



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2009: No. 88

BETWEEN:

S

Petitioner

-and-

S

Respondent

Dates of Hearing: 2-3 June 2010

Date of Judgment: 28 July 2010

Mrs. Jacqueline MacLellan of MacLellan & Associates, for the Petitioner;
Mr. Jai Pachai of Wakefield Quin, for the Respondent

JUDGMENT

1. I shall refer to the parties as the husband and the wife although they are now divorced.
2. The petitioner, husband, is Bermudian and the respondent, wife, is Brazilian.
3. They were married on the 5th September 2002. The marriage was unhappy and they had counselling virtually from the commencement of the marriage. They finally separated in November 2008 when the wife left the matrimonial home. Decree Nisi was pronounced on the 24th July 2009 and made absolute on 1st October 2009.
4. There is one child of the family.

5. This hearing is in respect of an application by the wife filed on 8th July seeking the full range of ancillary relief – periodical payments, maintenance pending suit, lump sum provision, settlement or transfer of property, variation of a settlement and a property adjustment order.
6. On the first day of the hearing Counsel for the wife informed the Court that the wife abandons her claim for a transfer of property or a variation of settlement and was seeking an order for a lump sum payment.
7. The parties filed four affidavits two (2) by the wife and two (2) by the husband. Both gave oral evidence and were cross examined.
8. There is an agreed statement of facts. I have had the benefit of written and oral submissions from Mrs. MacLellan and Mr. Pachai Counsel for the husband and the wife respectively.
9. The wife is seeking a lump sum payment of two million dollars while the husband submitted that based on the circumstances of this case she is entitled to lump sum of \$478,765.08.

Background

10. The husband is 44 years and the wife is 39 years old.
11. The parties were married on 5th September 2002. They separated in November 2008 the wife moved out of the former matrimonial home and moved into a two bedroom townhouse. They were divorced by 1st October 2009; therefore the marriage lasted 7 years.
12. The only child of the marriage was born in October 2006 and is now 3 years and eight months. The parties have joint custody of the child but the issue of her care and control is the subject of opposing claims by the parties and is to be decided by the court at a later date. In the interim the parties jointly share her care and control. She attends a nursery three mornings per week from 9.00am to 2.00pm. In September 2010 she will be attending a foundation year program from 8.30am to 3.00pm daily.

13. Following a lengthy period of negotiations, the husband purchased the life interest in the property, in April 2002 and on 10th September 2003, from all the beneficiaries except one for \$950,000. This interest is subject to a life interest owned by a Swiss national. There is no mortgage against the property.
14. The agreed statement of facts shows that the husband works as a general physician. He has a medical practice which operates under the umbrella of a Medical Center (MC) which was opened in December 2007. The Medical Center has a nominal value given its infancy and the debt associated with it.
15. The MC is owned by the C S Trust. MC owes the trustees of the C S Trust \$135,608 and the husband \$571,180.

The wife's income, expenses and earning capacity

16. The wife has no assets, property or any financial resources. Her income is minimal from her ad hoc earnings. She has been dependent financially on the husband. She receives \$7,300 monthly from him. The wife has a car valued at \$6,000. It continually breaks down and she expends a significant amount of funds to keep it running. The wife owes approximately \$105,000 in legal fees
17. Before coming to Bermuda the wife worked full time as a pre-school teacher.
18. The wife is a qualified language teacher who speaks and writes fluent Portuguese and English. Early in the marriage she returned to Brazil where she completed her bachelors. She has a Bachelor of Arts degree in Portuguese and English. The husband defrayed the cost of this training. She has taught at a language institute and has had experience translating documents. She is licensed to teach these languages.
19. In 2009, while the husband looked after the child the wife took a computer course in order to endow herself with office skills. The husband paid for the course. The wife has a certificate

effective 1st March 2010 which allows her to work in Bermuda without having to secure a work permit.

20. I am satisfied that the wife and the husband discussed and it was understood between them that once the child was in school she would return to work as a teacher starting about September 2010. I am also satisfied on the evidence that the wife can find employment as a teacher or in the first instance a teacher's aid which would give her remuneration of about \$60,000 per annum. The child will be attending school from 8.30am to 3.00pm daily starting September 2010. I have had regard to the evidence I consider that by September 2011 the wife will be able to put into effect her earning competence as a teacher or teacher's aid.

The husband's income and earning capacity

21. The agreed facts show that the husband works as a general physician. He completed his training and had been established in his career before he met and married the wife in 2003. The husband inherited three properties from his grandmother prior to his marriage to the wife. He sold the properties in 2007 and put the cash proceeds of \$3,140,531 of the sale in the C S Trust. The child of the marriage is the sole beneficiary of the trust. The wife is not and has never been a beneficiary of the trust. The C S Trust has investment in the amounts of \$2,853,675.89 at Schroder as at 28th May 2010 and \$680,003.04 as at 31st May 2010. In addition the husband has investment worth \$454,911.24. I accept and find as a fact that the husband had completed his medical training and established his medical practice long before he met the wife.
22. The husband's medical practice now operates under the umbrella of a Medical Centre (MC) which was opened in December 2007. MC is owned by the C S Trust. In order to open the medical centre the husband borrowed \$500,000 from the C S Trust for 10 years with 6% interest and \$767,757 from his personal savings. The Medical Practice owes the CS Trust \$135,608 and the husband \$571,180 as at 31st December 2009.
23. The husband works four mornings per week. He draws a salary of \$13,801 per month from the business. He pays the wife \$7,500 monthly – \$4000 for rent and \$3,500 for living expenses.

24. He has undertaken to pay all of the child's living expenses including educational cost (university as she chooses) medical and significant periodical payments to the wife for the child's maintenance.

The Assets

25. Mr. Pachai summarises the husband's asset position is as follows:

i.	a.	\$2,825,675.89	The CS Trust	Schroeders
ii.	b.	\$ 680,003.04	The CS Trust	Barrington
iii.	c.	\$2,100,000.00	Former Matrimonial Home	Bethel Island
iv.	d.	\$ 57,000.00	Boats	
v.	e.	\$ 74,808.00	Pension	
vi.	f.	\$ 38,000.00	Car	
vii.	g.	\$ 135,608.00	Debt to CS Trust	
viii.	h.	<u>\$ 571,180.00</u>	Personal loan from the Petitioner	
		<u>\$6,482,274.93</u>		

26. Mr. Pachai submits that the wife invites the court to require the husband to pay her a lump sum of \$2 million, which is less than one-third of the husband's total assets, in full and final satisfaction of all claims.

27. Additionally the wife seeks an order for ongoing periodical payments in the sum of \$6,500. This order would continue until such time as the wife secures sufficient full-time permanent employment, at which time the payment should be reduced to \$4,500, depending on the level of income she receives from her employment.

28. Mr. Pachai submits that in contrast to the wife by virtue of the husband's profession, he has a significantly greater earning capacity both current and in the foreseeable future. He maintains that the husband is actively increasing his business, by recently employing an associate doctor. On the other hand the wife is only recently embarking on employment in Bermuda with little past language teaching experience. While the wife accepts that the husband's

assets come from an inheritance, she argues that her housing and financial needs and that of the child are such that these assets cannot be excluded.

29. On the other hand, Mrs. MacLellan argues that the matrimonial assets do not include the assets in the C S Trust. These assets are held by the Trustees for the benefit of the child of the family. In any event fairness demands that the non-matrimonial assets should not be included in the division of assets. This was an inherited asset and the wife's needs are able to be met from the sharing of the matrimonial property and the Petitioners income.

30. Mrs. MacLellan assessed the value of former matrimonial home as follows:

- i. Value \$950,000
- ii. Real Estate Commission \$47,500
- iii. One half stamp duties and legal fees \$19,767.50 leaving a total of \$882,732.50 as the net equity.

In paragraph 24 of her submission she assesses the total amount of the matrimonial assets as \$1,196,912.70.

31. Based on her assessment Counsel for the husband submits that the wife should receive 40% of the total value or \$478,765.08

32. I disagree with the value of \$950,000 placed on the property by Counsel for the husband.

Valuation of the former matrimonial home

33. In December 2009 Mr. Newton, experienced in the valuation of residential properties valued the property, on the basis of an unencumbered fee simple interest in the property (i.e. not taking account the effect of the existing life interest) at around \$2m to \$2.1m. He said that in a real situation a prospective purchaser would be very cautious about the possible effect the life interest might have not only on the value but on the overall appeal. The property is situated on an Island. It has one main dwelling (divided into two dwelling units) each with ARVs. In addition to the main living accommodation at the upper level, there are ground floor ancillary areas in the building. The majority of the property is given over to the grass

and material landscaping. The house was built between 1900 and 1950. There are severe cracks in the porch structure to the southern elevation of the main unit. Many of the wood framed windows are in poor condition with some exhibiting a fairly advanced stage of rot. The kitchen is dated as are all the bathrooms. The apartment is currently in an “inhabitable” state.

34. Except for one beneficiary the husband finalised the purchase of the beneficiaries’ interest in this property in 2003 for \$950,000. The owner of the one remaining life interest is a foreign national and, although he has visited the husband’s office on a few occasions and nattered about his interest, he has not to date insisted on occupying the property.

35. I find it quite remarkable that Mrs. MacLellan says that were the husband to sell the island property in this market he was not likely to receive any more than the purchase price of \$950,000 which was paid in 2003. It is general knowledge that the price of real estate increased in the order of 20% annually over the last several years. It is impracticable to say therefore that were the husband to sell the property it would not fetch any more than the purchase price. Equally I disagree with Counsel for the wife’s submission that the value should be taken as \$2.1m. In my view the true value of a property lies in what a purchaser is prepared to pay for the property and a seller is prepared to accept on an open market basis. Mr. Newton did not discount the value although he sounded a note of caution about the possible effect a life interest would have upon the market value with vacant possession. In my judgment a more conservative approach can be taken because of the outstanding life interest, albeit it may never be put into effect. It would seem that the life expectancy of the foreign national is about 7-8 years. In the circumstances I propose to assess the value of the Island at \$1,800,000, on the evidence before me.

The Court’s Approach

36. In this case the court is required to determine the lump sum payable to the wife, the level and duration of any periodical payments payable to her and the quantum of maintenance for the child.

The husband and wife had marital difficulties from the inception of this marriage which lasted seven years.

They had marital counselling throughout the marriage but it failed. The only child of the marriage was born two years before they separated.

The husband who is Bermudian and a qualified medical practitioner and has started to build his medical practice several years before he met the Brazilian woman who later became his wife. The wife made no contribution to the development of the medical practice or the development of the medical centre under which umbrella the medical practice operates. Part of the husband's angst is that during the time he was trying to establish the practice life at home was unpredictable.

The parties have not contributed equally to this marriage. The assets did not derive from their joint efforts. The husband inherited three properties in 1994 from his grandmother which he eventually sold in 2007. He used the proceeds of this sale to establish a trust. The child is the sole beneficiary of the trust.

The husband started to negotiate the purchase of the property which became the matrimonial home before the parties met. The wife is a qualified language teacher. She earned her degree just prior to the marriage. The wife has training in computer skills. The husband baby sat the child while she attended classes to secure this training. The husband paid for both sets of training. They ordered their affairs with the mutual understanding that the wife would seek gainful employment outside of the home. After the child was born the husband asked her and she agreed to stay at home with the child until she entered nursery school. Thereafter, it was agreed that she would commence work. Presently the child is in nursery school three days per week and commencing September 2010 she will be attending a foundation year program from 8.30am to 3.00pm daily.

On this evidence I find that this was not a marital and business partnership whereby each party contributed to the full for the seven years of marriage.

The husband wishes the wife to remain in Bermuda with the child. The wife wishes to remain in Bermuda but has expressed a desire to reside in her own home where she can care for the child. The husband accepts that he must provide housing for the wife and child but prefers to purchase a house and give the wife and child a life interest. Alternatively, Counsel submits that the husband's income is sufficient to ensure that the wife can rent a home equivalent to the standard of living which she enjoyed during the marriage and which she has been living in since the separation.

37. Based on the findings of facts this case raises points of law relating to the application of the sharing principle, what is the approach to be taken when there is matrimonial and non-matrimonial property – inherited property or gifted property, and the impact of section 76 -77 of Part 1V of the Bermuda Immigration and Protection Amendment Act 2009 on property to be held by or for the benefit of a “restricted person”. In order to determine the approach the court is guided by section 29 of the Matrimonial Causes Act 1974 and the existing authorities.

The Law

38. Following the guidance in the landmark cases of *White v White* [2001] AC 596, *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 it has been established that in considering the quantum to be settled in ancillary relief matters a court should first have regard to the financial position of the parties and section 29 of the Matrimonial Causes Act 1974 (MCA) which sets out the statutory task. The 1974 Bermuda Act is almost in identical terms as the English 1973 MCA. In all cases the objective is fairness. Each case should be individually assessed. The process of distribution is informed by need (generously interpreted) compensation and sharing. In seeking a fair outcome there is no room for discrimination.
39. In *J v J* [2009] EWCH 2654 (Fam) at paragraph 288 Mr. Justice Charles said the following proposition can be stated with some certainty:
- i) Fairness is the objective.
 - ii) The distribution of assets between the parties should be effected on a principled and not on an arbitrary basis.

- iii) The starting point is the financial position of the parties and s. 25 MCA 1973. This appears for example at paragraph 67 of the judgment of Sir Mark Potter P in *Charman v Charman* [2007] 1 FLR 1246 (*Charman (No 4)*) where he says:

“... the starting point of every inquiry in an application of ancillary relief is the financial position of the parties. The inquiry is always in two stages, namely computation and distribution;”

and at paragraph 24 of *B v B (Ancillary Relief)* [2008] 1627 (cited below).
- iv) The House of Lords in *White v White* [2001] AC 596 and *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 has given guidance as to the approach and principles to be applied in the exercise of the statutory discretion conferred by the MCA 1973.
- v) That guidance makes it clear that the court is to have regard to, and apply, the relevant statutory provisions.
- vi) In doing so the three main principles that inform the second stage of the enquiry (i.e. distribution), and thus the reasoning to be applied in determining on a principled basis applying the statute what is a fair result, are need (generously interpreted), compensation, and sharing.
- vii) The source of assets is relevant.

Matrimonial property and non-matrimonial property

40. In the Miller case matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance.

41. *At Paragraph [22-25], the court dealt with how the source of assets should be treated. The court said as follows:*

“...The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter

is not. 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 it 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.

[23], the matter stands differently regarding property ('non-matrimonial property') the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the White case [\[2001\] 1 AC 596, 610](#):

- i. 'Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. 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.'*

[24]. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

42. In this case the husband's inheritance which he received from his grandmother in 1994 should be treated as non- matrimonial property. The property was sold in 2007 and the proceeds placed in trust. The child of the marriage is the sole beneficiary of this trust.

Periodical payments and the clean break principle

43. Counsel for the wife in addition to the lump sum being sought is seeking maintenance for the wife by way of periodical payments for ongoing maintenance. At paragraph 35 the court dealt with the impact of the clean break principle on periodical payment orders. This reads:

“[35], This leads me to the second issue regarding periodical payments orders. It concerns the impact of the clean break principle on periodical payment orders made to provide compensation to a disadvantaged party. There is of course a significant practical difference between providing compensation by appropriate division of existing capital assets and providing compensation by means of a periodical payments order. Of its nature a lump sum payment is once and for all. A lump sum payment represents, to that extent, the financial closure of a failed marriage. It draws a line under the past. Periodical payments represent the opposite. Future earnings and future payments lie in the future. They are a continuing financial tie between the parties. Today the undesirability of such continuing ties is regarded as self-evident. The modern approach was expressed succinctly by Lord Scarman in his familiar words in Minton v Minton [1979] AC 593, 608:

i. ‘An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.’ “

44. *“At paragraph [38] the court expressed the view that the court should have in mind that the parties’ mutual financial obligations should end as soon as the court considers just and reasonable.”*

45. *“The requirements of fairness*

2. The statute provides that first consideration shall be given to the welfare of the children of the marriage. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (b): ‘the financial needs, obligations and responsibilities

which each of the parties to the marriage has or is likely to have in the foreseeable future'.

3. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

*7. A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R* [[1992](#)] [1 AC 599](#), 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.*

*8. This principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [[2003](#)] [EWCA Civ 565](#); [[2003](#)] [2 FLR 299](#), 305, para 19 per Hale LJ. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership. “*

46. Added to these circumstances one must add the case of a non-Bermudian spouse who needs a home to care for children of the family. The Bermuda Immigration and Protection Act 2007 provides for additional circumstances that must be considered. The husband wishes the wife to remain in Bermuda with the child of the family and accepts that he has to meet her housing

requirements. He has put forward a number of suggestions among them that he would rent a property for her benefit whilst she remains in Bermuda. Also he had suggested that he would purchase a property, give the wife a life interest and the child the remainder interest.

47. I accept Counsel for the wife's submission that such a transaction is illegal and is contrary to Sections 76 and 77 – Part VI of the Bermuda Immigration and Protection Amendment Act 2007. The sections are as follows:

Section 76 “Restricted person holding or acquiring land without a licence:

No restricted person shall hold or acquire land in Bermuda with the intention of occupying it, or of using or developing the land for profit at any time whether for his own benefit or for the benefit of another person, unless the restricted person has a licence or a deferral certificate.

“Benefit” is defined as meaning any benefit whatsoever, including an indirect benefit, an eventual benefit and a potential benefit (section 72).

Section 77 “Trustee holding or acquiring land without a licence : No trustee shall hold or acquire land in Bermuda in trust for a person that the trustee knows or has reasonable grounds to suspect is a restricted person, unless the trustee has a licence or a deferral certificate.”

“Trustee” is defined as including “any person who owns land in Bermuda, against whom another person (in this Act a beneficiary) or a person directly or indirectly deriving right from a beneficiary may enforce rights at law or in equity, however they arise, such that the person in ownership is not able to dispose of the land and use the proceeds of disposition as a beneficial owner absolutely entitled to encumbered property” (section 72)

48. The husband is unable to do as he suggested as the Act prohibits it. Additionally in providing for the wife and in contemplation of a clean break both parties should be allowed to get on with their respective lives.

Conclusion

49. Although not lavish the parties had a comfortable standard of living. The husband will continue to reside in the former matrimonial home which is in rundown condition and requires refurbishing. The plumbing and electricity system needs upgrading. The husband said that he does not spend any money to fix up the property because of the threat of the foreign life tenant. The wife and the child must be provided with a comfortable home. The court must deal with the reality of the situation. In my judgment although the point was not argued before me the legislature had no intention of treating a foreign spouse any differently from a Bermudian spouse after the breakdown of a marriage.

50. Each party to a marriage is entitled to a fair share of the available assets.

In search of fairness, the court must also consider the feasibility of allowing the parties to carry on with independent lives in failed marriages. The assets are as follows:

a. **Non-matrimonial – inherited /gifted property**

ii. \$2,825,675.89 The CS Trust

iii. \$ 680,003.04 The CS Trust

\$3,505,678.93

b. **Matrimonial Assets**

iv. \$1,800,000.00 Former Matrimonial Home

v. \$ 57,000.00 Boats

vi. \$ (74,808.00) Pension is excluded from the calculations as it is not immediately realisable

vii. \$ 38,000.00 Car

vii. \$ 571,180.00 Personal loan due to the Petitioner

viii. \$ 6,000 Respondents car

\$2,472,180.00

51. What are the requirements of fairness in this case? Of the assets \$3,505,678.93 represents the proceeds of property that was inherited by the husband from his grandmother in 1994. That property was sold during the marriage and placed in a trust. The child of the marriage is the sole beneficiary of that trust. The husband brought the matrimonial home and the other assets which form the matrimonial asset into the marriage. The court has excluded the accrued

pension of \$74,808 from the calculation although the fact that the husband will be entitled to a pension is taken into account in the overall assessment.

The parties' needs

As I must, I give primary consideration to the care and financial support of the child of the marriage whose care and control is shared almost equally by her parents. The husband accepts the responsibility to pay for her general maintenance, and her educational costs inclusive of her tertiary education should she wish to attend university. Commencing September 2010 the child will begin private education, which is a long term substantial financial obligation that the husband will carry well into his sixties if the child decides to attend university.

The custody of the child is still unresolved. Nevertheless, irrespective of the final result of the custody issue both the husband and the wife have a need for accommodation. The husband has a home which he will keep and will continue to reside there. The husband accepts that the wife has a need for accommodation. He is unable to purchase a house for the benefit of the wife and child as that proposal infringes the Bermuda Immigration and Protection Act. This act prohibits the husband holding property for the benefit of a restricted person.

The husband has also offered to pay rent for their benefit as he is presently doing. This too would be a long term financial commitment and fraught with difficulties. This type of arrangement is likely to be “overshadowed by the relationship that has broken down” and would not allow the parties to get on with their own lives, see the remarks of Lord Scarman in Minton paragraph 47 supra.

The wife's financial needs require that she should have a home in which to live and to take care of the child. When considering the wife's housing needs it is important to bear in mind that she should not be seen as the poor relation. Whenever a “restricted person” purchases property he or she must comply with the provision of the Bermuda Immigration and Protection Act. Counsel for the wife referred the court to the latest listing of properties available for sale to non-Bermudians. At the lowest end of the scale is property for \$1.150m. He submits that since the property has been on the market for sometime the price maybe negotiable. She has to pay a land holding charge of 18% of the value of the land plus the other costs associated with the purchase.

52. Applying the principles which I have set out to the facts, in my judgement, based on the evidence the wife's needs will be satisfied by having a home with a garden where she and the child can reside comfortably. I consider that her need for a housing fund inclusive of all cost of acquisition is approximately \$1.1m. She needs a car as the one she has is on its last legs. She has legal fees liabilities of about \$105,000. She has put forward an annual budget of \$80,000 or approximately \$6,700 monthly.
53. The way the parties organised their affairs it was always understood that the wife would be employed. After the child was born the wife did not commence working as the husband asked her to stay at home and look after the child until she entered nursery school. It was discussed that that the wife would begin her employment after the child entered nursery school; she did not do so. In September 2010 the child will enter a full time programme yet the wife took no steps to secure employment. She has now secured her Extension of Spouse's Employment Rights Certificate (ESERC) which allows her to work without having to secure further immigration approval.
54. This was a relatively short marriage. As was said by Hale L.J, in Foster at paragraph 48 supra a short marriage is no less a partnership of equals.....In the nature of things this will affect the quantum of the financial fruits of the partnership.
55. A significant amount of the assets is made up of non-matrimonial property – they derive from the husband's inheritance in 1994. Therefore, I give weight to their origin and I accept that they should not be invaded unless the wife's needs cannot be met without an invasion. Pre-acquired and gifted assets constitute a "good reason" to depart from equality within the sharing principle. In any event the assets are in a trust and based on the evidence this court has no jurisdiction over the trustees in these circumstances.
56. It is clear to the court and it finds that the parties had agreed that the wife would return to work once the child of the family started nursery school. The wife will in time be able to exercise her earning capacity. However, I propose to order a measure of compensation by way of periodical maintenance payments for a limited period within which her teacher's career can be established. She lost 3 years in doing so while she was at home caring for the

child. Fairness dictates that she should receive financial assistance from the husband until she is more settled. In my estimation this should be no later than September 2011.

57. In assessing the wife's entitlement, applying the sharing principle, I would have allowed her 30% of the matrimonial assets or \$741,654.

58. After I applied the sharing principles the result is less than what is required to meet the needs (generously interpreted) of the wife. If after applying the sharing principle the outcome does not meet the need of the parties only then will those needs dictate a greater share of the property than that produced by the application of the sharing principle. In my judgment the order that I propose to make should now meet the requirements of needs and compensation. In so doing, I have regard to the fact that the husband has the earning and borrowing capacity and will be able to borrow the monies to settle this award.

59. In judgment based on the evidence and having regard to all the relevant factors I consider the sum of \$1.25m a fair result on a clean break basis. Payment should be made within four months of the date of this order.

She is to receive maintenance of \$6,500 monthly inclusive of the maintenance for the child until October 31st, 2011 when the payments will cease. I assess the wife's maintenance at \$4,500 per month and the child's at \$2,000. The care and control application and the child's maintenance issue I believe should be settled before September 2011. Adjustment if any to the child's maintenance will be made at the time that issue is settled.

60. In making this award I reject Mr. Pachai's submission that the wife should receive \$250,000 as a "financial cushion" for future financial emergencies that may occur and periodical payments almost indefinitely; the facts and circumstances and authorities do not support this. The goal is to have the parties "mutual financial obligations end as soon as is just and reasonable."

61. The periodical payment order I make in this case is to provide maintenance for the wife's financial needs until she is in a position where she is employed and more settled. In the circumstances the wife is entitled to periodical maintenance payments of \$6,500 monthly

until 31st October 2011. This should give sufficient time to get her teaching profession on track. For an avoidance of doubt, the status quo in relation to the payment of the wife's accommodation should continue until 3 months after she receives her lump sum award.

62. The husband should be able to meet the payments by borrowing the capital to do so. He should be able to meet this payment and in due time replenish his capital. He will of course, have a substantial financial commitment to the education and maintenance of the child. However, based on the evidence the balance of the asset plus the husband's earning power is adequate to meet his needs.

63. The wife has requested some of the household furnishings. It seems to me that the parties should be able to agree this. However, if the parties encounter any difficulty agreeing the division of the household furnishings they have liberty to apply.

64. I will leave the parties to draw the appropriate order for my signature. The wife's overall award is \$1.25m plus periodical maintenance until 31st October 2011. There shall be a clean break.

65. As requested by Mrs. MacLellan, I will hear the parties on costs if they so wish.

Dated the 28th of July 2010.

Norma Wade-Miller
Puisne Judge