have
16 put it towards the \$3000.00 which she had loaned him to pay for the vehicle but that she
17 did not believe his intent was specifically for this amount to go towards the car loan. She
18 then said that she does not know and that despite the fact that the deposits say car loan,
19 she believes that these payments were towards the larger loan amount.

20
21 51. I was left with a sense of lack of assuredness from the evidence of the Wife as to what
22 these repayments were for and on this aspect I preferred the evidence of the Husband
23 that the repayments were for car loans and not towards the larger debt.
24

¹⁷ Affidavit of 4th October 2018 , paragraph 5





1 52. The Wife produced, as attachments to her Affidavits, a number of emails. One of these
2 is an email dated 21st February 2018 at 10:55pm in which the Husband stated that he
3 would repay her if it is the last thing he does and asked that they come to a weekly
4 agreement as they had done originally. He also said that the company cannot afford the
5 payments that she seeks and would have to close down.

6
7 53. In another email sent by him to her on the 20th April 2018, he stated that he had made
8 changes from her original claim on 15th October 2013 and 'had now applied it to
9 September 17, 2014. He had also changed the STCW investments into loans and updated
10 each change. 2013 was a good year and all were repayments except for one injection on
11 19th July.' According to the Husband, STCW investments was a reference to a boat safety
12 training course and had nothing to do with diving. This was an investment by the Wife
13 into that part of the company after they had sat down and done projections and she had
14 indicated that she thought it was a good investment.

15
16 54. She also produced an email from the Husband dated 10th July 2018. This was to her
17 Attorney copied to her in which he expressed surprise that the company business is being
18 mixed up with the family business. He then said that perhaps if they are not settled he
19 will go after his rightful share and stated his case therein which is that she was a sixty
20 percent shareholder in the diving business and lent the money to her own company. He
21 said that he tried his hardest to recoup her investment from the company.

22
23 55. It was the Wife's evidence that by the time of these e-mails, the Court process was
24 ongoing and the Husband was fully live to the attendant consequences of a loan as
25 distinct from a cash injection and was using the latter terminology so that he would not
26 have to repay her. This was despite that fact that there had been no discussions between

1 them about any such cash injections at the times of the loans, which were never intended
2 to be business to business.

3
4 56. The Husband's evidence is that he earns approximately CI \$24 000.00 or US\$30,000.00
5 per annum and that the Wife did not contribute to a pension scheme for him and did not
6 allow him to do so, stating to him that she could invest the money better than the Pension
7 Plan. The Wife denies this and disputes his earnings, stating that he receives \$4,000.00
8 per month from another company in addition to whatever he makes from the dive
9 company.

10
11 57. Both agree that the assets of the dive company are valued at approximately CI
12 \$40,000.00. The Wife's evidence was that she stepped away from the business, receiving
13 no monetary value for her shares and in the belief that as promised he would pay her
14 back "every penny he owed her."

15 **THE SUBMISSIONS**

16 58. There was an initial issue as to whether or not the Wife could rely on statements made
17 by the Husband in the course of mediation. Counsel for the Husband referred to the cases
18 of *Chocoladefabriken Lindt & Sprungli AG v. Nestle Co. Ltd*¹⁸. and *Ofulue v. Bossert*¹⁹
19 and argued that such communications which are made with the intention of settling
20 litigation on a reasonable basis without admission of funds owed are protected by the
21 without prejudice rule. At the start of the hearing, Counsel for the Wife indicated his
22 agreement with this position.

18 [1978] RPC 287

19 [2009] AC 990





1 59. I have also considered the case of *Tim Brown, (as Trustee in Bankruptcy of the estate*
2 *of Jane Elizabeth Rice) and Stephen Rice and Smita Patel*²⁰ which considers the rule
3 in a mediation setting and makes it very clear that no distinction is to be made between
4 party-to-party negotiations and negotiations conducted within a mediation; both are to
5 be treated as subject to the without prejudice rule. The rule applies to protect such
6 negotiations which do not result in an agreement. The Court stated:-

7 *“Mediation takes the form of assisted without prejudice negotiation. In Aird v Prime*
8 *Meridian Ltd [2006] EWCA Civ 1866, the Court of Appeal recognized that “with*
9 *some exceptions not relevant to this appeal”, what goes on in the course of*
10 *mediation is privileged, so that it cannot be referred to or relied on in subsequent*
11 *court proceedings if the mediation is unsuccessful: see at para 5, per May LJ, with*
12 *whom the other members of the court agreed.”*
13

14 60. Consequently and for the avoidance of doubt, I make it plain that any reference by the
15 Wife to statements made in the course of mediation are disregarded.
16

17 61. On the central issues, Counsel on behalf of the Wife urged the Court to find that the
18 Husband has no interest in the proceeds of the sale of the matrimonial home and shall
19 repay the sum of CI \$54,750 to the Wife. In support of his submission, he relied on her
20 evidence as to the factual matters in dispute and submitted that the Husband has not
21 produced any evidence to support his claim to an interest in the matrimonial home. He
22 asked the Court to note that the Husband was never added as a proprietor to the title of
23 the home which would have given rise to a presumption of an equitable interest. Counsel
24 for the Wife further argues that, as the home was acquired by the Wife prior to the
25 marriage, the Husband has no equitable interest in it or the proceeds of the sale of it. He
26 further submits that the Husband’s assertions of improvements were either discredited

²⁰ [2007] EWHC 625



1 or minimal and were the kinds of things that a decent husband would do and would not
2 be sufficient to establish equity. Additionally, the exterior improvements claimed to have
3 been done by the Husband were done on Strata property which is not matrimonial
4 property. These are voluntary works done which benefit the Strata.
5

6 62. Counsel's alternative submission was that the administrative assistance provided by the
7 Wife to the Husband's diving company would neutralize any possible equitable interest
8 that the Husband may have in the home.

9
10 63. Finally he submitted that costs should be awarded in favour of the Wife on the basis that
11 the Husband brought up the issue of corporate debt rather than resolving the matter by
12 consent.

13
14 64. In response, Counsel on behalf of the Husband submitted that the Husband had an
15 equitable interest in the matrimonial home and that the loan is a corporate loan. Further,
16 that given the shareholding ratios, the diving company is more the Wife's than the
17 Husband's and that all the funds injected into the company by her were capital
18 investments made by the majority shareholder and director of the Company and did not
19 constitute a matrimonial loan. According to Counsel, given that the Wife sold her shares
20 in the company, and therefore realised the capital investment, there is no longer any
21 liability by the company. There is thus no liability in relation to the Husband, the
22 company being separate from the person.

23
24 65. Alternatively it was submitted that even if the Court found that the funds injected into
25 the Company constituted a matrimonial loan or debt, it is trite law that monies between
26 spouses during the marriage are communal property and thus the loan would be a loan

1 from the Wife to herself, namely the single entity at law of married spouses and not a
2 recoverable amount. Counsel also submitted that while a married woman can own
3 property, a loan between spouses when matrimonial assets are used amounts to a loan to
4 one's self.

5
6 66. In support of this latter submission Counsel referred the Court to the cases of *Phillips v.*
7 *Barnett*²¹ and *Jansen v. Jansen*²². In the first case it was held that an action could not
8 be sustained for injuries caused by one spouse to the other as a husband and wife are one
9 person in law. Blackburn J. stated that the authorities show that the objection to such an
10 action is because a husband and wife cannot contract with or convey to each other. Lush
11 J. stated that neither can acquire any civil rights against the law or apply to any civil
12 court to enforce them. As to the effect of divorce on this, the Learned Judge said that it
13 *"merely terminates the relationship of husband and wife from the time of the divorce and*
14 *their future rights with regard to property are adjusted according to the decision of the*
15 *court in each case."*

16
17 67. In the second case cited by Counsel on behalf of the Husband, *Jansen v. Jansen*²³, Lord
18 Denning pointed out that before 1882 a husband and wife were one person in law and
19 neither could sue the other but that the passage of the Married Women's Property Act,
20 in England served to give rights where none before existed and that where those rights
21 could be ascertained, effect should be given to them.

22

²¹ [1876] 1 Q.B. D. 436

²² [1965] P. 478

²³ [1965] P. 478





1 68. Counsel also drew my attention to a discussion paper by Glenda Laurence entitled
2 Family Law and Debt Creation²⁴ which I have read carefully. Much of the discussion and
3 cases referenced therein deal with debts to third parties including loans by family
4 members to married couples.

5
6 69. Section 3 of the *Married Women's Property Law* (1997 Revision) is in the following
7 terms:

8 *"(1) Subject to this Law, all property which-*

9 *(a) immediately before 1st June, 1941, was the separate property of a*
10 *married woman or held for her separate use in equity;*

11 *(b) belongs at the time of her marriage to a woman married on or after*
12 *1st June, 1941; or*

13 *(c) on or after 1st June, 1941, is acquired by or devolves upon a*
14 *married woman,*

15 *shall belong to her in all respects as if she were a feme sole and may be*
16 *disposed of accordingly."*
17

18 70. Section 10 of the said Law provides as follows:

19 *"10. (1) Every woman, shall have in her own name, against all persons,*
20 *including her husband, the same civil remedies, and also (subject*
21 *as regards her husband to the proviso hereinafter contained) the*
22 *same remedies and redress by way of criminal proceedings, for the*
23 *protection and security of her own property, as if she were a feme*
24 *sole, but, except as aforesaid, no husband or wife shall be entitled*
25 *to sue the other for a tort."*
26

27 71. I accept that the argument put forward by Counsel goes beyond these statutory
28 provisions. As I understand it, the argument is that the monies used to loan the Husband
29 were the joint property of the couple and therefore constituted matrimonial property
30 which the Husband was entitled to share, and which did not constitute the separate
31 property of the Wife. Thus she is not therefore entitled to be repaid. This then becomes

²⁴ June 2103 , Argyle Private by Rockwell Olivier

1 essentially an issue for factual determination as to whether the property used by the Wife
2 to make the loans were part of the couple's joint property.

3 **ASSESSMENT**

4 72. There are no children of the marriage whose needs I must first consider and neither party
5 has expressed or appears to have needs for which provision requires to be made out of
6 the matrimonial assets or the non-matrimonial assets, if the matrimonial assets are
7 insufficient. The strand to which I must have regard in considering this case is that of
8 sharing and possibly but to a more limited extent that of compensation. This was neither
9 a very short nor a long marriage and was a marriage between middle aged adults who
10 have their careers and are able to maintain themselves in the future.



11

12 73. The evidence in this case is that the parties resided at the Prospect property which was
13 their matrimonial home. On the basis of the general principles outlined above, despite
14 its sole legal ownership by the Wife, it was property which was placed into "the melting
15 pot of the marriage" and which would fall to be considered as matrimonial property.
16 Thus the property or in this case given that it has been sold, any proceeds from it, is to
17 be shared between the parties. The check point is equality, with the Husband and Wife
18 each having an entitlement to a fifty percent share of the proceeds from the sale, unless
19 there is good reason to depart from this.

20

21 74. Following the hearing, Counsel on behalf of the Wife advised that the home which was
22 purchased some 19 years earlier was purchased at a price of CI \$186,900. 00. It was sold
23 for CI\$211,000.00. After deduction of the agent's fee of 7%, the net proceeds received
24 by the Wife was \$196,230.00.

1 75. On behalf of the Wife, the submission is that the Husband is entitled to no share given
2 the source of the property, the intention of the parties as demonstrated by the absence of
3 any change to the legal ownership of the property following the marriage as well as the
4 Husbands' limited contribution to the home. Counsel on behalf of the Husband, argued
5 that he is entitled to a modest or at the very least a minimal share of the proceeds.

6
7 76. I have to consider all the circumstances of the case in order to arrive at a decision as to
8 in what proportions this sharing should be made. Applying the starting point of the yard
9 stick of equality, what would be the fair result in all the circumstances of this case?

10
11 77. In the case of *Miller v. Miller*, in her judgment Baroness Hale of Richmond referred to
12 the case of *White v. White* where it was recognised that the source of the assets might
13 be a reason for departing from the yard stick of equality. It was stated therein referring
14 to that case:-

15 *"There, the reason was that property had been acquired from or with the help of the*
16 *husband's father during the marriage, but the same would apply to property*
17 *acquired before the marriage. In White, it was also recognised that the importance*
18 *of the source of the assets will diminish over time(see p 611b). As the family's*
19 *personal and financial inter-dependence grows, it becomes harder and harder to*
20 *disentangle what came from where. But the fact that the family's wealth consists*
21 *largely of a family business, such as a farm, may still be taken into account as a*
22 *reason for departing from full equality: see P v P (Inherited Property) [2004]*
23 *EWHC 1364 (Fam); [2005] 1 FLR 576. So too may be the nature of the assets, where*
24 *these are businesses which will be crippled or lose much of their value, if disposed*
25 *of prematurely in order to fund an equal division: see N v N (Financial Provision:*
26 *Sale of Company) [2001] 2 FLR 69."*²⁵
27

28 78. It was further stated:

29 *" 152. My lords, while I do not think that these arguments can be ignored, I think*
30 *that they are irrelevant in the great majority of cases. In the very small number of*
31 *cases where they might make a difference, of which Miller may be one, the answer*

²⁵ *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24 - Paragraph 148

1 *is the same as that given in White v White [2001] 1 AC 596 in connection with pre-*
2 *marital property, inheritance and gifts. The source of the assets may be taken into*
3 *account but its importance will diminish over time. Put the other way round, the*
4 *court is expressly required to take into account the duration of the marriage: section*
5 *25(2)(d). If the assets are not 'family assets', or not generated by the joint efforts of*
6 *the parties, then the duration of the marriage may justify a departure from the*
7 *yardstick of equality of division. As we are talking here of a departure from that*
8 *yardstick, I would prefer to put this in terms of a reduction to reflect the period of*
9 *time over which the domestic contribution has or will continue (see Bailey-Harris,*
10 *"Comment on GW v RW (Financial Provision: Departure from Equality)" [2003]*
11 *Fam Law 386, at p 388) rather than in terms of accrual over time (see Eekelaar,*
12 *"Asset Distribution on Divorce – Time and Property" [2003] Fam. Law 828). This*
13 *avoids the complexities of devising a formula for such accruals."*
14

15 79. In the instant case, the Husband has made earnest efforts to detail his contributions to
16 the home and Counsel on his behalf has invited me to consider this. The Wife is in sharp
17 disagreement with the extent of his assistance in the household. On the whole, having
18 observed the parties as they gave evidence, where there is disagreement on this area of
19 the facts, I prefer the evidence of the Wife to that of the Husband, I accept the Wife's
20 evidence that the Husband was always struggling financially and although they had
21 worked out a sharing of responsibilities, he did not contribute very much to the
22 household. Indeed it appears that he was financially unable to do so. He mentioned a
23 figure for a single year and gave a general description of what this was for (that is, to
24 include matters such as entertainment and food). The source of this funding was not
25 detailed by him. Additionally I did not get a clear picture from the evidence as to how
26 much of this was spent on the house and how much was spent on the general care of the
27 household as distinct from his own entertainment. The Wife's evidence was that she
28 rarely went out with him because if she went, she had to pay for whatever entertainment
29 and meals he wanted.²⁶

²⁶ Affidavit of 9th April 2019 paragraph 18





1 80. It does appear that he endeavored to assist with maintenance of the home on occasion
2 and I accept that he did assist with the lawn, yard and deck from time to time. I accept
3 also that he did do or caused to be done some minor shelving work and either painted
4 two interior walls and the kitchen ceiling himself or arranged for the painting to be done
5 using paint that the Wife bought. All of this must have been done by him in an effort to
6 make their joint lives in the home more comfortable. However as to the scale and
7 continuity of his assistance, I accept the evidence of the Wife that any maintenance work
8 which he did was relatively minimal and inconsistent. I also accept the Wife's evidence
9 that for the most part she paid the cleaner, although it had been agreed between them
10 that he would do so and that she undertook payment for all major repairs required to the
11 home and in respect of minor repairs or upkeep such as painting, she provided the
12 funding for the needed supplies. I believe her evidence when she said that he had only
13 raked the lawn twice in the six years they had been together and only because guests
14 were coming over and that his further lawn assistance consisted of helping her to plant
15 small plants which she bought. The impression I had was that the Husband sought to
16 make his home maker efforts appear more than they actually were. My overall sense is
17 that both in terms of financial resources and home maker support, the Husbands'
18 contribution to the welfare of the family was very limited. I also noted that the Wife in
19 response to his needs took on additional work hours in order to assist him financially.

20
21 81. While this issue of contributions has been raised by both parties, my view is that this has
22 to be approached with some care, and it would not be wise to try to weigh to a fine
23 balance the ratios of contributions in order to arrive at a monetary conclusion. I have in



1 mind the recommended approach to contributions as set out in the cited cases.²⁷ I also
2 bear in mind the general principles that financial and domestic contributions rank equally
3 in value, the importance of the home maker role to the family unit and that one party as
4 for example the Husband in this case, may not have the financial resources but may have
5 otherwise contributed all that he or she could.

6
7 82. I thought it significant that in his email of 10th July 2018 exhibited to the Wife's'
8 Affidavit of 5th October 2018, the Husband describes himself as the one that believed
9 the Wife when he married her, that she would financially take care of him and be the
10 bread winner and the one who lost his Cayman rights to work, being married to a
11 Caymanian and was stuck with a failing company.

12
13 83. In considering contributions, what I have to consider is whether on all the evidence, there
14 is such a disparity in the respective contributions to the welfare of the family that it
15 would be inequitable to disregard it. Additionally in my view contributions are but one
16 of a number of factors which fall to considered.

17
18 84. Thus in arriving at a conclusion on this aspect, I have regard to all the relevant
19 circumstances including, the source of the property, the length of the marriage, the age
20 of the parties, the income and earning power of the parties and the parties contributions
21 to the acquisition and maintenance of the value of the property. I do not think that the
22 marriage was long enough such that the importance of the source of the home had
23 diminished over the time period of the marriage. The Husband made no contribution to
24 the acquisition of the property. The Wife had paid off the mortgage before they were

²⁷ Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - Paragraph 146



1 married. With respect to maintenance contributions, I have considered the duration and
2 nature of the contributions by each and the efforts made by each, whether sustained or
3 not. I have noted the relatively minor and apparently un-sustained nature of the
4 husband's non-financial contributions and the absence of financial contributions as
5 against the wife's far more significant and sustained contributions. I think it would be
6 inequitable to disregard the extent of the Wife's contributions.

7
8 85. Consequently while no one factor is determinative, in all the circumstances of this case
9 I think there is good reason to depart from the yard stick of equality. In my view to award
10 a 50 % share to the Husband in these circumstances would be deeply unfair. The
11 Husband's own Counsel acknowledged in the course of her submissions, that any share
12 to which the Husband could lay claim would, depending on the evidence accepted as to
13 the level of his contributions, be minimal.

14
15 86. Against this background, I find that the Husband had an interest in the matrimonial home
16 and I consider it fair to assess that interest to be 10 %. He should therefore receive the
17 equivalent share of the proceeds from the sale of the matrimonial home.

18
19 87. Counsel on behalf of the Wife urged that any share in the home to which the Husband
20 may be entitled should be set off against the value of the work done by the Wife on the
21 administrative aspects of the Husband's dive business. In response Counsel for the
22 Husband submitted that the value of such work would not exceed the Husband's interest
23 in the matrimonial home given that the Husband's assistance was daily in the home while
24 the Wife's accounting /administrative assistance was weekly. On this issue there was no
25 detail from either party as to the level and value of this assistance and how this was to
26 be calculated over time. Weekly assistance of a certain number of hours may well be of



1 more value than minor daily assistance. Counsel for the Husband submitted that the
2 assistance provided by the wife was not free assistance but assistance as a shareholder
3 and director. On this issue there was an absence of evidence as to the circumstances
4 surrounding the assistance and the reason and basis for it. On the available evidence I
5 was not able to say on balance, that this was assistance provided by the Wife for which
6 she expected to be paid or whether it was agreed that she would be paid and was not.
7 Neither was it clear whether this was assistance to the Husband personally in order to
8 assist him in building his business or assistance to his company.

9
10 88. Against this evidential background, I do not consider that it would be appropriate to set
11 off the Husbands' interest in the home as against the work carried out by the Wife for
12 the dive company and I decline to do so.

13
14 89. On the second issue of whether the funds provided to the Husband by the Wife was their
15 joint property, I reviewed the evidence of both parties carefully. No doubt there will be
16 cases where such an argument would apply to the factual circumstances. Examples may
17 be where the parties co-mingle their finances either formally by way of a joint account
18 or more informally or where the earnings are made against the background of assistance
19 and support from a homemaker for the benefit of the family as a whole and there is
20 "*personal and financial interdependence*"²⁸."

21
22 90. In the case of *Miller v. Miller, McFarlane v. MacFarlane*,²⁹ Baroness Hale of
23 Richmond gave the example of a genuine dual career family where each party has

²⁸ *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24 - Paragraph 148

²⁹ [2006] UKHL 24

1 worked throughout the marriage and certain assets have been pooled for the benefit of
2 the family and others have not. In such a case where there are no needs requiring
3 compensation, and family assets are divided equally, it may well be fair for there not to
4 be a distribution of additional surplus assets.³⁰

5
6 91. Family assets are defined by reference to the landmark case of *Wachtel v. Wachtel*³¹ :-

7 *"It refers to those things which are acquired by one or other or both of the parties,*
8 *with the intention that there should be continuing provision for them and their*
9 *children during their joint lives, and used for the benefit of the family as a whole."*

10
11
12 92. In the Grand Court case of *Millwood v. Seymour-Ebanks*³², McMillan J. emphasized
13 that one must bear carefully in mind the distinction between common endeavor and
14 separate endeavor and the intention of the parties themselves. The Learned Judge said
15 this:

16 "11. *The Cayman jurisprudence has accepted and recognized the modern*
17 *concept of marriage as a union of presumed equal partners, per Forte JA in*
18 *Wight v Wight*³³. *In short, what the union has created by its common*
19 *economic endeavours, the parties are entitled to share upon the dissolution*
20 *of the partnership. One must also bear carefully in mind a distinction*
21 *between common endeavour and separate endeavour.*

22
23 12. *In addition, although the starting point for the division of any matrimonial*
24 *assets is equality, nonetheless the Court may depart from an equal division*
25 *of the matrimonial assets only where there is good and clear reason to do*
26 *so. Essentially, the overall aim of the Court at that point is to achieve*
27 *fairness in all the circumstances.*

28
29 13. *In order to address and determine the issue of beneficial interests, the role*
30 *of the Court as described by Baroness Hale at paragraph 60 in* *Stack v*
31 *Dowden*³⁴ *can be summarized as follows:*

32

³⁰ Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - Paragraph 153

³¹ [1973] Fam. 72

³² FAM 177/2011, 6th March 2015

³³ 2010 1 CILR 60 at page 78 paragraphs 47 - 48

³⁴ [2007] 2 AC 432





The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it. '''

5 93. In the instant case, the Wife's evidence which I accept having found her to be a truthful
6 and honest witness is that they had agreed to keep their businesses separate at the start
7 of their relationship and that she constantly reminded the Husband of this. The fact of
8 the placement of funds into company accounts as distinct from personal or joint personal
9 accounts is an added factor in that it may well be said that the monies were the property
10 of the company and not the property of the Wife personally.

11
12 94. As to their intentions, notably on the Husband's own account, his company business
13 account which he also used for personal spending was not accessible by the Wife. He
14 was the signatory on that account. There is every indication that the couple kept their
15 finances separate and there is no evidence that I can see of a common intention between
16 them that the accounts of the Wife's company business or indeed her own personal
17 accounts were treated by them as a joint pool or that they intended to treat them as such.
18 Indeed the fact that the Wife expected to be repaid and the Husband initially repaid her
19 sums borrowed, belies any such conclusion.

20
21 95. Due regard must be had to the clear intentions of the Parties. Against this background, I
22 conclude that the money in the bank account of the Wife's company was separate
23 property and was not matrimonial property. It was not a product of their joint
24 endeavours, neither was it intended by them to be used for the benefit of the family. The
25 loans which were made to the Husband from her company's account were not made
26 using matrimonial property and thus are subject to repayment by the Husband.

1 96. The fact that the Wife was on the books as a majority shareholder of the company does
2 not give rise to the automatic conclusion that the Wife must therefore have been
3 investing in her own company when the loans were made. This is particularly so in
4 circumstances where despite the shareholding ratios, the dive company was agreed by
5 all to be the separate business of the Husband which he ran as he saw fit.

6
7 97. There is no formal paperwork as to the loans between them. This is not surprising and
8 one would hardly have expected, between a married couple, the formalities of such
9 paperwork. I preferred and accept the evidence of the Wife that these loans were made
10 not to a company but to the person of her husband in order as she says for him to live. I
11 do so against the backdrop of the Husband's own evidence that he never drew a salary
12 from the business and the agreed position that the business was by no means profitable.



13
14 98. I note also that it seems unlikely that if in fact the Wife had made loans to the company
15 as a corporate transaction, she would have then effected a nominal transfer of her shares
16 for \$1.00 without securing from the company the return of her funding. She struck me
17 as an astute professional and I was inclined to believe her on a balance of probabilities
18 that the Husband's claim that this was a corporate loan is a late claim on his part so as
19 to delay or avoid having to pay her back.

20
21 99. I do not consider that this was a marital debt in the sense of being a debt incurred for a
22 marital purpose which was to benefit the marital estate and for which both should bear
23 joint responsibility. On the evidence which I have accepted, I find that this was a
24 personal debt which is owed by the Husband to the Wife in the agreed sum of
25 \$54,750.00. In my view it is appropriate and fair that this be taken into account when

1 considering the disposition of matrimonial property, to wit the respective interests in the
2 matrimonial home. I do so to the extent that, taking this into account, would serve to
3 reduce the amount to be distributed to the Husband on the sale of the property. The
4 ultimate effect of this is that the Husband's interest in the proceeds from the matrimonial
5 home (of 10% in the sum of \$19, 623.00) is extinguished leaving a balance of \$35,127.00
6 which is still owed by him to her.

7
8 **COSTS OF THE HEARING**

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10 100. On the issue of costs, I have taken into account the submissions of both parties. However
11 neither party has been entirely successful. In these circumstances I would exercise my
12 discretion to say that each party should bear their own costs in respect of this matter.

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15 **Dated this the 17th day of July 2019**

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20 **Honourable Justice Cheryll Richards Q.C.**
21 **Judge of the Grand Court**
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