The Judgment was delivered in private, but the Judge hereby gives leave for it to be published. The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

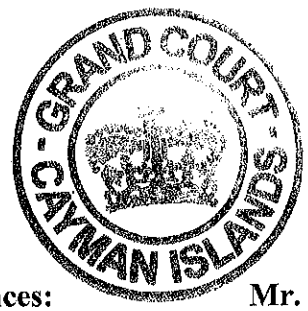
CAUSE NO: FAM 119 OF 2012

BETWEEN:

RE

Petitioner/Cross-Respondent

AND



CD

Respondent/Cross-Petitioner

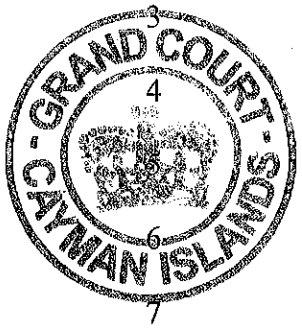
Appearances:	**Mr. Conor Fee from Samson & McGrath for the Petitioner** **Mr. Graham Hampson from Hampson and Company for the Respondent**
Before:	**Hon. Mr. Justice Richard Williams**
Heard:	**20 & 21 April 2015, 22 June 2015, 27 July 2015**
Written Submissions filed:	**21 August 2015**
Requested Updated Material from Petitioner:	**16 December 2015**
Updated Comments from Respondent:	**12 January 2016**
Circulation of Draft Judgment:	**15 February 2016**
Date of Judgment:	**18 February 2016**

HEADNOTE

Financial Provision - Ancillary relief - Court has the power to order periodical payments for school fees - Consideration of what is meant by the Court's s.19 duty to have regard first of all to the bests interests of the children when dealing with ancillary relief matters - What constitutes a matrimonial asset - Effect of contributions by parties towards purchase and improvements to matrimonial assets - US income tax liability as a marital debt - Suitability of Mesher orders.

JUDGMENT

1. This is an application for ancillary relief made by CD, the 52 year old Respondent/Cross Petitioner wife, who is a Caymanian national. The application is made against her 53 year old American husband RE who, having moved to the Cayman Islands in 1989, has Caymanian status. The wife did not file a summons for ancillary relief, but her Cross Petition dated 25 June 2012 contains the relief sought.



2. I hope that the parties will not be offended if from now on I refer to them, for convenience, as the husband and the wife.

3. There are three children of the marriage A aged 15 (DOB 29 July 2000), M aged 13 (DOB 1 May 2002) and S aged 11 (DOB 19 October 2004). I note that the husband has two adult children from previous marriages. The children of the marriage live with the wife. Unfortunately, the children do not have contact with the husband and the status quo is unlikely to change. The wife contends that this is the husband's choice rather than her preventing contact. The husband contends that his relationship with the children has been damaged as a consequence of the wife and her family members denigrating him in front of the children. There are a number of affidavits filed by the wife from various family members in which they express their negative opinions about the husband's character and conduct, and they blame him for the damaged relationship between him and the children. Although I have not fully inquired into these

issues, it is clear to me that part of the reason for the breakdown in the children's relationship with the husband is the total lack of meaningful communication between him and the wife and their clear dislike of each other. No application for orders pursuant to s.10 of the Children Law is made by the husband.

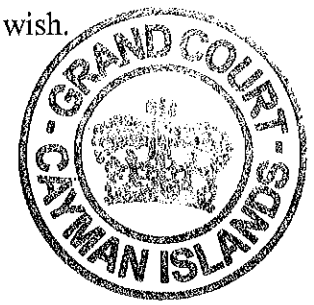
4. I do not accept the wife's submission that the father's alienation from and lack of involvement in the physical upbringing of the children makes this a conduct case. Neither party's conduct is so "*obvious or gross*"[1] that it demands consideration and needs to be taken into account.

5. When I reach this conclusion I have regard to the fact that Baroness Hale at paragraphs 145 and 146 in ***Miller v Miller; McFarlane v McFarlane*** [2006] 1 FLR 1186, [2006] 2 AC 618 ("***Miller***") considered conduct and contributions together and said that they should be approached in the same way. She noted that s.25(2)(f) of the Matrimonial Causes Law 1973 states that the court shall have regard to contributions made to the welfare of the family, rather than to the parties' accumulated wealth. Baroness Hale concluded at page 663A:

> *"Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares"*

[1] ***Wachtel v Wachtel*** [1973] Fam 72, [1973] 1 All ER 829.

Despite the fact that the husband may have played a minimal physical role in the children's lives post separation, I am satisfied that he has contributed to them financially, albeit at a level lower than the mother would wish.



BACKGROUND

THE PARTIES

6. The parties met in the Cayman Islands in 1997 and cohabited in the former matrimonial home ("the FMH") located in Tropical Gardens. The wife had purchased the FMH in 1992, which was before the parties were in a relationship, and it was later transferred into their joint names in 2005. The parties married on 14 February 2000 and finally separated, 13 years later, in August 2013 when the husband vacated the FMH for the last time. A month after the separation the wife moved with the children into her parents' home, her stated reason being that it was a cheaper option for her. During the course of these proceedings she and the children moved back into the FMH.

7. On 6 June 2012 the husband filed his Petition for the Dissolution of the Marriage. The wife filed her Acknowledgement on 25 June 2012, indicating her intention to defend. The wife filed her Answer and Cross-Petition to the Petition on the same date. Almost two years later, on 3 June 2014, both parties sensibly agreed that the husband should withdraw his Petition and that the wife's Cross-Petition would proceed on an uncontested basis. I note that the consent order provided that any order relating to the costs of that application be adjourned to

be dealt with at the ancillary relief hearing. Being seized of the case, I am satisfied that no order for costs is the appropriate order relating to that application. The Cross-Petition was proved on 15 July 2015. It has been a medium length marriage.

8. On 6 August 2014, the wife filed a Summons for interim support, a costs allowance order, interim care and control of the children and an order granting her and the children exclusive occupation of the FMH.

9. The wife's Summons came on before me on 5 September 2014 when substantive directions were given and the Summons was adjourned generally. On 30 October 2015 specific disclosure orders were made and directions to trial given.

10. The final ancillary relief hearing was spread over four days. The parties were then afforded the opportunity to file written closing submissions. The submissions were filed on 21 August 2015 after an extension of time for filing was later granted. During the preparation of this Judgment I required and requested clarification about the husband's IRS tax liabilities and invited further comment about the issue of the application of s.52 of the National Pensions Law (2012 Revision) (the "NPL") to the transfer of the relevant property. The husband's attorneys responded on 16 December 2015. The wife's attorneys' final response was received on 12 January 2016.

11. This is my reserved written Judgment given after careful consideration of the parties' oral and written evidence, their written skeleton arguments and their more recently received written comments.

THE LAW AND PRINCIPLES TO BE APPLIED

12. The Law pertaining to the making of periodical payment orders and to the division of matrimonial assets is governed by s.19 of the Matrimonial Causes Law (2005 Revision) ("the Law"), which reads as follows:

> *"In dealing with all ancillary matters arising under this Law the court should have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities and financial and other resources, actual and potential earning power and deserts of the parties."*

13. Section 19 of the Law must be read in conjunction with s.21 of the Law, of which the relevant parts for my consideration in this matter provide as follows:

> *"At the time of pronouncing a decree under this law, the court shall, as appropriate, make order for:*
>
> *(a) ....*
>
> *(b) the disposition of matrimonial property, <u>including the matrimonial home</u>[2];*
>
> *(c) ....*
>
> *(d) ....*
>
> *(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse:*

[2] My emphasis by underlining.

(f) providing for periodical payments to be made by either spouse for the benefit of the children of the marriage and the other spouse: and

(g) costs."

14. I do not share Mr. Fee's view that s.21 of the Law does not give the Court a power to order a party to pay school fees in the absence of consent. Mr. Hampson refers to paragraph 10.25 in **Jackson's Matrimonial Finance (9th Edition)** which states that it is *"...conventional for school fees to be discharged by means of periodical payments...."* Maintenance orders may contain an element in respect of school fees.[3] Section 21 of the Law gives the Court the power to make payments for school fees which, like cost allowances orders, are regarded as being a type of periodical payment order. Although the Law does not specifically provide, unlike s.25(3) the Matrimonial Causes Act 1973, and now s.3 of the Matrimonial and Family Proceedings Act 1984 in England and Wales ("the English Act"), that the Court should have regard to the manner in which a child is or in which the parties expect him to be educated, this is a factor the Court always puts its mind to when paying regard first of all to a child's best interests.[4] Educational expenses orders requiring a party, or often both parties, to meet these costs when they arise frequently appear in ancillary relief orders made by the Grand Court in the Cayman Islands. Maintenance orders containing an element in respect to school fees can be distinguished from the house

[3] See ***L v L (School Fees: Maintenance: Enforcement)*** [1997] 2 FLR 252; ***Practice Direction Periodical Payments - Ancillary Relief: Payment of School Fees*** (1983) 4 FLR 513; and ***Practice Direction Periodical Payments – Ancillary Relief: Payment of School Fees*** (1987) 2 FLR 255: - Although the Court is not bound by the English Practice Directions they illustrate the relationship between school fees and periodical payments.

[4] See approach to s.25 of the English Act set out in paragraph 12 herein.

purchase order which the Court of Appeal found to be inappropriately made in ***Ebanks v Zelaya-Ebanks*** CICA 23/2012, 2014 (1) CILR Note 1.

15. Section 19 and s.21 of the Law give the Court a wide discretion when it comes to financial provision and any awards made to the parties. The Courts in the Cayman Islands, in deciding whether to exercise their powers under s.21 and, if so, in what manner have, when considering what is fair in all the circumstances of the case, traditionally had regard not only to the matters set out in s.19, but also been guided by the relevant factors raised in s.25(2) of the English Act.[5] The factors to be considered include:

(i) The income earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;

(ii) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(iii) The standard of living enjoyed by the family before the breakdown of the marriage;

(iv) The age of each party to the marriage and the duration of the marriage;

(v) Any physical or mental disability of either of the parties to the marriage;

[5] ***Doak v Doak and Riley*** [2002] CILR 224, [17], [21], [22], ***Wood v Wood*** [2009] CILR 255, [12] and ***McTaggart v McTaggart*** (2011) 2 CILR 366[39].

(vi) The deserts of the parties, including contributions made by each of the parties to the welfare of the family (to include contributions made by each of the parties to the accumulation of matrimonial assets as well as non-matrimonial property) and any contribution made by looking after the home caring for the family;[6]

(vii) The value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring; and

(viii) 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.

16. Sir John Chadwick, President of the Court of Appeal, in ***Valerie Ayala Gordon v Jefferson Raymond Watler*** CICA (Civil) 13/2014 ***("Gordon")*** at paragraph 12 reiterated the principles set out in ***McTaggart v McTaggart [2011 2 CILR 366] ("McTaggart")*** and the approach to be taken to the case law emanating from England and Wales when he stated:

> *"12. The correct approach to the division of property in ancillary relief cases was set out by this Court in McTaggart. At paragraph 40 of the judgment in that case the Court said this:*
>
> > *"40. We were referred by the parties, both in the skeleton arguments lodged on their behalf and in oral submissions made in the course of the hearing, to a plethora of judicial decisions in England and Wales and to a few decisions in this jurisdiction. Observations made by experienced judges are, of course, of assistance to an understanding of the*

[6] ***Wight v Wight***, Zacca P. at para 33.

application of the section 19 factors; but it must be kept in mind that most cases in this field are decided on their own facts and that there is a risk that extensive citation may confuse rather than illuminate. It is not necessary, I think, to look further than the decision of the House of Lords in Miller - and in particular the speeches of Lord Nichols and Baroness Hale - in order to identify the principles. Leaving aside, in this context, the best interest of the children, which (as I said) are paramount, there are three strands: need, compensation and sharing [2006] 2 AC 618 at paragraphs [10]-[16] per Lord Nichols and at paragraphs [138]-[143] per Baroness Hale. The ultimate objective, as Baroness Hale explained at paragraph [144], is to give each party an equal start on the road to independent living. She said this:

> *'[144] Thus far, in common with my neighbour and learned friend Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need, generously interpreted, compensation and sharing. I agree that there cannot be a hard and fast rule, but whether one starts with equal sharing and departs when need or compensation supplied a reason to do so, or whether one starts with need and compensation and shares the balance, much will depend on how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal share start on the road to independent living.[7]'"*

When Baroness Hale referred to "sharing" in that context, she had in mind - as her speech demonstrates - sharing of all the assets; not simply sharing the assets which could be classified as matrimonial property. This court went on in McTaggart to say this, at paragraphs 42 and 43:

> *"42. In this jurisdiction a court will need to consider whether, having proper regard to the section 19 factors, an order under section 21(b) of the Law for the disposition of the matrimonial property will make appropriate provision*

[7] My emphasis by underlining.

for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under section 21(e), that is to say, an order making financial provision for that party out of property of the other party.

43. It seems to me reasonably clear (and I would so hold) that, if satisfied that an order under section 21(b) of the Law (or the combination of orders under section 21(b) and (e) would make appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing), the court should not, without good reason, make an order for periodic payments under section 21(f). To make an order for periodic payments - in circumstances where such an order is unnecessary because appropriate provision can be made by the disposition of matrimonial property either (under section 21(b) or by a capital adjustment from the separate property of the other party (under section 21(e)) - would be inconsistent with the principles of clean break to which Lord Scarman referred in Minton v. Minton, ([1979] AC at 608):

> *"There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other - of equal importance - is the principle of 'the clean break.' The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order...."*"

Those observations must be read in the light of the observations in Miller - and in particular those in the speech of Baroness Hale to which I have referred - that the ultimate objective is to give each party an equal start on the road to independent living."

17. When deciding whether to make an order under s.21(b), and from where any such order should be made, as made clear by the Court of Appeal in ***McTaggart,***

I am required to consider and decide which assets are to be regarded as being marital property. In the combined House of Lords appeals of ***Miller***[8], Lord Nicholls described matrimonial property as "*property acquired during the marriage otherwise than by inheritance or gift.*" Its distinguishing feature is that it is "*the financial product of the parties' common endeavour.*" In ***McTaggart***, Sir John Chadwick P approved Lord Nicholls' view.

18. When carrying out this exercise I am assisted by further guidance given by Sir John Chadwick P. In ***W v W*** [2009 CILR 225] the President reiterated the importance of the principles set out in (i) ***Wight v Wight*** 2006 CILR 1 ("***Wight***"), (ii) ***White v White*** [2001] 1 A.C. 596 ("White") and (iii) ***Miller v Miller***. Referring to Forte J.A.'s Ruling in ***Wight***, the President stated that the Court should construe s.19:

> *"On the basis of the new approach to the institution of marriage and the fact that it is a union of partners.....Each therefore would be entitled to equal share of the assets acquired in the marriage, unless there is a good reason to depart from that principle."*

19. The President understandably then referred to the guidance given in the English cases concerning property brought into the marriage by one of the parties. This included reference to what Lord Nicholls stated at page 610 in ***White*** and repeated by him in ***Miller v Miller*** at paragraph 23, namely:

> *"Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the*

[8] ***Miller v Miller; McFarlane v McFarlane*** [2006] 1 FLR 1186, [2006] 2 AC 618

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 factors to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the Claimant's financial needs cannot be met without recourse to this property."

20. As highlighted by Mr. Fee in his written submissions, the President of the Court of Appeal in ***Zelaya-Ebanks*** reiterated the importance of the Court applying the procedure laid down by the Court of Appeal in ***McTaggart***. The President stated:

> *"1. This Court had occasion to address the powers conferred by s.21 of the Matrimonial Causes Law in its judgment in McTaggart v McTaggart [2011] (2) CILR 366. At paragraph 34 of that judgment the Court drew attention to the difference between the legislative framework in this jurisdiction and the position in England and Wales under the Matrimonial Causes Act of 1973. It said this:*
>
> > *"34. The 1973 Act does not (in terms) require the court to give separate consideration to the question - what order (if any) should be made for the disposition of matrimonial property? - although, in practice, the court will usually do so. Section 21 of the Matrimonial Causes Law, on the other hand, plainly does require the court to give separate consideration to that question. The court must do so in order to decide what order (if any) it is appropriate to make under s.21 (b). The judge was correct, in my view, to reach the conclusion (at para. 39 of his judgment) that he did need to determine which of the parties' assets were to be treated as matrimonial property for the purposes of s.21 of the Law and which were not."*

Then, after considering some of the English authorities dealing with the proper approach to the division of matrimonial property, this Court went on:

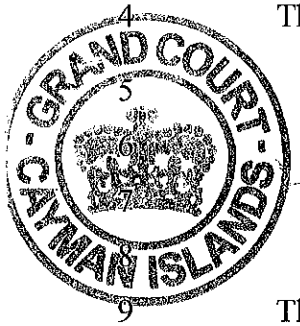
> *"42. In this jurisdiction a court will need to consider whether—having proper regard to the s.19 factors—an order under s.21(b) of the Law for the disposition of the matrimonial property will make appropriate provision for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under s.21(e): that is to say, an order making financial provision for that party out of the property of the other party."*

The Court sought to emphasise that, under the Matrimonial Causes Law, there are, essentially, two stages in the process: first, what provision can be made under s.21(b) out of matrimonial property; and, second, whether if the provision that can be made under that paragraph does not make appropriate provision for the relevant party, then what further provision can be made under s.21(e) by way of an order out of the non-matrimonial assets of the other party?"

21. The position is that the Court should determine, whilst reminding itself that it must have regard to the best interests of the children first at the outset as well as when then considering the other factors in s.19 of the Law, what the matrimonial assets are and their value and then deciding how they should be fairly divided. If those assets appropriately meet the needs of the children and each party, then the Court does not need to make any orders in relation to non-matrimonial property. If the Court has to consider the non-matrimonial assets and apportions those in such a way that it meets each party's needs, it may then also order a clean break between the parties.

22. Mr. Hampson highlights that great care must be taken when considering the approach taken in ***McTaggart***, as the President therein stated that, although it was not a factor in that appeal, the best interests of children are "*paramount*". The President in ***McTaggart*** noted the absence of any:

> "*suggestion that the best interests of the children required that the proposals made by one party for the division of the available assets should be preferred to the proposals made by the other.*"



The wife's proposals before me are grounded on the basis that they are the appropriate orders if the children's interests are treated as being "*paramount*".

23. I have regard to the President's note of caution at paragraph 39 in ***McTaggart*** that the underlying statutory provisions in this jurisdiction, although similar, are not the same as those found in England and Wales. The President, however, did not feel that the approach adopted in this jurisdiction in having regard to s.19 matters differs materially from the approach which had been adopted in England and Wales under s.25(1) and s.25(2) of the English Act. Guidance can be gleaned from the case law in England and Wales about the approach to be taken when considering the interests of the children. In those cases it has been held that the first consideration is not the same as the paramount consideration.

24. Section 25(1) of the English Act also refers to a concept of first consideration and provides:

> "*It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above and, if so, in what*

manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18."[9]

25. In England the welfare of the child is not regarded as taking total precedence over all other matters, but it is the first matter to which the Court should direct itself. As stated at paragraph 36 in **Rayden (15th Edition)**, the welfare of any child is:

"a consideration to be regarded as of first importance, to be borne in mind throughout consideration of all the circumstances, including the particular circumstances specified in section 25. But Parliament has not made the welfare of the children the paramount or overriding consideration."

26. In ***Suter v Suter and Jones*** [1987] Fam 111, CA the Deputy Circuit Judge was found to have erred when he treated the children's welfare as the paramount consideration when determining the amount of the periodical payments to be made to the wife. Sir Roualeyn Cumming-Bruce found that it was the duty of the Court to have regard to all of the circumstances, first consideration being given to the welfare of a child. He went on to say at page 123F that:

"Having regard to the prominence which the consideration of the welfare of children is given in section 25(1), being selected as the first consideration among all the circumstances of the case, I collect an intention at this consideration is to be regarded as of first importance, to be borne in mind throughout consideration of all the circumstances including the particular circumstances

[9] My emphasis by underlining.

specified in section 25(2). But if it had been intended to be paramount, overriding all other considerations pointing to a just result, Parliament would have said so. It has not. So I construe the section as requiring the court to consider all the circumstances, including those set out in subsection (2), always bearing in mind important consideration of the welfare of the children, and then try to attain a financial result which is just as between husband and wife."

27. In **Duckworth Matrimonial Property and Finance** at para. B3 [33] the authors write:

> *"Under MCA1973, s. 25(1) children's welfare is the 'first' consideration. But 'first' does not mean 'paramount'."*

Reference is then made to the following extract from **Hansard, HL Vol 359**, Col 544 per Lord Simon, referring to the analogous s.12(2) (b) of the Children Act 1975:

> *"[It] directs the court ... To consider specifically the welfare of the child and to give its welfare greater weight than other considerations; but it does not say that it must prevail over other considerations."*

28. I accept that s.19 does not use the phrase *"all the circumstances of the case,"* but I share the previously expressed view[10] that our legislation gives the Courts here a broader discretion than that granted to English Courts and that the principles established in the English authorities are helpful as guidance. I am satisfied that the position in the Cayman Islands is that the Court should have

[10] Taylor J.A. in ***Doak v Doak*** 2002 CILR at para 17.

regard first to the best interests of any children of the marriage when considering all of the other s.19 factors. The best interests of a relevant child are the first thing which the Court should direct itself to. In the absence of the word paramount, which appears in other pieces of legislation[11], I am not satisfied that s.19 of the Law makes the interests of the children paramount. The effect of the requirement in s.19 is that the best interests of any children of the marriage are to be regarded as the consideration of first importance which must be borne in mind throughout when the Court goes on to consider the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties. This is what is meant by the word "*thereafter*" in s.19. It cannot be right that the Court has regard only to the best interests of the child when making financial orders without giving any consideration at all to the other s.19 factors. The Court must consider those factors to enable it to make an informed decision about how the children's needs can be met having regard to the prevailing circumstances including available and potential resources. The position of children is not merely something additional to any application in ancillary proceedings, their welfare is a first consideration and the husband, who has an obligation to provide maintenance for them, has a responsibility to order his financial affairs in a way which meets this before meeting his other financial obligations.[12] A general principle is that a home for minor children is normally a main requirement and this is consistent with their best interests as a first consideration.

[11] For example the Children Law (2012 Revision).
[12] Finch L-B in Guernsey case of ***C v C*** [2007-2008] GLR Note 1.

29. I have carefully considered the case authorities which the parties have referred me to. I also have regard to the principles outlined above, much of which was set out in similar detail and terms in my judgment dated 6 March 2015 in ***AT v JT*** Fam 34 of 2012, a case brought to the attention of the parties during the hearing. The principles highlight that the Court is charged with dividing the assets in a fair and equitable manner, whilst trying to see if there can be a clean break. Both parties agree that this case is one in which there should be a clean break.

THE HUSBAND'S EMPLOYMENT, INCOME AND OUTGOINGS

30. The husband is a Certified Public Accountant and is the Associate Director of a trust company. He has worked for the same company since 2002, after he closed his firm. He receives a salary of CI$9,370 before deductions for pension and health insurance.

31. Dependent on the business' profits, he is entitled to receive a discretionary bonus each April. In 2015 the bonus he received was CI$43,970, in 2014 it was CI$44,690, in 2013 it was CI$45,756 and in 2012 it was CI$97,990. Although discretionary, it is evident that the average bonus received over the last three years is CI$44,895 and if this was averaged out over a 12 month period gives a monthly figure of CI$3,741.25. I feel it is appropriate to have regard to the average figure as a part of the husband's foreseeable income when determining his current income capacity. If no bonus or a reduced bonus is received in the

future the husband may, at that time, be able to argue that due to a change of circumstances there should be a variation of the maintenance order made. Although I note the larger 2012 bonus, I have excluded it from my calculations as only the past 3 years show a developing pattern about the level of the bonus to be expected. The husband contends that the bonus is used to "*balance the books*", meeting the shortfall between his outgoings and income.

32. I share the approach to bonuses taken by Mr. Mostyn, Q.C. when, then sitting as a Deputy Judge in the Family Division, he stated at para 24.3 in ***Rossi v Rossi*** [2007] 1 FLR 790[13] that he would not allow a post-separation bonus to be classed as a non-matrimonial asset unless it related to a period which commenced[14] at least 12 months after separation. The parties separated in August 2013 so the bonus payment made in April 2015 is a matrimonial asset which is subject to division.

33. In his written submissions Mr. Fee has summarised his client's essential fixed monthly costs. He states that those are pension of CI$300, healthcare CI$400, housing costs CI$2,395, US taxes going forward at CI$1,000, backdated US tax CI$574. These fixed cost items total CI$4,669 and do not include child maintenance, school fees of $2,741 (from September 2015) and his day-to-day expenses.

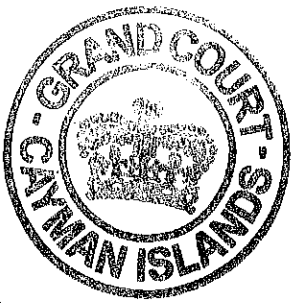
[13] Referred to by the Court of Appeal at para. 49 in ***McTaggart*** and at para.19 in ***Doak***.
[14] My emphasis by underlining.

34. At paragraph 25 of his affidavit sworn on 3 September 2014 the husband set out his monthly outgoings, which he totalled at CI$12,903. At paragraph 31 of his affidavit sworn on 9 April 2015 he varied the outgoings slightly by increasing his groceries from CI$400 per month to a maximum of CI$600 per month and he increased his car repairs and maintenance from CI$150 to CI$500 per month. This means that he was then saying that his total outgoings amounted to CI$13,453.

35. During his evidence in chief he commented that his car loan would be repaid in May 2015 and his monthly outgoings were:

Pension	$ 300
Cell phone	$ 159
Internet	$ 79
Online TV	$ 66
Rent	$ 2,395
CUC	$ 250 - $300 ($250 in affidavit)
Water	$ 40 - $45 ($40 in affidavit)
General repairs/replacement	$ 200
Groceries	$ 500 - $600
Entertainment/restaurants	$ 300
Lunches	$ 300
Medical expenses	$ 125 (not in affidavit)
Dental expenses	$ 150 (not in affidavit)

Auto insurance	$	125 ($200 in affidavit)
Car repairs	$	500 ($150 in affidavit)
Hairdressing	$	100
Credit card	$	450
Clothes/work clothes	$	200
US taxes current year	$	1,000
US taxes back payment	$	574 (not in affidavit)
Health insurance *(Dependents' premium)*	$	400 ($913 in affidavit)
School fees *(average 12 months)*	$	2,555 ($3,066 for 10 months in affidavit)
Term school fees	$	90 (not mentioned in affidavit)
TOTAL:	**$**	**10,858 - $11,013***



** (after September with increased school fees $11,044 - $11,199)*

** (after September excluding school fees $8,213 - $8,368)*

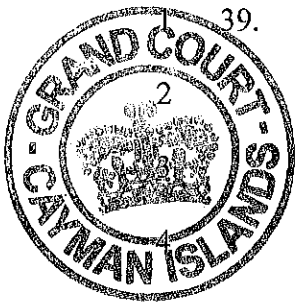
36. The wife submits that:

- the $200 claim for general repairs and $150 for car repairs are contingencies and should be removed;
- no amount should be given for entertainment and restaurants as this should rank secondary to the children's needs;
- the medical and dental expenses both put at $125 should not be permitted as it is not a recurrent month expense and is excessive;
- the $200 claim for auto insurance was accepted in evidence to be only $75; and
- the cost of haircuts should be reduced from $100 to $50 and the figure for clothes from $200 to $100.

37. When I review the husband's schedule of outgoings, I am satisfied that there are reasonable savings that should be made. The husband, with whom the children do not stay and have no contact, does not need a property with a rent of CI$2,395 a month. The advantage of being a judicial officer in a small jurisdiction, having regard to only limited submissions before me, is that I may determine there are quality two bedroom rental properties available in good areas for under CI$1,800 a month. I therefore assess his reasonable rental figure as CI$1,800 per month. The husband's medical expenses may be reduced to CI$75 per month and his dental expenses to CI$100 per month. As he claims that his groceries expenditure is $600, his total budget of $600 for entertainment and lunch expenses should be reduced to $300. His car repairs should be set at $150 per month as set out in his affidavit. His hairdressing may be reduced from $100 to $50 per month and his work clothes reduced to $150 per month. This means that his amended total outgoings, excluding maintenance and school fees but including health insurance and provision to enable him to pay current and back taxes and pay towards his credit card, is in the region of $6,868.

38. The husband has suggested that he pay half of the CI$2,741[15] monthly school fees ($1,370.50) as well as $500 per child per month maintenance, a total of CI$2,870.50. The wife seeks an order that the husband pay for all of the school fees as well as additional reasonable child maintenance.

[15] Fees from September 2015.



39. The husband's income before bonus is $9,370. I am satisfied that he could reduce his outgoings, as a single person with whom the children do not stay, to around $6,868. This would give a regular disposable income of $2,502.

THE WIFE'S EMPLOYMENT, INCOME AND OUTGOINGS

40. The wife is an Office Manager/Administrator and she earns CI$5,000 per month before deductions. The wife's case is that she worked throughout the marriage, including up to 2002 in the husband's accountancy firm. The husband contends that she has the capacity to earn greater income by doing accounts out of hours for third parties and from managing a property in Cayman. The wife denies this, stating that although she has looked into the option of finding a second job she has been unable to take up further employment, as she has had to ensure that she spent sufficient time with the children who she must physically care for and who do not see their father. On the evidence before me, I assess her fair income capacity to be CI$5,000 per month.

41. The wife's projected outgoings, now that she has moved out of her parents' property and back into the matrimonial home, are those set out in paragraph 19 of her affidavit sworn on 8 April 2015. The outgoings total CI$5,450 per month. On the whole her figures are not excessive, although electricity at CI$775 per month, food at CI$1,600 per month (not including the cost of school lunches) may be regarded as being on the high end and open to some reduction. I also note that during examination in chief the wife said that she believed there is only

one year left on her vehicle loan for her 2011 Ford Explorer which has monthly payments of CI$650, this will then reduce the stated monthly outgoing figure to CI$4,800. The figures do not include house insurance, clothing, additional medical expenses for the children, petrol, internet, presents and vacations. Therefore, even after the loan is repaid and even if the husband is paying the school fees, there will be a need for some child maintenance. In the closing submissions filed on behalf of the husband the wife's outgoings figures were not challenged, the view being that *"to a certain extent the parties' budgets are of limited assistance to the Court."*

42. It is contended on behalf of the husband that the wife currently has no debts and that she has been able to meet the needs of herself and the children from income since the parties' separation. It is submitted that the position will further improve when she no longer has to pay legal fees. The wife rightly highlights that she has been able to keep her outgoings down and not go into further debt because she has been living at her parents' home rather than at the former matrimonial home. The wife is entitled to set up her own home for her and the children.

ORDER FOR CHILD MAINTENENACE WITH A SCHOOL FEES ORDER ELEMENT

43. It is in the children's best interest to keep them at their current private school. They have been there for a while and the disruption at their ages to their

education and social relationships, and the change of curriculum would be detrimental. I am satisfied that, with his regular disposable monthly income of at least CI$2,502, the husband should pay all of the school fees. Accordingly, I order that the husband do pay or cause to be paid to the wife for the benefit of the children of the marriage until the relevant child ceases full-time secondary education or further order periodical payments of an amount equivalent to the school fees, but not the extras in the school bills, at the said children's current school. It is further directed that the school fees shall be paid to the School's Fees Office as agent for the wife as and when they fall due and the receipt of that payee shall be a sufficient discharge.[16] The parties are to agree additional educational expenses, for example extracurricular activities, and to equally share the costs of the same.

44. As this school fees order forms a part of the periodical payment considerations the level of the related child maintenance order will be at a low rate considering the level of the husband's income, namely $300 per month/child (CI$900). This order will expire when the respective child reaches the age of 18 or ceases full time education (up to the age of 21) whichever may be the later. If a child intends to go to university/college then the parties may agree how to apportion the ongoing education expenses or, failing agreement, apply to the Court. If a child/ the children leave private school then the monthly child maintenance figure should increase.

[16] The terms of this School Fees order is based on precedent No.71 in Solicitors Family Law Association publication **"Precedents for Consent Orders" (5th Edition)**.

45. Therefore, the husband's total monthly contribution to the children will be CI$3,641. I accept that this is over his regular monthly disposable income figure, but I take into account that he will most likely receive a bonus of over $40,000 each April and he should be expected to budget for the additional CI$13,668 from that extra income, still leaving him with funds which he may, if he wishes, use for additional payments towards his credit card or IRS liabilities. If a bonus was not received or was considerably less than $40,000 that could be regarded as being a significant change of circumstances.

THE MATRIMONIAL ASSETS

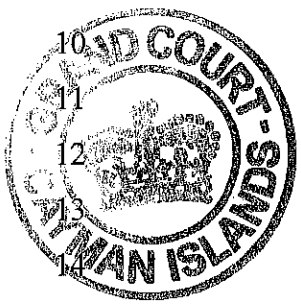
46. Lord Nicholls held at page 634C in ***Miller*** that:

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

47. The primary matrimonial asset is the FMH which is held in the parties' joint names. It has no encumbrances save for a potential liability relating to the husband's pension resulting from the drawdown against his pension fund to clear the balance of the mortgage. The FMH has an agreed valuation of CI$385,000. The husband contends that each party has a 50% interest in this property as well as in the contents. The husband contends that the property

should be sold and the wife would be able to rehouse with the children from her share of the net proceeds of sale. The wife seeks an outright transfer of the former matrimonial home to her sole name with no payment to the husband.

48. The husband states that, as he withdrew CI$26,752 from his pension plan to pay off the existing mortgage, if the property is sold to a third party or transferred to the wife there will be a requirement for him to pay back 10% of the market value (CI$38,500) pursuant to s. 52C(9) of the NPL and that this should be taken into account when distributing the available capital assets. Section 52C(9) states:

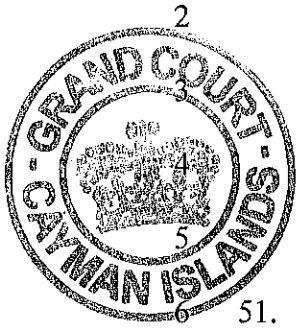


> *"Where, before attaining the normal retirement age, a person sells*[17] *the dwelling unit acquired through the use of an amount withdrawn pursuant to this section, the person shall upon completion of the sale return the amount withdrawn or ten per cent of the fair market value of the dwelling unit, whichever is greater, back to his pension plan account."*

49. There is no doubt that if the party receives a payment, that the fund should be replenished from the proceeds of a sale. The section makes no reference to a transfer. The husband contends that the repayment trigger provision in the section applies to both a sale and transfer of the property as they both result in a change in the legal ownership of the property. It is submitted by the husband that a transfer in matrimonial proceedings is a transfer for value as it forms part of a redistribution of assets.

[17] My emphasis by underlining.

50. Mr. Fee contends that a consequence of not agreeing with his contention about s.52C(9) would result in his client being left with a CI$26,752 (drawdown) or CI$38,500 (10% of market value) deficit in his pension fund without any balancing payment from the wife.



51. The wife contends that the NPL would not require a return of money in the husband's pension plan if the property were transferred to her as the relevant section refers only to a sale of the property. The wife relies upon s.55(2) of the NPL which provides that s.55(1), which states that any transaction is void if it purports to convey, assign, charge anticipate or give as security, *"does not apply with respect to a transfer required by a court order relating to the transfer of assets on a divorce...."* She also submits that, in any event, there is no restriction registered under the provisions of s.52(G) of the NPL as she contends that she was not involved in the husband's transaction. The wife argues that the Superintendent of Pensions would in such circumstances have difficulty enforcing any claim.

52. Due to the limited submissions made in relation to s.52C(9) and without affording the Superintendent of Pensions the opportunity to make representations on the issue, I am not in a position to make an informed decision concerning its applicability to a transfer. If the FMH is transferred to the wife, and it transpires that the NPL does apply to a transfer the husband would be responsible for the payment back as only he will enjoy the long term benefit

from the resultant increase of the funds in his pension account. The use of the draw down is to be regarded in the same way as the wife's contributions to the FMH, and similarly does not give rise to an increased interest in that asset. If the property is retained in the parties' joint names upon trust for sale and the wife is able to remain in the property until the youngest child reaches 18 years of age (October 2022)[18], and the property is then sold and the net proceeds divided, and if the husband has by then reached the normal retirement age of 60, s.52C(9) would not 'bite'.

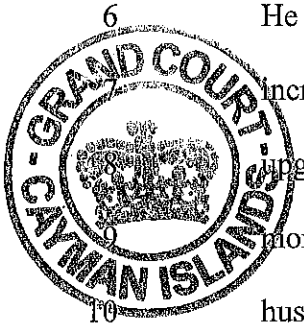
53. In support of her contention for an outright transfer the wife relies upon the background in relation to the FMH which she purchased in 1992 for CI$125,000. The wife contends that she spent just over CI$70,000 improving the state of the FMH before she met the husband. In support of this contention she relies upon the affidavit evidence of David Arch who had transferred the FMH to her. At paragraph 4 of his affidavit he said he was able to confirm that, after the property had been purchased from him, the wife invested a further CI$70,000-CI$74,000 into the FMH as that is what she paid to his construction company to carry out the work. The husband does not accept that CI$70,000 of improvement works were undertaken on the property, but did not choose to cross-examine Mr. Arch. The wife contracted with Mr. Arch to carry out the work. On the evidence before me, on the balance of probabilities, I find that this additional investment was made by the wife for property improvements prior to her meeting the husband.

[18] Mesher order – ***Mesher v Mesher and Hall*** [1980] 1 All E.R 126.

54. The wife states that prior to the marriage she had purchased land in her own name in South Sound. The transfer document from March 1998 indicates that it was transferred to the wife for CI$127,000. The husband contends that the land was his, was purchased from one of his clients and that it was registered in the wife's name at her request and, as they were getting married, he agreed to that. He contended that the deposit was paid from his accountancy firm. The husband disagreed with the wife that the equity in the property secured the purchase of the South Sound property. The property was sold in June 2001 for CI$171,000 and it appears that CI$40,000 from the proceeds of sale was paid into the mortgage account for the FMH. The husband states that all of the payments to the mortgage on the South Sound property had been made by him and from the accounts at his accounting firm. He states that he was the one who took on responsibility for making the payments, but the wife says that she in effect made the payments as they were a part of her wages as she was working for the firm. There is no documentary evidence before the Court reflecting that this was an arrangement that the parties had agreed to put in place at the time. I am satisfied that the evidence supports a finding that both parties were at the time working in unison and using their assets and matrimonial income to bolster their matrimonial portfolio, although there may very well have been an imbalance in the quantum of the amounts each were then contributing. It is clear to me, no matter which of the parties' evidence is preferred, that the South Sound property if it had not been sold would have been treated as a matrimonial property. Accordingly, the proceeds from the sale of that property invested into the

matrimonial home bolster the inevitable conclusion that the FMH is a matrimonial asset.

55. The husband contends that, from the time he moved into the FMH, he paid the mortgage and the majority of the bills, save for the house insurance up to 2005. He also added that after Hurricane Ivan he arranged for the mortgage to be increased by $38,000 to top up monies received from the insurance to pay for upgrades. At that stage the FMH was registered in both parties' names, as the mortgage was transferred from Fidelity to Butterfield because the latter was the husband's bank. The wife contends that she was responsible for repairs post-Ivan and that even her parents contributed CI$7,500.



56. The contributions made by both parties to the FMH during the 13 year marriage, even though it was purchased prior to the parties relationship, do not enable either party to run a special contribution argument as a reason for receiving a larger share in the property. Sir John Chadwick, President of the Court of Appeal, at paragraph 16 in ***Valerie Ayala Gordon v Jefferson Raymond Watler*** CICA (Civil) 13/2014, referring to the observations of Mark Potter, the President of the Family Division in ***Charman v Charman (No.4)*** [2007] 1 FLR 1246, stated that:

> *"...Special contribution cases were really limited to circumstances in which the wealth was so large that there could be no question but that equal division would more than provide for the elements of need and compensation.* Chadwick, P. went on to say that *" In*

such a case it might be appropriate to depart from the principle of equal sharing which would govern normally the approach to sharing element of the three strands in circumstances where equity required some recognition to be given to the special contribution made by one party or the other."

The President further stated that:

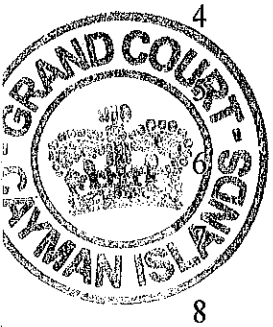
> *"...Absent some exceptional and individual quality in the generator of the fortune, a case for special contribution must be hard to establish."*

This is not one of those cases highlighted by Baroness Hale at paragraph 146 in ***Miller v Miller*** in which there is such a disparity in the parties' respective contributions to the welfare of the family that it would be inequitable to disregard it and take it into account in determining their shares in the property.

57. Other matrimonial assets include the husband's pension fund which is valued at CI$78,674.49[19] and this figure is after he drew down the CI$26,752 from the pension to pay off the remaining balance of the mortgage during the period of brief reconciliation towards the very end of their marriage. The wife's pension fund is valued at CI$55,215.29[20], a CI$23,500 differential. If the husband seeks to retain his pension and also a payment from the wife or credit equal to the amount of his draw down for investment in his pension then his pension fund would in effect increase to CI$105,426, a considerable disparity in pension values of CI$50,211.20.

[19] Balance US$95,994.50 as of 30 June 2014 - this is after statement page 181 of bundle.
[20] Balance US$67,335.72 as of 30 June 2014 - statement page 314 of bundle.

58. The wife does not seek an adjustment in pension entitlement despite the larger fund if the FMH is transferred into her sole name. The husband contends that the parties' pensions should remain with each party, but the values form a part of the overall calculation. The wife, however, during the hearing stated that the husband should be refunded for the drawdown from his pension made to clear the mortgage if, as she contends, the FMH is transferred to her outright. With this in mind, the fair and most cost effective way to deal with this is to order that the parties retain their pensions, and the disparity be treated as offsetting the husband's draw down.



59. The content of each party's bank accounts may also be regarded as matrimonial assets. The husband has three Butterfield bank accounts, the only account of any importance is one which has a balance of US$6,676.92 (CI$5,481.02)[21]. The wife also has bank accounts, again the only one with any significant balance is the FCIB account which has a balance of CI$3,654.07. The wife does not seek an order against the content of the husband's accounts which contain around CI$1,800 more than her account. In light of her position, the nature of the usage on the accounts and the fact that the wife benefitted by around CI$1,626 by the manner in which the pensions have been dealt with, I order that each party retain the content of their bank accounts.

60. The husband has a Mercedes motor vehicle which is valued at CI$45,000 and the wife has a Ford SUV valued at CI$15,000. Both vehicles should be regarded

[21] XE Currency Converter.

as being matrimonial assets and their value be included in the calculations when deciding how to divide the assets.

61. The parties accept that the contents in the FMH can be regarded as being marital assets. The wife values the contents at CI$15,000. It is not clear how the wife arrives at her figure of CI$15,000. The husband values the contents at $100,000 relying upon the contents and computer figure of $99,600 set out in the dated September 2007 Cayman First Insurance Renewal Endorsement Form. The husband stated in a position statement of 30 October 2014 that the contents included "*very many extremely valuable antiques and antiquities.*" In a letter dated 13 November 2014 the husband indicated that he saw no point in going through the process of listing the contents and other valuable items. The husband raises a claim that the wife has a DVD collection valued at CI$25,000. Whether or not she has 2,500 DVDs, it is evident that he over-exaggerates the value because second-hand DVDs sell for less than the purchase price and would unlikely sell for $10 each. In any event, the wife submits that the DVD collection can be sold and the proceeds shared and that is what I expect the parties to do. The DVDs will not form a part of my calculations. The husband also claimed in the 30 October 2014 Position Statement that the wife has CI$100,000 in "*very valuable pieces of jewellery*".

62. I share the view expressed by Walton J. in ***Richards v Dove*** [1974] 1 All ER 888 at 895 that furniture presents an "*extremely difficult question.*" As stated in

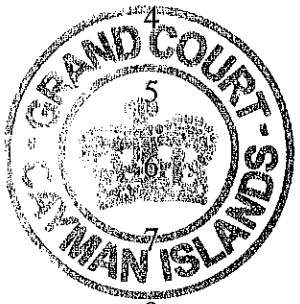
Hoddinott v Hoddinott [1948] 2 KB 406 the fact that furniture is intended for joint use does not in itself make it joint property. The authors of **Duckworth** state at paragraph 46 in Update 19:

> *"If purchased by one party it may be possible to discern an intention to share the beneficial interest with the other spouse, but that must be a question of fact and degree. Without more, if one spouse draws money out of a joint account (not open for any specific purpose) and buys property with it, it belongs to that spouse alone[22], but this may yield to evidence that the money and property purchase with it was intended to be enjoyed in equal shares[23]."*

63. I am unable to establish on the balance of probabilities what the actual contents at issue are, how most contents were purchased, what the intention of the parties was in relation to the contents at the time and what the total value of the contents of the property is. It is not appropriate for the parties to expect the Court to determine the issue on the limited evidence they have provided. I am not persuaded that the dated insurance document is sufficient to enable me to make a finding of the depreciated value of contents in 2015. I am unable to determine in an informed manner how the figure of CI$100,000 was reached or why it was given to the insurers, neither party having provided that detail, or what may be an accurate figure for contents therein. Unless they are items that are particularly rare and/or collectable they are usually depreciating assets.

[22] ***Re Bishop*** [1965] Ch 450.
[23] ***Jones v Maynard*** [1951] Ch 572.

64. If the husband feels that there are contents in the property that should be divided or for which he should be compensated, then he should not simply leave it to the Court to guess but set out a schedule of the contents which he feels he has an interest in, and then the Court can properly conduct the exercise of splitting the contents or setting a monetary value. It appears that the husband felt that there was little point doing that and, having taken that approach, he should not expect the Court to be able to make an informed decision in the absence of such detail. It appears that both parties have approached contents as rather an afterthought, inappropriately expecting the Court to fill in the gaps in their evidence.



65. There is good reason why the Form E used in ancillary relief proceedings in England and Wales deals expressly with personal belongings individually worth more than £500, including jewellery. The belongings must be itemised with details of their current value. Current value is then usually interpreted as the reasonable re-sale value of the item as opposed to an insurance valuation.

66. Baron J. made some useful suggestions in ***K v K (Financial Relief: Management of Difficult Cases)*** [2005] 2 FLR 1137 at 1145-6 about how chattel disputes should be resolved. He stated that a Scott schedule should be prepared containing details of disputed chattels. Armed with that schedule the disputed chattels and their values can be better resolved in an informed manner. In ***K v K*** the parties made their lists of the items in descending order of preference and then alternated choosing items until the bottom of their list was

reached. The unclaimed items were then sold and the proceeds divided equally. Of course, it could be feasible, once the chattels have been identified and their monetary value properly ascertained, for one party to retain the items and compensate the other party for those items.

67. There is inadequate evidence before me to reach an informed conclusion concerning the husband's claims about the existence of and valuation of jewellery in the wife's possession. The wife says that she has jewellery, but it is valued at only CI$4,000. The evidence of Hamish Drummond, a gentleman who the husband characterises in his affidavit as being honest, indicated that he had no knowledge of jewellery being passed between the wife and his wife, especially to keep them out of the divorce proceedings. The evidence of Valerie Drummond indicated that she gave small items including antiques such as pottery to her children as gifts and often lent her jewellery. She denied giving the wife expensive "*stones*". When it was suggested to her that there was jewellery in the figure of CI$100,000 she promptly retorted that it was a "*lot of old rubbish.*" The wife stated in her evidence that any jewellery she had received she had given back to her mother and that it was a family heirloom which was to be forever kept within the family. I found Mr. and Mrs. Drummond, who were both briefly cross-examined, to be reliable witnesses when dealing with the issues of jewellery and valuables.

68. If a party contends that there exists jewellery and antiques with investment value then the Court would require a specialist valuation. In ancillary relief proceedings, unless shown on the balance of probabilities to have a substantial and realisable financial value, when an item of property has been received as a gift from a third party or is inherited they are frequently left out of the calculation when other assets are divided.

69. I note that the husband when seeking disclosure listed the wife's wedding ring. Thankfully things have moved on from the time in England and Wales when back in the 1870s, and the Married Women's Property Act, the law presumed that any gifts of jewellery to a wife from a husband was "*for the decoration of her person*" and not hers to own. The correct approach is that, unless it can be demonstrated that it was expressly intended to be returned to the giver in the event of the relationship breaking down, a woman's jewellery is hers to keep regardless of whether it was bought or gifted to her. The husband has not demonstrated that.

70. The husband fails to particularise or place any value on his personal jewellery. He does accept that he owns a Rolex watch and that he did not inform the Court of its value.

71. For the reasons stated above, I am unable to place an informed figure in my calculations for the contents of the property or any jewellery that may be owned

by the parties. I am not able to find, on the evidence before me, that there are any antiquities of significant value. The best I can do is place into the calculations the figures the wife gives for jewellery at CI$4,000 and contents at CI$15,000 without making a firm finding that this is the actual figure. If the Cayman Islands had provisions similar to those found in England and Wales in s.17 Married Women's Property Act 1882 and s.39 Matrimonial Proceedings and Property Act 1970, due to lack of helpful evidence before me, I may have informed them that, if later able to be better prepared in relation to chattels, the Court may later consider applying an order for a declaration as to the ownership of some of the contents and items in question.

MATRIMONIAL LIABILITIES/DEBTS

72. The outstanding school fees are stated to be CI$12,169.60. It is evident from paragraphs 35 to 36 in the husband's affidavit sworn on 9 April 2015 and at paragraph 37 of his affidavit sworn on 3 September 2014 that he then accepted that the responsibility for the payment of school fees pending the outcome of these proceedings rested with him. He commented that he felt that such an arrangement could not be sustained in the longer term and that if the children are to remain at the school "*beyond these proceedings*" that there would have to be an equal sharing of the school fees. At paragraph 16 of his affidavit sworn on 29 June 2015 he indicated that the balance of the school fees would be discharged from his April 2015 bonus. The fees should be paid from that matrimonial

resource.[24] The written submissions filed on behalf of the husband on 5 September 2014 dealing with interim relief made clear that he was paying the school fees and he submitted that bearing that in mind that he should not be asked to pay anything more by way of interim maintenance. I am satisfied that this reflects the interim financial arrangements put in place and these were made on the basis that the husband remained responsible for paying the school fees pending the outcome of this hearing. I say this although in his Position Statement dated 30 October 2014 it was suggested that he pay CI$1,500 per month child maintenance with the school fees then to be equally shared and also in his schedule in the closing written submissions he refers to the fees as being a joint liability. Therefore, in my balancing calculations I do not include the arrears of school fees as a joint liability, as it is a payment that the husband accepted he would be paying pending the hearing in lieu of an interim maintenance responsibility.

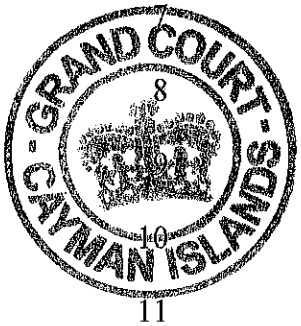
73. The husband claims that the balance on his Butterfield Visa credit card of $12,675.42 should be regarded as matrimonial debt and form a part of the Court's determination in relation to the division of available assets. It became clear during the hearing that the husband uses the credit card to supplement a lifestyle which is not consistent with the impoverished predicament he sought to portray in his affidavit sworn on 3 September 2014. At paragraph 23 he says that he has had to *"cut corners"* in many areas just to make ends meet, including eating $4 TV dinners or home-made salads most evenings and renting

[24] See reference to Mostyn J. in ***Rossi*** at paragraph 32 above.

accommodation in which his utilities will be low. It is debatable whether a single person who does not have children staying with him for contact is cutting corners when that person rents a property for CI$2,395 per month. It is clear on a review of his credit card and bank statements that in fact the husband is not living the frugal lifestyle he claims. There is no need for me to herein set out in detail the contents of those statements, but for example it is easily gleaned from them that he often frequents bars and restaurants spending far greater than the disclosed $300 per month entered in his schedule of outgoings in his September 2014 affidavit for entertainment. For example in September 2014 he spent US$1,842.85 at restaurants and bars. When taken through the statements during cross-examination it was evident that he felt it appropriate to pay for and take vacations to the Far East including trips to Malaysia, Bali, Sulawesi and Singapore. At the time he felt financially stable enough to purportedly lend, without any formal written agreement, US$5,600 to a third party, a dentist in the Philippines. Having regard to the nature of his credit card usage for his personal benefit I am not satisfied that the debit balance should be considered as a marital debt and does not form a part of the calculations. Having regard to the nature of his funding for his lifestyle I am also not minded to include in my calculations the Butterfield Bank account for which an overdraft of CI$5,080.60 is claimed, especially as I feel it fair for the wife to retain responsibility for the CI$4,220.53 on her CNB credit card.

74. The husband contends that he has a significant US tax liability, on his evidence the outstanding figure is CI$69,419.33.[25] He states that the liability, including for 2013, should be treated as a matrimonial debt. The liability has occurred due to short or non-payments yearly from 2006 to 2012.

75. The husband states that the 2013 liability including penalties and interest is $10,442.70. Regrettably the husband has failed to provide a breakdown, or to comment upon why one is not available, despite his attorney indicating to the Court on 16 December 2015 that he had asked his client if one was available and that his response would be given forthwith.



76. The husband's estimate for the 2012 tax liability, of which $11,406.22 is estimated to be for penalties and interest, is CI$37,101.85. Regrettably, especially having regard to the larger figures involved, the husband has failed to verify the figures by disclosing a formal assessment. The husband's attorneys indicated to the Court on 16 December 2015 that they had asked him whether a formal assessment had been carried out and that they would revert to the Court with his response forthwith. No response has since been received by the Court. One problem for the husband is that, despite the passage of time and an indication from him that the final figure would be known in May 2015, he still has only provided his own estimate for his 2012 liabilities and expects the Court to accept it. Understandably, Mr. Hampson on behalf of the wife submits that

[25] US$9,625 was paid from the husband's April 2015 bonus to clear his IRS liability for 2014.

there "*must be some doubt as to the veracity*" of the husband's figures for purported liability for 2012 and 2013.

77. The husband concedes that the tax liabilities that have accrued since 2013, for example CI$7,892.50 in 2014, should not be considered as a matrimonial debt. I note with interest that he decided to pay $9,625 from his bonus to pay his 2013 liability rather than paying towards the IRS debt that had accrued during the marriage.

78. The wife, due to the husband actually providing the appropriate documentation in relation to these years, accepts the accuracy of the IRS liability figures for 2006-2011. The wife rightly contends that the IRS debt has arisen due to the husband's decision not to file tax returns in a responsible manner. She says that when she brought to his attention letters received from the IRS he would dispose them without considering the content. Her view, with which I agree, is that he only started to properly address the liability during the divorce proceedings as he wishes her to share the financial burden caused by his financial mismanagement. She submits that recently it appears that he has been able to negotiate an instalment plan of payments with the IRS. The wife primarily contends that the husband should be solely responsible for the IRS debt which came about due to his deliberate failure to meet the expenses, especially as he was able to spend money on his aforementioned lifestyle in 2013 and 2014 rather than using that money to meet his IRS liability. The wife stated that he should bear sole

responsibility for the tax liability of US$39,160.42 outstanding for the period 2006 to 2011 which he appears able to pay at the rate of US $700 per month. She contends that at no time has he properly explained why he failed to make those payments. Mr. Hampson, in his written comments received on 11 January 2016, stresses that at the very least it would be:

> *"totally unfair on the wife to attribute to her detriment any sum for interest and penalties"* especially as the husband had *"a duty to order his financial affairs."*

79. As a general rule, for a US citizen, income tax is a necessary expense incurred in the process of earning marital income. Thus, to the extent that income tax is based upon marital income, income tax liability should generally be treated as a marital debt. This does not depend on whether the taxes are paid in a timely fashion. A debt incurred for a marital purpose benefits the marital estate and should be paid from the marital estate. The late payment of the tax liability does not change the fact that the marital estate benefitted from the debt. In some cases the marital estate can benefit from the delay, as the marital funds that should have been used to meet the liability may have generated additional value through income or appreciation during the delay. As a consequence, the principal portion of income tax debt on marital income is a marital debt, even if paid late or taxes remain due.

80. I am satisfied that during the marriage the husband redirected some of his marital income to benefit the family which could have been used to pay his

income tax liability. This is not a case where all of his income was clearly spent for the husband's exclusive benefit, although some was. That is not the end of it, as the US Tax Authority has imposed interest and debt penalties due to the late payments. I find that these are due to the husband's financial mismanagement. I cannot disregard the fact that the husband is an experienced accountant and that he can be regarded as being fully aware of his tax obligations. I am satisfied that the interest and penalty portions of the debt which have arisen due to the husband's unilateral late or non-payment of taxes are the husband's separate debt and he is responsible for paying them. They are non-marital debts as they are solely attributable to the husband's delay in filing. This means that if the balance of the tax liability still to be paid for each year is greater than the interest and penalty figure for that year then the husband now bears responsibility for that outstanding payment. On the other hand, if the liability figure is less than the interest and penalties imposed for that year, then the difference between the principal and the penalties and interest should be included in my distribution calculations.

81. The CI$ figures for the tax liability are;

- 2006 - Total liability $661 minus interest of $19.86 = $641.14
- 2007 - Total liability $941 minus interest of $28.27 = $912.73
- 2008 - Total liability $4,337.60 minus interest/penalty $497.41 = $3,840.19
- 2009 - Total liability $8,130.89 minus interest/penalty $742.51 = $7,388.38
- 2010 - Total liability $10,108.57 minus interest/penalty $931.06 = $9,177.51

- 2011 - Total liability $8,101.36 minus interest/penalty $944.53 = $8,101.36

82. In relation to the tax liability for 2012 I am not willing to accept the estimates provided by the husband, especially as he indicated that the final assessed figure should have been known in May 2015. After the hearing the husband has failed to take up the further opportunity given to him by the Court to properly verify the figures for both 2012 and 2013. That said, in the absence of verified figures a just way of dealing with it is to take the average net figure (following deduction of penalties and interest) for the previous three years, which would give a figure of $8,222.41 for 2012. For 2013, it is appropriate, having regard to the previous figures to roughly assess a figure of $1,000 for interest and penalties, giving a net figure of $9,442.70.

83. I am satisfied, having added up the net figures set out in paragraphs 77 and 78 above that the total tax liability figure which can be treated as matrimonial debt is CI$47,726.42.

84. The husband also comments upon a potential capital gains tax liability if the FMH is sold, but he is unable to confirm whether such a payment will be required. On the evidence before me, the husband has not satisfied me that such a liability will exist and therefore it is not appropriate to include a figure for capital gains tax in my calculations.

CONCLUSIONS

85. I approach this case on the basis that each party will retain their motor vehicle, their pension and the contents of their bank accounts. The wife will retain her jewellery and the contents of the FMH and each party will be responsible for their loans and credit card debt. In relation to the motor vehicles there is a $30,000 disparity of value in favour of the husband. Offset against that is my finding, based on the limited evidence placed before me, that the wife's jewellery should be valued at $4,000 and the house contents at $15,000. This means that the disparity between the husband and wife is reduced to $11,000. I have found that the IRS liability (excluding penalties and interest) amounts to $47,726.42 which the husband, along with the interest and penalty element, will pay. 50% of this tax liability, $23,863 is the wife's. The husband will pay the full tax liability and this means that there is a disparity in favour of the wife in the sum of $12,863 which can be taken into account when reviewing the parties' interest in the FMH. The husband is, in principle, entitled to a 50% share of the $385,000 equity in the property.

86. On the basis that the husband is responsible for the outstanding school fees for the reasons stated earlier in this Judgment and for the IRS payments, I go on to consider what should happen to the FMH. The FMH has an agreed value of $385,000. This is a case in which I have determined that each party has an equal interest in the property, namely $192,500. Having regard to the disparity in favour of the wife of $12,863 the value of his interest would amount to

$205,363, a percentage of 53.34%. This percentage may then be varied depending on what type of order the Court goes on to make in relation to the FMH.

87. The wife seeks an outright transfer of the FMH into her name with no sum paid to the husband. This would clearly not be a fair order to make and would not be in line with Lord Nicholl's statement in ***White v White*** when he said:

> *"...There is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles....As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."*

88. The husband seeks a sale of the FMH in which both parties are entitled to an equal share of the equity. As there are three children, with the youngest still having a good few years left at school, if having regard to the family's financial circumstances a realistic possibility exists of them remaining in the FMH with the wife, the Court should be slow to feel obliged to sell the property and consider other options. During the hearing I also informed the parties that the Court might be considering making either a Martin or Mesher order. I have carefully considered paragraphs 82-86 of the Written Closing Submissions filed on behalf of the wife.

89. In ***Mesher*** an order was made that the former matrimonial home be held on trust for sale for the parties in equal shares and for the house to not be sold until the child of the marriage was over the age of 17 or until further order. This enabled the wife to remain living in the home rent-free, but she was required to pay for the outgoings and half of the capital repayments. Although in that case it was an equal share the Court can fix another percentage share of the proceeds of sale at this time. One of the advantages of a Mesher order is that it satisfies the statutory requirement under s.19 MCL for the Court to have regard first of all to the best interests of the children of the marriage. The postponement of the sale at a time when the parties' finances are stretched has the benefit of delaying incurring immediate moving costs and other costs associated with the sale of the property. This is particular so when the husband has already moved out into rented accommodation.

90. Mr. Hampson invites the Court simply to make an outright transfer to the wife and not to make a Mesher order. He relies upon the case of ***B v B (Mesher order)*** [2003] 2 FLR 28 in which the Court did not adopt the Mesher approach, feeling that it would be unfair to expect the wife to relinquish capital at a future date. The Court considered that there would be inequality because the husband was in a position where he was more likely to generate capital than the wife as she would be responsible for looking after the child of the family. The facts in ***B v B*** were not typical and are very different to those in the matter before me. The marriage was very short, one year. The child was very young, aged only one. In

the matter before me the children range from 12-16 years old and the mother is in good full-time employment and has a very supportive wider family who live in close proximity. The Court felt that the earning capacity of a mother of such a young child would be adversely affected and that it should take into account her post marriage contribution to the marriage from raising the child for so many years. The Court found that the father, unlike the mother, would be able to recreate his capital lost under the order.

91. Mr. Hampson also refers to the case of ***Tattersall v Tattersall*** [2013] EWCA 772. In that case the circumstances are also different to those before me. The parties were in their mid-30s and were married for 10 years. There was one child of the marriage, aged 3½ years old, who lived with the mother. The Court of Appeal did not criticise the trial Judge who decided that the mother's need to house herself and the child, justified a departure from equality in proportions which she calculated were approximately 30% to the husband and 70% to the mother. The Judge started from the mother's need to fund the purchase of a property for £250,000 and her mortgage capacity of £100,000. The mother therefore needed £150,000 towards the purchase and needed also to pay off her debts. Mr. Hampson relies upon the case, commenting that "*the fact that the Judge declined to make a mesher order was not criticised on appeal.*" However, at paragraph 54, which is set out in the written submission, Lady Justice Black also stated that some Judges in the circumstances of the case might have made a Mesher order. She highlighted, drawing similarities with ***B v B,*** the fact that the

child was only three years of age and that this would likely impact the mother's career as she would have to make a substantial and protracted contribution to the welfare of the family. The Court of Appeal ultimately felt that mother should be compensated with more of the capital because of the damage to her career potential in caring for the minor child. The Court of Appeal felt that the Judge had been entitled to take into account the potential for future conflict, up until payment in approximately 20 years, arising under the operation of a Mesher order. The Court of Appeal also said where the finances are so tight and there are legitimate needs to be met, both parties are expected to cut back on their living expenses.

92. When deciding whether or not to make a Mesher order I am conscious of the concerns about the potential conflicts that may arise over issues such as structural repair and insurance, and due to both parties being bound to one another for an extended period. One detriment of such an order is that the husband, whilst not having the benefit of occupying the FMH, may be unable to have access to his share of the FMH until, for example, the child of the marriage reaches 18 years of age. This may cause him difficulty in himself purchasing a property, although I note in the matter before me the husband says he is settled in a rental property and he has a far bigger income capacity than the wife. A Mesher order can leave parties in a state of uncertainty about whether or not they will be able to rehouse themselves when the proceeds of sale become available.

93. Thorpe L.J. in ***Dorney-Kingdom v Dorney Kingdom*** [2000] 2 FLR 285 recognised the problems that may exist with Mesher orders. He agreed with the granting of the Mesher order because the matrimonial home had sufficient value that the wife could be rehoused and the husband adequately compensated on the sale of the property when the children would no longer need to be housed. Thorpe J. stated at paragraph 16 that when he made this decision he bore in mind that the:

> *"Mesher order has been criticised in a number of decisions in this court for producing a harsh situation in which the primary carer, having discharged her responsibility to the children, is then left in a position when she is unable to rehouse herself as an independent person, probably at a relatively vulnerable stage of life."*

94. Thorpe L.J. also said that it was necessary to find a clear explanation for stripping a husband of his acquired capital beyond the point that enabled his wife as the primary carer to discharge her responsibility for the children until they achieved independence. Thorpe L.J. highlighted that, when considering whether there should be a Mesher order and the percentage share upon sale, the Court should have regard to the wife's housing needs at the time of sale and compensation to her for having to draw on her own resources to maintain the property until that date.

95. In the matter before me the husband is in rental accommodation. The trigger point for the sale of the FMH under a Mesher order would arise only in around seven years' time, the youngest child will be 18 years old in October 2022. The

children reside with wife and it is in their best interests to remain in the FMH. If the proceeds of sale from the property were divided almost equally at this time, although the husband may be able to raise a suitable mortgage to enable him to purchase a suitable property for a single person, it does not appear that the wife could be in a position to purchase a family home. When the children have all left school, she could then seek to purchase a smaller property. She has less income capacity than the husband, especially as her working hours are more limited than the husband's as she will be the children's sole physical carer until they leave school. Thankfully there is no mortgage on the property and, as the wife will not be paying occupational rent, I deem it appropriate for her to be responsible for routine maintenance and decorative repairs as well as for the cost of insuring the FMH prior to the sale of the property. Although quantifying these costs to be met by the wife, especially on the evidence placed before me, cannot be an exact science, I am satisfied that these contributions, coupled with the fact that she does not have the same capacity as the husband to raise capital during the next seven to eight years to put towards topping up the proceeds of sale to enable her to buy a new home when she is about sixty years of age, makes it just and fair for her to obtain 55% of the proceeds of sale, with the husband's share being reduced from 53.34%[26] to 45%.

96. I order that the FMH be held by the husband and wife upon trust for sale for themselves as beneficial tenants in common, the proportions being 45% share to

[26] See paragraph 86 above.

the husband and 55% share to the wife and be upon the following terms and conditions:

a) The wife shall be entitled to occupy the FMH rent free to the exclusion of the husband until sale;

b) The property shall not be sold without the prior written consent of both parties or further order until the first to happen of the following events ("the determining event") namely:

(i) The youngest surviving of the children of the marriage attaining the age of eighteen years or completing his full-time secondary education whichever shall be the later; or

(ii) The death of the wife.

c) The wife shall with effect from the date of this order be solely responsible for all routine maintenance and decorative repairs to the said property;

d) The costs of insuring the property shall be met by the wife. The wife is directed each year within one month after the renewal date of the house insurance policy to serve the husband with a copy of the relevant renewal notice certifying that the premium has been duly paid or that an instalment agreement for payments put in place;

e) The cost of any structural repairs defined as repairs to load-bearing walls and to the roof shall be shared equally between the husband and the wife provided that no works of structural repairs shall be carried out to the

said property save by agreement between the parties or by further order of the Court;

f) If the wife shall remain in occupation of the property for more than six months after the determining event, she shall pay to the husband from the date thereof such sum by way of occupation rent as may be agreed or, in default of agreement, determined by the Court; and

g) On or before the determining event the wife shall have the right to purchase the husband's interest in the property at an open market valuation to be agreed, or, in default of agreement, to be determined by the Court.

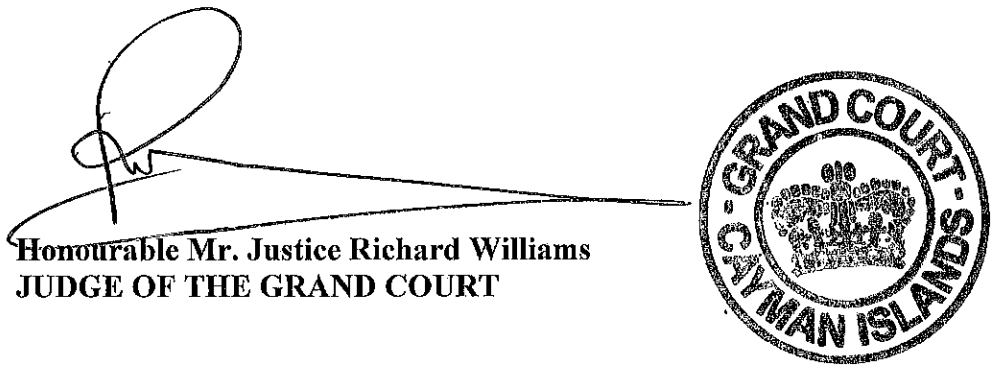
97. Notwithstanding the provisions of paragraph 96, but subject to the requirements in 96 b), the wife is not disentitled at any time prior to the determining event, from placing the property on the market. Circumstances may arise in which she no longer wishes to live in the property and it would not be appropriate to compel her to do so. While the property provides a home for the children, and the wife wishes to live there, she should have the right to do so. In the event of such a sale, the net free proceeds will be divided between the parties in the shares provided for by this order.

98. When the time comes for the property to be sold both parties shall cooperate with each other to achieve the best possible price for the property.

LEGAL FEES/COSTS

99. Unless I hear from the parties within seven days of the delivery of the perfected Judgment that they wish to make further submissions on the issue, I intend to make no order for costs.

100. I end by thanking both Counsel for their careful and well-argued presentation of their clients' respective cases in this matter. I also thank both parties for their patience in awaiting this decision.



Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT