THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(DIVORCE)
A.D. 2013

CLAIM NO. SKBHCV 2013/0007

BETWEEN:

NAEEMAH HAZELLE MENON
Petitioner

And

NICHOLAS MENON
Respondent

Appearances
Ms. Midge A. Morton and Ms Maurisha A. Robinson for the Petitioner
Ms. Sherry-Ann Liburd-Charles and Ms. Sonya Parry for the Respondent

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2013: November 27
2014: April 8

JUDGMENT

[1] **RAMDHANI J. (Ag.)** Dreams of a life together often become reality for many married couples. The planets often stay in perpetual alignment for those lucky ones bringing realization to the hopes, expectations and plans that were given validity by that 'I do'. The married lives that follow for those lasting couples are often perhaps the better for those bad moments and those sad moments that make the bonds even stronger. Most who have grown old together in happy marriage know that sometimes it is those really challenging times that make the marriage what it is – a union of love, for those lucky ones, blessed by children, strengthened by the passage of time and the events of life.

[2] For others, like the divorced parties in this matter, it does not last. Divorce dashes those dreams of a married life. For such unions which are blessed with children, this judicial decree terminating the marriage, calls upon the once-loving partners who were right together, to find a different kind of strength to get past the immediate aftermath of the irretrievable breakdown of the marriage, and hopefully, at least in the near and foreseeable future, settle into some workable routine for the welfare of those children.

[3] In this case, the parties, Naeemah Hazelle Menon, the Petitioner and Nicholas Menon, the Respondent, were granted an order of divorce in 2013 after ten years of marriage and the birth of two boys, Khallil aged 11 and Nile age 7. The issues are many between them, and they have sought the intervention of the court in providing the legal framework for their transition into life after marriage. Hopefully this ruling will provide some direction, and settle for these parties, most of those ancillary matters that often follow divorce.

[4] There are four substantive applications for ancillary relief before the court; two each filed by either side. These applications have raised a number of matters for considerations, including spousal support, custody care and control of the two minor children and possession of the matrimonial home. All of the applications have been contested. All of the substantive applications were consolidated and heard together.

[5] The first two applications were filed by the Respondent following the filing of the petition but before the order of divorce was granted. These applications are (1) an application filed on the 11th July, 2013 for sole possession of the former matrimonial home and for payment by the Petitioner to the Respondent of the value of his interest in motor vehicle PA 2521; and (2) an application filed on the 29 July 2013 for joint custody and care and control of the children of the marriage and for the Petitioner to contribute such sums towards the maintenance and support of the children of the marriage. Affidavits in support of his application for custody was sworn to by his mother Ms. Kaye Menon, and two other persons, Ms. Anita Huggins, the housekeeper for the Respondent, and a Ms. Keimon Archibald who once provided care services for the children. The Respondent himself

swore a total of six affidavits in support of his applications, and in response to the Petitioner's applications.

[6] The last two applications were filed by the Petitioner. These are (1) an application filed on the 17 September 2013 for the sole custody, care and control of the children and spousal support and maintenance of the children; and (2) An application by the Petitioner for interim custody of the children of the marriage filed on the 22 October 2013. She swore a total of eight affidavits.[1] There were two other affidavits filed in support of the Petitioner. These came from a Ms. Nadia Rawlins, Guidance Counselor, and Ms. Alana Burroughs a teacher, who both swore their respective affidavits on the 7 October 2013.

[7] All the deponents were cross-examined on their affidavits.

[8] Before the substantive applications could be heard, there were certain preliminary objections taken to the first application filed by the Petitioner, namely the one filed on the 17 September 2013. As a result of these objections, a procedural application was filed by the Petitioner on the 1 October 2013, to extend the time within which to file the application for spousal support and to deem the application 17 September 2013 properly filed. Following written submissions by both parties on these preliminary points, oral arguments were heard by the court on the 25 October 2013 on the objections and procedural application for leave to extend time, and a decision was reserved on the points raised, and the application. It was agreed at the time that the court would hear the substantive applications on the 27 November 2013, and deliver a single judgment on all the applications including these preliminary points.

[9] Following the hearing of all applications, the parties were ordered to file written closing arguments by the 16 December 2013. These were duly filed together with written

[1] An objection was raised by the Respondent to the affidavit of the Petitioner sworn to on the 2 August 2013. It was submitted that this affidavit being sworn to by the Petitioner before her own solicitor meant that the affidavit should not be used. Reference was made to the learning from England in particular to Halsbury Laws of England Volume 65 (2008) 5th edn. at para 1460. This may have been a point to consider but the Petitioner was allowed to give her oral evidence on oath when she stated that she was relying on all her affidavits and that they were true and correct. I see no reason why I should not rely on this affidavit.

submissions. This is the court's judgment on all the applications. As a logical and chronological matter, I propose to treat with the preliminary objections and the procedural application that were heard on the 25 October 2013, and then to rule on the substantive applications that were heard on the 27 November 2013.

Preliminary Objections to the Application Dated the 17 September 2013, and the Procedural Application for Leave to extend Time.

[10] Following the Petitioner's application dated the 17 September 2013 for spousal support and for sole custody, care and control of the children of the marriage, the Respondent took some preliminary objections. These have raised the following issues:

(i) Whether the court has jurisdiction to hear the Petitioner's application for spousal support filed on the 17 September 2013;

(ii) Whether the court has jurisdiction under section 44 of the Matrimonial Causes Rules 1937 to grant leave to extend time for the filing of the application for spousal support by the Petitioner; and

(iii) If issue number (ii) is answered in the affirmative, whether the court should exercise its discretion to grant leave to extend time sought by the Petitioner in her application of 1 October 2013.

Preliminary Objection No. 1 – Whether the court has jurisdiction to hear the Petitioner Application's for spousal support?

[11] The Respondent has argued that the Divorce Act, by the provisions of sections 2 and 15, only provides for spousal support for 'spouses' and not for 'former spouses', and that when the application was made for spousal support the divorce was already final. This being the case, the parties were no longer spouses. The Petitioner had therefore lost her right to any spousal support.

[12] The Petitioner on the other hand has argued that section 4 of the Divorce Act uses the term 'spouse and 'former spouse' interchangeably, and having regard to the whole of the

Divorce Act, it is clear that the obvious intention of the Act is to allow a former spouse to make an application for an order of spousal support. Any other conclusion would be absurd.

Analysis and Findings

[13] The Divorce Act Cap 12.03 of the Revised Laws of St. Kitts and Nevis (the 'Act') is the relevant legislation that both parties are relying to ground their respective positions. The long title of the Act[2] states that it provides 'for the dissolution and nullity of marriages; and to provide for related and incidental matters.' Ancillary proceedings are described by section 2 of the Act as 'corollary relief proceedings' which means 'a proceedings in a court in which either or both former spouses seek a support order or a custody order or both such orders.'

[14] The court's power to hear and determine an application for corollary relief is found in section 4 which states

> *"The court may hear and determine corollary relief proceedings where*
> *(a) either a former spouse is ordinarily resident in Saint Christopher and Nevis at the commencement of the corollary relief proceedings; or*
> *(b) both spouses accept the jurisdiction of the court."*

[15] Section 2 of the Act goes on to define a 'support order' as an order 'made under section 13.2 of the Act.[3] An examination of section 13 however reveals that it relates to the 'date on which [a] divorce takes effect', and speaks not at all to any 'support order'. It is equally clear that the section that speaks to a 'support order' is section 15.

[16] It is section 15(1) of the Act which has led to this objection. This section reads:

> *"15. Order for Support*
> *(1) A court of competent jurisdiction may, upon an application by either or both spouses, make an order requiring one spouse to secure or pay, or to*

[2] It is legitimate to use the long title of the Act for the purpose of interpreting the Act as a whole and ascertaining its scope. See Vacher & Sons Ltd. v London Society of Compositors [1913] AC 107; See also Re Wykes [1961 Ch 229
[3] Note section 2 also speaks of section 15(1) of the Act in the following terms: "'variation order' means an order made under section 15.(1)

secur(sic) and pay, such lump sum or periodic sums, or such lump sum and periodic sums as the court thinks reasonable for the support of

(a) the other spouse;
(b) any or all children of the marriage;
(c) the other spouse and any or all children of the marriage."

[17] Unlike other jurisdictions, a 'spouse' in St Kitts and Nevis is defined as meaning 'either of a man or woman married to each other'. So is the Respondent right? Is a former spouse barred from making an application for a 'support order'. I would have thought that section 2, providing that it does that 'corollary relied proceedings' means a proceedings in a court in which either or both **former spouses seek a support order** or a custody order or both such orders', actually provides the answer. [emphasis supplied].

[18] The Respondent has argued when section 2 defines 'corollary relief proceedings' as including applications for 'support orders', one has to go on to ask what does a 'support order' mean under the Act? The Respondent states that section 2 also defines 'support orders' as being an order made under section 13(2) of this Act. He says that: 'the reference to section 13(2) in the 2009 revision of the Act is an error and is really a reference to section 15(2). Prior to the latest revision of the laws in 2009 what are now sections 15 and 16 were previously sections 13 and 14 of the Act of the 2002 revised laws. Therefore the reference to section 13(2) of the Act must naturally be interpreted as a reference to section 15(2) since section 13(2) of the 2009 revised laws deals with the date upon which the divorce takes effect and not a support order. Section 15(2) deals specifically with an application for an interim order pending the determination of the application for support (alimony pending suit) and not a final order for spousal support (permanent alimony) as in section 15(1). Based on sections 4 and 2 – corollary relief proceedings does not cover section 15(1) applications for a final order for spousal support (permanent alimony). Therefore that provision will not assist the Petitioner in her application'.

[19] I respectfully do not agree with the Respondent's conclusions. As noted above I agree that when section 2 speaks to support orders by reference to section 13(2) that must be an

error. However I do not agree that, as defined 'support orders' as defined by the Act are only referenced to section 15(2) and excludes section 15(1). Section 15(2) reads:

> *"Where an application is made under subsection (1), the court may, upon an application by either or both spouses, make an interim order requiring one spouse to secure to pay, or to secure and pay, such lump sum or periodic sums, or such lump sums and periodic sums as the court thinks reasonable for the support of*
>
> *(a) the other spouse;*
> *(b) any or all the children of the marriage*
> *(c) the other spouse and any or all children of the marriage pending determination of the application under subsection (1).*

[20] Section 15(2) itself only speaks to an order being sought by a 'spouse' and being granted to a 'spouse', it says nothing about the order being applied for, by any former spouse. The Respondent seem to be saying here that the definition section limits 'support orders' to the section order made under section 15(2), thus this would be the only kind of support order afforded to former spouses by way of 'corollary relief'. If the Respondent is right, it would lead to the curious and absurd conclusion that a former spouse could apply for an interim support order pending suit (alimony pending suit), but could not apply for a final support order after suit. Further, it would seem that a former spouse entitlement to an interim order under subsection 15(2) would only arise if she had filed an application under section 15(1), which the Respondent is saying is impermissible. On the Respondent's interpretation, a former spouse would never be able to apply for any support order, whether interim or permanent.

[21] To my mind, when section 2 defines 'corollary relief proceedings' as being proceedings in which former spouses seek a support order, and further defines 'support orders' as being an order made under section 13(2), this is really an error. To make sense of the Act, when section 2 defines 'support orders' as orders made under section 13(2), it must be read to mean section 15 instead. Section 15 deals with support orders. It does not make sense to seek to apply the definition of a 'support order' to any one subsection of section 15. This being the case, sections 2, 4 and 15 are to be read together. This purposive interpretation of the Act allows former spouses to make applications for support orders. Any other conclusion would be absurd. I do not agree that the clear definitions given to 'corollary

relief proceedings' should be ignored or that the meaning given to 'support orders' should be limited to one subsection of section 15.

[22] This absurdity becomes even more patent when it is noted that section 17 allows for applications to vary 'support orders'. The relevant portions of this section reads"

> *"(1) The court may make an order varying, rescinding or suspending, prospectively or retroactively,*
>
> *(a) a support (sic) or any provision of the order on application by either or both* ***former spouses****...*
>
> *(2) A person, other than a* ***former spouse*** *shall not make an application under subsection (1)(b) without leave of the court.*
>
> *(7) A variation order varying a support order of a* ***former spouse*** *shall...*
>
> [Emphasis supplied]

[23] The Respondent has argued that this section only allows a former spouse to seek a variation where that former spouse had earlier obtained a support order when he or she was still married and was accordingly a 'spouse'.

[24] On this interpretation, the Respondent must be also saying that a former spouse may be able to get a support order increased, but if she had failed to obtain the order when she was still married, her entitlement was lost. This also collides with the Respondent's argument that the distinction between the right of a 'spouse' and 'former spouse' regarding her entitlement to a support order is grounded in the 'clean break' principle. A former spouse who has had an order made during the pendency of the marriage would still be able to apply for variations years after the divorce has been made final. The Respondent's arguments do not reconcile this.

[25] The Respondent has attempted to draw an analogy with section 19 of the Married Women's Property Act Cap 12. I do not find that comparison to be relevant. That section is intended and is expressed to give a court summary jurisdiction, to decide disputes or questions relating to property title between husband and wife. It created a specific procedural jurisdiction empowering the court to resolve disputes between husband and wife and is usually invoked when the marriage has broken down. This case is about what

those specific provisions of the Divorce Act says. It is one of statutory construction. I do not find that the Divorce Act excludes applications being made by former spouses for support orders.

[26] The Divorce Act is untidy. The word 'spouse' and 'former spouse' has been used interchangeably, and I am of the view that to read the specific provisions referred to, to exclude applications by a former spouse for a final support order, would defeat the intention of this Act, and would lead to an absurd conclusion. I find that a former spouse is entitled to make an application for a support order under section 15(1).

Preliminary Objection No. 2 - Whether the court has jurisdiction under section 44 of the Matrimonial Causes Rules 1937 to grant leave to extend time for the filing of the application for spousal support by the Petitioner?

Preliminary Objection No. 3 - Whether Leave should be Granted?

[27] The issue, which arises here, is whether the court has the power under section 44 of the **Matrimonial Causes Rules 1937** to grant leave to the Petitioner to apply for spousal support. The Respondent's arguments on this point were that a 'former spouse' had no right to apply for a support order. Beyond this the Respondent does not appear to be saying that there is any other reason why Rule 44 of the **Matrimonial Causes Rules** should not apply. Having regard to this court ruling on the first issue, I will move right on to consider I should grant leave to the Petitioner to apply for a support order.

[28] Rule 44 provides that:

> *"(1) An application for maintenance ... in the case of proceedings for divorce, may be made by the Petitioner at any time after the time for entering an appearance to the petition has expired and by a respondent spouse at any time after entering an appearance to the petition, but no application shall be made later than one month after final decree except by leave of a judge.*

[29] The divorce in this matter was made final on the 31 July 2013. By Rule 44, the application for spousal support should have been filed no later than the 31 August 2013. The

application was made on the 17 September 2013, 17 days after the divorce was made final. Following the preliminary objections by the Respondent that the court had no jurisdiction to entertain this application, on the 1 October 2013, the Petitioner filed an application for leave and for an order that the application for spousal support be deemed properly filed. An affidavit of even date was filed in support of the application.

[30] I agree with the Respondent that I should consider the evidence on the affidavit supporting the application for leave, and not have regard to the submissions filed on behalf of the Petitioner.

[31] The Petitioner has deposed that her delay was not intentional and that she was out of the jurisdiction accompanying here eldest child back to Canada where she is now enrolled in a Boarding School, and that she only returned to the Federation in the first week of September 2013.

[32] She further deposed that since the divorce she continues to reside under the same roof and continues to be dependent on the Respondent to provide housing accommodation and the accompanying expenses.

[33] The reason for the delay in this case is not the best reason that can be submitted, but it is neither inadmissible nor inadequate. I consider that having regard to the fact that these parties have been married for some ten years and have lived together for at least 13 years, a union that saw the birth of two children, the justice of this case requires that the court grant leave to the Petitioner extending time and making an order deeming the application filed on the 17 September 2013 as being properly filed.

The Substantive Ancillary Applications

[34] The Substantive Applications as has been noted earlier relates to the following matters, namely:

(1) Whether an order should be made in favour of the Respondent for possession of the former matrimonial home? Is the court entitled to consider on this application whether the Petitioner is entitled to an interest in the former matrimonial home? And if so, is she entitled to an interest in the property?

(2) Whether the motor vehicle presently in the possession of the Petitioner is owned by the two of them or whether the Petitioner is the sole owner of this vehicle?

(3) What order relating to the custody, care and control of each of the two minor children is proper in the circumstances of this case?

(4) Whether an order of maintenance for the benefit of the children should be made against either of the parties?

(5) Whether the Petitioner is entitled to an order for spousal support?

[35] I will now go on to consider each of these in the order set out.

Substantive Issue No. 1 - The Application by the Respondent for Possession of the Former Matrimonial Home

[36] Nothing in this matter was left uncontested. The parties found every point that was capable of being taken and took it.

[37] This application for possession was filed on the 11 July 2013, by the Respondent claiming possession of the former matrimonial home which is evidenced by Certificate of Title registered in Book Z2 Folio 212 of the Register of Titles for the St. Christopher Circuit (the 'property'). He grounds this application on the fact that he hold the sole legal title to the property and asserts that he also hold the sole beneficial title to the property.

[38] In her response to this application, the Petitioner has not filed any application of her own for a declaration of any interest in the property but contends first she is entitled to an equitable interest in the property, and that the court should make such a declaration on her

behalf on this Respondent's application. Secondly, and in the alternative, she has asked this court to consider what obligations the Respondent has towards her if no order is to be made in her favour on the beneficial interest issue, and she has to vacate the property.

[39] The Respondent states that the property is legally owned by him, and he further asserts that this means that he also owns the equitable interest in the property as well. He states that the Petitioner has not brought any application for a declaration of an equitable interest in the property and as a consequence the court has no jurisdiction to make any declaration in her favour regarding an equitable interest in the property.

[40] The Petitioner on the other hand argues that the Respondent, by his application for possession, has raised the issue of ownership before the court and the court is required to enquire into what interest, if any, the Petitioner has in the property, having regard to her contentions that she is entitled to such an interest.

[41] Does the court have the jurisdiction to consider whether to grant and to grant a declaration that the Petitioner is entitled to an equitable interest in the property?

Analysis and findings

[42] The court's jurisdiction to consider and grant order relating to the title and the possession of matrimonial property is grounded in section 19 of the **Married Women's Property Act Cap 12.11** of the Revised Laws of St. Kitts and Nevis. The relevant portion of this section states:

> *"In any question between husband and wife as to the title to or possession of property either party... may apply by summons or otherwise in a summary way to any Judge and any such Judge may make such order with respect to the property in dispute, and as to costs of and consequent on the application, as he or she thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the maters in questions to be made in such manner as he or she shall think fit."*

[43] The power conferred on the court by this section is to make any order as the court thinks fit, and it has been recognized that the discretion given is a wide one as 'enforcement of

the propriety or possessory rights of one spouse in the property against the other.'[4] I note Lord Morris statement in **Pettitt v Pettitt** when he said of the equivalent provision in the English legislation:

> *"In my view, all the indications are that s. 17...was purely a procedural section. It gave the facility for obtaining speedy decision. It related to any question between husband and wife as to title to or possession of property'. In regard to a question to the title to property the language suggests a situation where an assertion of title by either husband or wife has been met by denial or by counter assertion on the part of the other. The language is inapt if there was any thought of taking title away from any party who had it. The procedure was devised as a means of resolving a dispute or a question as to title rather than a means of giving some title not previously existing. One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership. All this, in my view negatives any idea that s.17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title of property the question for the court was – "whose is this-" not – "To whom shall this be given."*

[44] There is no doubt that there is a dispute as to possession of the matrimonial property. The Petitioner has contested the Respondent's application for possession. On this application for possession, the court is tasked with determining who is entitled to possession. I agree with the Respondent that there is no general rule that pending the hearing of the matrimonial suit, either party has an absolute right to remain in the matrimonial home apart from the right of property in that home.[5] There is no doubt that the owner of property is prima facie entitled to exclusive possession of property. I also agree that after the marriage, a former spouse's right to remain in the matrimonial property must be ultimately dependent on whether he or she has an interest in the property. I find the passage in the text 'Family Law' relied on by the Petitioner as being instructive:[6]

> *"A person has the right to occupy the house if they have an interest in the property under an express trust, resulting trust, constructive trust or a proprietary estoppel."*

[45] This Petitioner is not simply saying in her answer to this application for possession that she is contesting the application for possession. She has gone further and is saying that she is

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[4] Per Lord Diplock in Pettitt v Pettitt [1969] 2 All ER 385 at page 411, speaking of equivalent provision of the English Act, namely section 17 of the Married Women's Property Act 1882.

[5] Wilmot v Wilmot [1921] P 143

[6] "Family Law" Jonathan Herring at page 138

entitled to share in the beneficial ownership of the property. She has set out certain matters that she states supports her claim to be entitled to that interest in the property.

[46] The Petitioner has referred me to **Bertha Francis v First Caribbean International Bank**[7] in which the court had to consider whether it was permissible to grant relief that was not specifically claimed **by the claimant** who had brought the claim. There the court accepted that notwithstanding an order was not specifically sought, if the party was entitled to it and the supporting matters were sufficiently pleaded, then the court had the power to grant such a relief. I do not think that a court should lightly take the position to consider granting orders to an applicant on an application, when there has been no specific application for such an order. If the court were minded to do that in favour of an applicant in a given case, the basis of such a relief should be properly grounded in the pleadings. The issues should be sufficiently raised so that the other side is not prejudiced in the sense that he is taken by surprise. A *fortiori*, if any relief is being sought by the defendant or the Respondent without a specific application for such relief, the court should be even more slow to consider the grant relief.

[47] Notwithstanding, I am of the view that this is an appropriate case to consider the grant of such relief to the Petitioner.[8] When section 19 is engaged for an order of possession, and the other party claims to be entitled as a beneficial owner of the property, these two issues are so integrated, that it would be an artificial exercise for a court to deal with the possession application and turn a blind eye to the claim that the other party is claiming to have an equitable interest in the property. I am of the view that a court faced with a **contested application of this nature**, cannot, having seen the title deeds, simply go on make the order for possession in favour of one party without making an enquiry as to whether the other party is also entitled to a share in the property. If such an enquiry

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[7] High Court Claim No. 538 of 1998

[8] See Norma Ellen Louisien nee Siemsemn Claim No. 8 of 2010 (St. Lucia) though this case was decided on the specific legislation in St. Lucia, Wilkinson J drew attention to the fact that the Respondent who was seeking a property order had failed to make the appropriate application in accordance with the statutory provisions. On the basis that the Petitioner was claiming to solely entitled to the property, she nonetheless went on to consider whether he in fact had an interest in the property, and after finding no such interest made a declaration in favour of the Petitioner. It would have been startling, having regard to the nature of the application, that if the Learned Judge had found that he had an interest, that she would have been unable to declare it.

reveals that the other party is entitled to such an interest, the court could properly proceed to grant a declaration to that effect.

Is the Respondent Entitled to Possession/Is the Petitioner entitled to a Beneficial Interest in the Property?

[48] I propose to approach this issue first with a consideration as to whether the Petitioner is entitled to a beneficial interest in the property.

[49] The applicable principles in this area which has been clearly set out **Abbot v Abbot** has been developed and established by a series of cases, namely **Pettitt v Pettitt** [1970] AC 777, **Gissing v Gissing** [1971] AC 886, **Lloyd's Bank plc v Rosset** [1991] 1 AC 107, and **Stack v Dowden** [2007] UKHL 17 largely approving a decision of the English Court of Appeal in **Oxley v Hiscock** [2005] Fam 211. The passage from the speech of Lord Harwich in Rosset's case continues to be relevant. His Lordship stated:

> *"The first and fundamental question which must always be resolved is whether independently of any reference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to the acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.*
>
> *In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments, will readily justify the inference necessary to the creation of a*

constructive trust. But, as I have read the authorities, it is at least doubtful whether anything less will do."

[50] As **Abbot's** case has shown there are two questions for the court in this exercise. These are, first, 'was it intended that the parties should share a beneficial interest in a property conveyed to one of them only; and second, if it was so intended, in what proportions was it intended that they share the beneficial interests?'[9]

[51] The cases have shown that the constructive trust is generally the more appropriate tool of analysis in most cases of this nature. In finding the 'common intention' trust, the courts are now even inclined to infer this even when there is no evidence of an actual agreement. As Baroness Hale has put it:

"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[52] With regard to proving a constructive trust in the property, the onus is on the Petitioner to prove that interest and the extent of the interest.[10]

[53] I now turn to the facts in this case, and to examine the evidence to decide first, whether prior to the acquisition of the property or at some later date, there was any agreement, arrangement or understanding between the parties that the Petitioner was to have a beneficial interest in the property. Second, it is necessary that the party relying on the agreement, arrangement etc. must have acted to her detriment.

[54] I have considered all of the affidavits filed in support of the substantive applications as these applications were all heard together. I have also seen both the Petitioner and the Respondent testify and cross-examined by the opposite side. There were certain aspects of the evidence on which I found neither party to be as forthcoming as could have been expected. Notwithstanding, I do not find that these aspects of the evidence, has rendered

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[9] Per Baroness Hale in Abbot.
[10] Stack v Dowden [2007] UKHL 17

either one to be incredible or incapable of belief. With this in mind, I have generally looked for support in the evidence generally, on material issues that I have been called on to decide.

[55] The parties met before 1995, and became a couple since the Petitioner was 18 years old. At that time the Petitioner was studying in Canada and pursuing her dreams to be a lawyer, and was enrolled at York University completing pre law courses. The first unofficial proposal of marriage from the Respondent was on the 26 December 1995, and was coupled with discussions about shared responsibilities for their future home. The Respondent eventually persuaded the Petitioner to give up her career as a lawyer and to return to St. Kitts permanently. She agreed and gave up her pursuit of the law. She initially moved into his rental apartment at Mattingley Heights, St. Kitts. More discussions between the parties led to a decision that she become a teacher, so that she could complete her studies sooner and return to St. Kitts to begin her life with the Respondent. These discussions involved her remaining flexible to take care of the future home and children who were yet to come.

[56] On deciding and taking steps to relocate to St. Kitts, the Petitioner found out she was pregnant with their first child. She returned to Canada for the birth of the child. Whilst she was there in confinement, the Respondent called her and spoke about whether the two of them should purchase a property that had come on the market, and that they could get it at a 'cheap price'. The two of them spoke about the location and the fact that the house needed extensive renovations. She agreed that he should buy the property and he eventually purchased it while she was still in Canada. He led her to believe and she understood that the house was being bought for the two of them.

[57] The Respondent has attempted to minimize the nature of the relationship that existed between the parties at that time. This attempt on his part was significant for me. I prefer the evidence of the Petitioner on these matters. One of the other significant factors, apart from seeing the parties testify and forming my own view of their credibility on this issue, is the fact that it is undisputed that the Respondent bought an engagement ring in 2000. He

claims that he bought it without her knowledge and he kept it a secret from her and locked it in a safe for many years. I have great difficulty accepting this evidence. I believe the Petitioner that they bought the ring together, and that they became engaged before they moved back to St. Kitts in 2000.

[58] I also considered his oral evidence in which he accepted that **the first car** that was bought in 2000 was a **family car**. I find that they both considered themselves a family at the very least from 2000 before the property was bought.

[59] I accept her evidence that at least from 2000, prior to the property being purchased, the two agreed that the Respondent would be responsible for the major expenses associated with the household. As time went by and the house was purchased, the arrangement was that he would pay the mortgage, property insurance and taxes, utility bills, and as the children were born and the need arose, pay the children tuition. All of this was grounded on the fact that he was earning more, and that she would and did, give up her career, take care of the home and the children and the share as far as she was able with the minor expenses, such as supplementing the groceries bill and other expenses associated with the care and upbringing of the children.

[60] Over the years the Respondent was the significant earner. He held the high paying job, and was promoted over time. She balanced child-care, but was able to return to work early in the marriage, though it was in a career that it was agreed she would pursue instead of law. The Petitioner contributed to the home and some of the expenses. After the wedding in 2003, the parties moved into a house next door, whilst the matrimonial home was being renovated. This lasted for a year, during which time she was actively involved in the design and the decoration of the home, choosing the kitchen.

[61] I agree with the Petitioner that the Respondent himself provides evidential support for the arrangement between the two that there would be a sharing of expenses. I agree that this is shown in particular by the Respondent's statement at paragraph 7 of his affidavit of the 11 July 2013 where he states: *"Before the breakdown of the marriage, I contributed*

EC$1000.00 monthly towards the purchase of food items for ourselves and the two children of the marriage. All maintenance, cleaning and washing items were charged to my TDC account that was paid by me. The Petitioner paid the difference in food which I estimate to be between EC$500.00 and EC$1000.00 monthly.

[62] I have noted the evidence of the Petitioner when she says that after the home was renovated, during a financial investment course, she found out that she was not on the mortgage papers which at the time was being re-negotiated by the Respondent. She spoke to him about it and he told her that it was expensive to get her name on it, and additionally he was protecting her from the debt. I believe this.

[63] If this Petitioner had simply contributed by way of decorating and making improvements that are ephemeral in nature, this would not have assisted her in proving that she was entitled to a share in the property. As Lord Denning M.R. speaking of the husband in **Button v Button** quoted with approval in **Pettitt v Pettitt**: *"He should not be entitled to a share in the house simply by doing the 'do-it-yourself jobs' which husbands often do."* Speaking of the wife he said: *"The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interest in the property."*

[64] The position is different on this point, where the wife 'provides with the assent of the spouse who owns the house, improvements of a capital and non-recurring nature.' As Lord Reid noted in these types of cases, 'it is not necessary that the spouse prove an agreement before the spouse can acquire any right.'

[65] I bear in mind that that in these types of cases that when spouses are living together they rarely apply their minds to ensure that the family arrangements are neatly arranged and that all terms of any mutual understanding and agreement is clear as would be necessary on normal contractual arrangements. As was stated by Lord Morris:

> *"When two people are about to be married and when they are arranging to have a home in which they live they do not make their arrangements in contemplation of*

future discord or separation. As a married couple they do not, when a house is being purchased or when the contents of a house are being acquired, contemplate that a time might come when a decision would have to be made as to who owned what. It would be unnatural, if at the times of acquisition there was always precise statement or understanding as to where ownership rested. So, if at a later date, questions arise as to the ownership of a house or of various things in it though as to some matters no difference of views will arise, as to others there can be such honest difference because previously the parties might never really have applied their minds to the question as to where ownership lies."

[66] In these types of matters the court's function after seeing and hearing the parties is "...to try to conclude what at the time was in the parties' minds and then to make an order which, in the change conditions, now fairly gives effect in law to what the parties...must be taken to have intended at the time of the transaction itself."[11]

[67] I have looked at the evidence in this case carefully. I find that these parties had an understanding that the property was being bought for the two of them, and that the wife would have a share, notwithstanding that the husband would have sole legal title. On the basis of being married to the Respondent and with regard to all that it entailed, the wife agreed that she would give up her career, and initially forego further studies in the law, and return to St. Kitts to start family life with the Respondent. I find that she suffered a detriment by giving up her career choice, and by arranging her life, in child care and career choices and do what the Respondent expected and required of her. I also find that the parties agreed that she would share in the household expenses, thereby facilitating the Respondent being able to take care of all the major expenses including the mortgage and house related expenses. I therefore find that she has a beneficial share in the matrimonial property. Having regard to the indirect contributions of the Petitioner and more significantly the manner in which they structured their finances and the fact that the Respondent undertook all the major expenses, I will depart from the 'equality is equity principle'.[12] I am of the view that the Petitioner is entitled to a 30 per cent share in the property.

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[11] Evershed L.J. in Re Rogers Question [1948] 1 All ER 328

[12] White v White [2001] 1 AC 596 quoted with approval in Romig Westerby Michael v Heather Michael Civil Appeal No. 15 of 2008 Antigua and Barbuda

[68] The property is to be appraised, and the Respondent is to pay to the Petitioner, 30 per cent of the value of any equity that presently exists in the home having regard to the fact that it is mortgaged and he is legally responsible for those payments.

[69] In light of this order, the Respondent is granted sole possession of the former matrimonial home, and the Petitioner is to vacate within one month of today's order.

Substantive Issue No. 2 - The Motor Vehicle PA 2521

[70] This motor vehicle PA 2521, which was purchased from TDC for the sum of EC$84,815.10 in the sole name of the Respondent. It was paid for in part by the 'trading in' of a previous vehicle which was valued as EC$35,000.00. The balance of the purchase price was paid by the Petitioner in the sum of EC$30,000.00, and by the Respondent in the sum of EC$23,870.78. The previous vehicle was also in the sole name of the Respondent.

[71] The Respondent in his application seeks an order that he paid the value of his interest in the motor vehicle PA 2551 which is currently in the possession of the Petitioner. The Respondent contends that this is a 'family car'. The Petitioner on the other hands contends that the Respondent's contributions to the purchase of this motor vehicle was done by way of a gift to her, and that no order should be made in favour of the Respondent with regards to this car.

[72] There is no doubt that in certain circumstances, that one person can make a gift of a chattel to another by a deed or instrument of gift, or by his words and or his conduct evidencing his intention to make a gift and making an actual delivery of the thing to the donee.[13] In **Valier v. Wright & Bull Ltd.**[14], 'the plaintiff's husband gave her a car which afterwards continued to be on the husband's premises and used by him in his business. The plaintiff and her husband subsequently separated and the plaintiff took possession of the car and put it in the defendant's garage. The car was still registered in the husband's

[13] *Cochrane v. Moore* (1890) 25 Q.B.D 57, 59 LJQB 377, 6 T.L.R. 296
[14] (1917) 33 T.L.R. 366

name and the defendants gave it up to him on demand. In an action by the plaintiff against the defendants for the return of the car or its value, it was held that after the gift no change had taken place in the custody of the car and there had been no valid gift because there had been no actual or constructive delivery and therefore the action failed.'[15]

[73] I have also noted **Waite v. Waite**[16] a case from British Columbia where again the issue was whether the husband had given a car to this wife. The court examined the matter in the following manner:

> *"There is some evidence here that the wife had one set of keys to the car. The husband denies giving her the keys to the car. I take it he means as a symbol of delivery for the parties lived together at various places and he says that she didn't get a set of keys until after she came up to Sayward. She says the husband had a set of keys of his own. She says at Sayward he used the car to go back and forth to his work; similarly he had the car on the Hart Highway. When she left him at Vanderhoof the car was left with him; again when she finally left him she removed their chattels to a storage place but did not take the car — she explains this by saying, "When I left him I did not want support or anything." As against this rather equivocal evidence as to possession, none of which appears to be any exclusive possession, there is the evidence which is undisputed that the licence to the car remained in the name of the husband, that the insurance was in his name and he paid all the premiums and he declares that, although he may have used an expression somewhat similar to that which the wife says, he never had any intention of transferring the car into her name. When he went to work on the Alcan project he asked her to come over to Fanny Bay and get the car because at the project there was no use for a car. He says however that he had always had a car and had no intention of making it over to his wife as her property."*

[74] There is no doubt in my mind that the Petitioner has always had the use of the motor vehicle in this case. She used this car to the exclusion of the Respondent. This is one of the significant aspects of the evidence from the Respondent, which is to the effect that he has never had the cause to use, as he calls it, the 'family car' that was left to the sole use of the Petitioner. It was the evidence from him that he had had a company car from as far back as 1997, and that the first car was brought when the Petitioner returned to live with him in 2000.

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[15] Facts as recited by the court in Waite v. Waite 1953 CarswellBC 159

[16] 1953 CarswellBC 159

[75] The Respondent has asked that the court find that the Petitioner is not to be believed having regard to her evidence. He has raised a number of matters in his closing arguments which he argues goes to her credibility. Again, I have examined each and every one of these matters and I do believe that none of them affect the Petitioner's credibility to the extent that the Respondent has urged.[17] I must say, as I have said elsewhere in this judgment, I have found that both of these parties were not as forthcoming on certain issues as they ought to have been. This did not render them incredible in my view however. As noted before, I did draw on other aspects of the evidence in relation to my findings.

[76] On this issue, this Petitioner herself expended EC$30,000 on this motor vehicle, and I accept her evidence that the earlier vehicle had been for her sole use and that the Respondent had led her to believe that this was her vehicle. I find as a fact that when he made this contribution to this purchase of this car, he meant it as a gift to her. I accordingly find that this there have been sufficient words and conduct amounting to a gift of all of the interest in this motor vehicle to the Petitioner and further there has been a full and proper delivery of this vehicle to the custody of the Petitioner.

Substantive Issue No. 3 - Custody and Care and Control of the Minor Children of the Marriage

[77] Both the parties have filed applications in relation to the custody and care and control of the minor children of the marriage. The first application filed by the Respondent on the 29 July 2013, asked the court for an order of joint custody, joint primary care and control of the children. On the 17 September 2013, the Petitioner filed her application for sole custody and primary care and control of the children. Following this, the Respondent filed an application to amend his notice of application to include an alternative relief for the sole care and control of the children. This application was withdrawn as all parties agreed that the court had the power on the applications already before it, to make any order that it sees fit, including an order granting sole custody and care and control to the Respondent.

[17] These were set out in the written closing arguments on his behalf at pages 17 and 18.

[78] A number of affidavits were filed on behalf of each party in support of their respective applications. The Respondent's application is supported by his own affidavit and oral evidence and the affidavit and oral evidence of three witnesses, namely: Mrs. Kaye Menon, the children paternal grandmother, Ms Anita Huggins, presented to the court as a 'caretaker/helper', and Mrs. Keimon Archibald, presented as a 'caretaker'. The Petitioner's application was supported by her own affidavit and evidence, and the affidavits and oral evidence of Ms. Alana Burroughs, and Ms. Nadia Rawlins.

[79] Like everything else, the parties are at odds about who should have custody, and whether it should be joint custody, or sole custody for either the Petitioner or the Respondent. The Respondent has generally argued that the Petitioner should not be awarded sole custody of the children and an award of joint custody is in the best interest of the children. The Respondents justifies this on the following:

(a) The children of the marriage have for all of their lives grown up in a home with both parents;

(b) For the entire lives of the children, the Respondent has along with the Petitioner been making major decisions that affect the children lives. In particular, the Respondent and the Petitioner agreed in 2011 that it would be in the best interest of the children that they remain in St. Kitts under the care of the Respondent while the Petitioner pursued her studies in Barbados. To deprive the Respondent of this parental obligation would not be in the best interest of the children of the marriage.

(c) Notwithstanding the breakdown of the marriage and the resulting acrimony between the parties – the Respondent and the Petitioner have demonstrated some ability to continue to make major decisions for the children. In particular the elder child of the marriage prior to the institution of the divorce proceedings was resident and attending school in St. Kitts. In or around August/September 2013, after the granting of the divorce petition the parties

made a joint decision in the best interest of the elder child of the marriage to send him to boarding school in Canada to continue his education.

(d) The Petitioner has not put forward any good reason why she should be granted sole custody. ... she demonstrated by her actions and decision-making skills that it is not in the child's best interest that she is granted sole custody. In support of this contention – we respectfully draw the court's attention to the Petitioner's application for interim custody filed on the 22 October 2013. The application was made by the Petitioner to be granted sole custody of the children of the marriage for the exclusive purpose of giving temporary guardianship to her sister in Canada for a perceived financial advantage of having Khallil registered for free insurance coverage OHIP. Now this application was made against the backdrop that the Petitioner admits that she is aware that the children including Khallil were covered by the Respondent's insurance in St. Kitts and that private insurance coverage was available at the school for the cost of $700.00 Canadian dollars per year. We submit that asking for sole custody so that it could be given away is the height of irresponsible parenting. The only check and balance to this is joint custody. the application was made to the court because the Respondent refused... to give up guardianship of the elder child of the marriage lightly. If the Petitioner had had sole custody of the children, guardianship of the elder child would have been given to an individual who part from being the children's aunt – the court has no information of her capability, ability and willingness. This is a real possibility if the Petitioner were to be awarded sole custody.

(e) The fact that the elder child resides in Canada is a very strong factor in support of an award of joint custody, especially as it relates to traveling between St. Kitts and Canada. If the Petitioner is granted sole custody, she alone will be in a position to determine where the elder child spends vacations and how often he travels to visit his family in St. Kitts. In all the circumstances, we submit that these decisions are best made by both parents.

[80] The Respondent has asked the court to make an order for joint care and control of the children of the marriage or alternatively sole care and control to the Respondent with liberal access to the Petitioner.

[81] The Petitioner, on the other hand has argued that the evidence shows that she and the Respondent does not get along, and there are potentially many factors on which they would not agree thereby resulting in the children being disadvantaged one way or the other.

[82] The Petitioner has pointed to the insurance arising out of the elder child's schooling in Canada as a vivid example of this. She states that 'the school does not offer any substantial health care coverage but recommends two types of coverage to parents whose children are enrolled thereat. The two types are private medical insurance coverage at a cost of CAN$700.00 (Canadian Currency) to the parents and the Ontario Insurance Health Plan (OHIP) a Government sponsored programme which according to the Petitioner offers extensive coverage beyond that offered under the private insurance plan. The Petitioner also explained under re-examination, that Khallil suffers from a respiratory condition which gave more reasons for preferring OHIP."

[83] The Petitioner continues that it is 'the case of the Respondent that the Petitioner opted not to ensure that Khallil had either coverage while she was in Canada. The Petitioner in response thereto argued that she could not afford the private insurance coverage and in any event it was not necessary in light of the fact that Khallil as a Canadian born citizen was entitled to more extensive medical coverage under OHIP. She argued that she however needed the Respondent's consent that they agree and appoint her sister Diahann as the child's temporary guardian since as a child, Khallil could not apply on his own behalf. Equally so, she stated that neither herself nor the Respondent could apply for Khallil's coverage under OHIP as neither of them were resident in Canada as is required under the plan."

[84] The Petitioner has argued that the Respondent refusal to allow her sister to be appointed a temporary guardian of Khallil is unreasonable and not in the best interest of the child. She states that none of the reasons given by the Respondent resisting such a course is reasonable, and that the court should find that the Respondent is not truly concerned about making decisions which are in the best interest of the child. She argues that the Respondent is 'allowing his feelings towards the Petitioner (and by extension her family) to cloud his judgment in so far as it relates to the welfare and best interests of his children.'

[85] The Petitioner argues that if the Respondent were truly concerned about the welfare of the child, he would have allowed the arrangement to be made for Khallil's coverage under OHIP notwithstanding this meant that temporary guardianship was to be given to the Petitioner's sister.

[86] The Petitioner contends that even when she was in Barbados studying, she would return home frequently and during that time she had primary care for the children, so much so, that even the services of the caretaker employed at that time would not be needed. In fact she points out that this caretaker was only needed because she was going to Barbados for studies. She makes the point that the Respondent had never had to assist with homework when she was on island, and that she was the primary caregiver for the children. She points to the frequency of the Respondent's overseas travel for his work. She argues that the Respondent would be ill placed to have primary care of the minor child Nile who continues to attend school in St. Kitts, as his frequent travel would not provide the child with any level of stability or continuity of arrangements.

Analysis and Findings

[87] The court's jurisdiction to make an order as to custody and the care and control of the children of the marriage is grounded in section 16 of the **Divorce Act.** This section provides:

> *"A court may, on application by either or both spouses or any person, make an order respecting the custody of or access to, or the custody of an access to, any or all children of the marriage.*

[88] Section 16(9) states that the court shall not in making an order under this section take into consideration the past conduct of any person unless the conduct is relevant to the ability to the ability of that person to act as the parent of a child. Section 16(10) provides that in making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interest of the child and for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Custody and Primary Care and Control

[89] In law, custody refers to the ability of the parent or parents to make the major decisions as it relates to the children of the marriage. These are decisions which, *inter alia,* involve not only where the child shall live and vacation, but also relate to educational, religious, and medical matters. When it involves decisions relating to medical issues, it means the ability of the parents to make decisions such as whether the child is to be hospitalized or whether consent should be given for particular kinds of medical procedures. When it involves schooling, it will include decisions pertaining to choice of courses in school, choice of subjects, whether the child should go on field trips and other school related activities. Where it relates to religious issues, it involves decisions such as which church the child should attend, when the child should attend, and whether the child should participate in particulars kinds of religious events and ceremonies.

[90] An order of sole custody means an order that gives the sole right to one parent to make these decisions to the exclusion of the other parent. It is not unknown that even an order of sole custody will direct that the parent with custody should consult the other parent on certain matters such as which school or church the child is to attend.

[91] An order of joint custody means that both parents will be tasked with the responsibility of making these major decisions in relation to the children of the marriage. It is also not unknown that where the parents are deadlocked on major decisions, it may mean that one

or the other will have to apply to court for an order for a determination of the disputed issue or for perhaps a reassessment of the custody order.

[92] An order of care and control of the children of the marriage means which parent the child shall live with. This really gives that parent the right to make everyday decisions for that child, and may include for example, what time the child shall be required to go to bed and in today's modern world, whether the child should be entitled to have unlimited access to a cell phone, what sites on the internet the child shall be allowed to visit.

[93] Many disputes arise, as to what should be considered a major decision, and often parents are known to squabble over small and trivial matters contending that these are really major issues and that they should have a say. Often common sense would provide an answer to the matter. Where this fails, and emotions overcome the issue, it might require a reconsideration of an order of joint custody if one is granted.

[94] My starting position on this issue is a consideration of what is in the best interest of each of these children. Where a marriage breaks down, the court should carefully assess the circumstances existing in relation to the individual child, and consider what kind of order would have the least adverse impact on the life of the child, as in these circumstances, any order would affect the child in some way. I will have regard to the fact that both parties are keen to have custody of the children. The Respondent would wish to have joint custody and primary care and control of them. The Petitioner wishes to have sole custody, care and control. I did not see it necessary to hear from the elder child Khallil having regard to the fact that he is at boarding school in Canada at the present, and the order which I propose to make. During the course of writing this judgment, I did consider seeing and hearing from the younger child Nile, and having requested that he be presented I was told he was overseas. I have considered waiting for his return, or directing that he be returned so that I could see and speak with him. Upon reflection I felt that this was unnecessary and there was sufficient material before me to make the order I propose to make.

[95] The Petitioner has argued that this is not an appropriate case for a joint custody order and she refers this court to the dicta of Justice Octave when she said: *"In joint custody, both parents have equal rights and in cases where they do not get along, exercising those rights and powers can easily lead to upheaval in their child's life. Simple matters are in any instances blown out of proportion, decisions as to the choice of school see the parents in full battle cry... joint custody works best when the parents get along."*

[96] Now, a divorce is an acknowledgement that spouses can no longer get along, so a court has to be careful to assess whether the differences between the parents are such that they affect the child's best interest in such a way as to make the order of joint custody inappropriate.

[97] Turning to the evidence in this matter all of the witnesses called on for either side predictably took the side of the party who they were called for. Notwithstanding, I still heard evidence from the opposite side that both of these parents have been good parents to their children. In fact the Petitioner has accepted that the Respondent is a good father, and the Respondent has accepted that the Petitioner has been a good mother. Even Mrs. Kaye Menon, the mother of the Respondent, giving evidence on his behalf has agreed that the Petitioner has been a good mother.

[98] I do not agree with the Petitioner that the Respondents conduct and his behaviour with regards to the medical insurance for Khallil in Canada leads to a conclusion that the Respondent is not acting in the best interest of the boy. I agree with the Respondent that the fact that both parties have been able to agree even during the breakdown of the marriage to have Khallil attend school in Canada, and largely together made the arrangements for him to do so. Both of these parties hold their own views regarding his medical insurance coverage, but I do not believe that this issue has gotten to the point where I find that they are incapable of making joint decisions on major matters regarding Khallil. I have not been presented with sufficient evidence, that the Respondent's approach to this issue is unreasonable, neither do I hold the view that the Petitioner's view is unreasonable. This is life and they have different views on this matter. That is

understandable. There is no sufficient evidence before me to find that the child is at risk because of the views of either parent on this issue. If this is the sticking point between these parties, I would prefer to deal with it in another way. I would order that the Respondent stand the costs of suitable private insurance for Khallil whilst he is at school in Canada. That being said I would order joint custody, care and control in relation to the elder child of the marriage.

[99] With regard to the younger boy, Nile who is now 7 years old, different considerations arise. Whilst it is not usual for a court to make an order to treat with siblings differently by way of varying custody and care and control orders, in certain cases it would be appropriate to do so. This is an appropriate case for different orders.

[100] I am of the view that again there is nothing on the evidence that indicates that both of these parents should not have the right to make major decisions on relation to this young child. All of the evidence shows that they also have the best interest of this younger child at heart. Sole custody is not an appropriate order.

[101] On the other hand with regards to primary care and control, I am of the view that a different order is appropriate. I believe that when the Petitioner was in Barbados, the Respondent had to secure the services of caretaker for the children, and when the Petitioner was in the country, she took over this role. On his own the Respondent is unable, having regard to his travel obligations/inclinations to properly fulfill the needs of the younger boy which would arise if I were to grant him primary care and control. I believe that the Petitioner is the primary caregiver with regards to the needs of this child, and her employment is such that she would provide the kind of stability and continuity that would be required following the breakup of his parents, and the separate homes that is to follow. Having regard to the possession order that I have made in this matter, I did indeed have regard to the consideration that he is accustomed to the home in which he has grown up, but I have balanced this against the kind of stability he would have with his mother, and the fact that

he is still at a very young age and is likely to be able to adapt more easily to these significant changes in his life.[18]

[102] Should the Respondent have primary care and control, it is more likely that he would have to employ caregivers to care for this young child, or might have his own mother fill the role of primary caregiver. I am of the view that the Petitioner on the other hand would substantially fulfill this need if she is granted primary care and control.

[103] On a lesser note, I have also considered the kind of relationship that the Respondent has with the members of the Petitioner's family, in particular with the mother of the Petitioner. He himself has described that relationship as being as a 'hot and cold relationship'. I am of the view that the Petitioner has been more prepared to maintain cordial relationship with the Respondent's family than the Respondent has been with regards to her family.

[104] Having regard to all of this I see no reason to grant sole custody to either of the parties in relation to this child, but I do believe that the Petitioner should have primary care and control of this child. The order therefore with regard to this child would be an order of joint custody and primary care and control in favour of the Petitioner. If it needs to be said, the Respondent is to have liberal access to this child.

Substantive Issue No. 4 - Maintenance of the Children of the Marriage

[105] Both parties have filed applications for maintenance of the children. The Respondent has asked the court to make an order that the Petitioner should be made to contribute towards the support of both children by paying maintenance for both of the children. He argues that she has accepted that she has an obligation to share in the expenses of the children. The Petitioner on the other hand essentially contends that having regard to her means, she in

[18] I considered the evidence of all the witnesses brought by the Respondent on this issue. I paid attention to Ms Huggins' evidence in her affidavit when she offered various views on the Petitioner's ability to properly care for her children. I also noted carefully the evidence of Mrs. Kaye Menon. I noted that when the Petitioner returned from Barbados and her studies she resumed the primary care of her children. The Respondent himself stated that when he was out of the island the best person to look after the children would be the Petitioner. He states that he believes that she is a good mother.

is no position to be required to pay maintenance, and that the Respondent should be required to meet the obligations for maintenance which he has assumed throughout the marriage.

[106] Under section 15 of the **Divorce Act**, the court has the power to require one spouse such lump sum or such periodic sums as the court thinks reasonable for the support of any or all of the children of the marriage. The court is empowered to make an order for a definite or an indefinite period or until the happening of a specified event.

[107] In making an order under this section the court shall 'take into account the means, needs and other circumstances of each spouse and any child of the marriage for who support is being sought including: (a) the length of the time the parties cohabited, (b) the functions performed by the spouses during cohabitation and (c) any order, agreement or arrangement relating to the support of the spouses or child.

[108] Where the application is one for maintenance of the children of the marriage section 15(7) goes on to provide that an order made under this section that provides for the support of a spouse should recognize that spouses have a joint financial obligation to maintain the child; and apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

[109] Turning to the evidence in this case, the Respondent's deposed and testified that his monthly income is EC$16,120.50. He asked this court to find that having regard to his expenses that while he is not living in the 'red', he is on a 'tight schedule'. The Petitioner has asked this court to consider that the Respondent has been able to secure a new loan in the sum of EC$50,000.00 for the older child's tuition, and this must be because he has a good debt service ratio. I do not agree. This really is not a determining factor in deciding whether his earning capacity is beyond his monthly salary, as banks have been known to take calculated and deliberate risks on some loans, and this Respondent appears to be a hard working man with good prospects.

[110] I do note however, that he appears to live beyond his stated means. He has not disputed that he has been able to travel on a private charter to see a cricket match, and has sought to explain his many travels out of jurisdiction as being required for business purposes. He has explained that these monthly trips are to Anguilla where TDC has a branch office. I am not convinced that the travel dates set out in his passport support his testimony, as these passport stamps show him not simply traveling through on the way to Anguilla, but spending time in other jurisdictions including St. Maarten.

[111] It also came out in evidence that he sat on a number of Corporate Boards as a director, but denied that he earned any sums or any substantial sums from these boards. That may be so, but he has not managed to properly explain how he is able to pay off his credit card bill of EC$22,340.00 in an expeditious manner.

[112] It also came out in cross-examination that he owned shares in several different entities, namely the St. Kitts Bottling Company, WINN FM, S.L. Horsford, TDC and Caribe Breweries. He admitted that some of the TDC shares were held jointly with the Petitioner but that the dividends were being paid directly to him. Curiously, he stated in cross-examination that sometimes he would buy to buy shares to help people in financial problems.

[113] Having regard to this evidence on this matter, I am left with the view that the earnings of the Respondent is more than he claims.

[114] With regard to the Petitioner, following the breakdown of the marriage, in July 2013, she received a promotion to Deputy Director of the Juvenile Center and now earns a gross monthly salary of EC$5,215.00, as well as an additional sum of EC$400.00 as a monthly traveling allowance. The Respondent has asked this court to make a finding as to her credibility having regard that she did not disclose this information relating to the traveling allowance until she was tasked with producing her 'pay slip'. The Petitioner explained this on the basis that she had recently been promoted and that this was an omission. In fact on this note I noticed that she too appeared startled when it was drawn to her attention that

she had received an amount double of what she claimed was her salary in October 2013. She then recollected that this was the month that the Government of St. Kitts and Nevis had paid 'double salaries' to all public workers, and she fell to benefit from that. Even counsel for the Respondent agreed that this was public knowledge at the time. In my view she has given acceptable explanations for these matters.

[115] The Respondent drew attention to the fact that the Petitioner stated that she was making a monthly payment of EC$667.00 towards a car loan, but that hat loan was due to be paid off in January 2014. I agree that the Petitioner will have this amount as part of her disposable income from February 2014 onwards. She also gave evidence of a personal loan which she stated required her to pay the sum of EC$700.00 monthly. She did not however present any documentary proof of this loan, nor did she say how long she would be required to continue to pay the installments. In the context of my approach on this matter in looking for independent support of those important matters that were contested, I was left in doubt about this personal loan. She gave evidence that she had a monthly expense of EC$300.00 for office supplies. The Respondent urged this court to have regard to the fact that she did not produce any receipts to substantiate this expense. I do not make a finding as to her credibility on the absence of such receipts. I also note that she had only been in this new position since July of 2013. Having regard to how she addressed this in cross-examination I am of the view she was approximating this expense. What I did conclude was that she did not seem to have any obligations to spend such sums on her job, and that she was volunteering to make these expenditures.

[116] I consider her credible on her average medical expenses of EC$150.00 per month. It was never suggested to her that medical expenses were manufactured. It was simply put to her in cross-examination that she had medical insurance and that she got back more than she was claiming. I also do not find that EC$1400.00 is an unreasonable amount to spend on groceries for herself and her son when she does buy food for him.[19] Her dining and entertainment expenses did seem on the high side. Both of these parties work, and buying

[19] I note that the Respondent in this regard states that he spends approximately EC$1800.00 a month on food for himself and Nile and he also spends an average of EC$416.00 on recreational activities.

take out meals for the child who still remains in jurisdiction is not unreasonable in the context of their life styles. I did form the view that the expense under this head was on the high side and I am prepared to say that she also has some credit here.

[117] Having regard to her evidence on her expenses I find that she does in fact have a surplus of about EC$1700.00 per month after her expenses.

[118] I have considered the evidence which speaks to the needs of these children. The elder child Khallil is in Boarding school in Canada and the tuition of the school is approximately US$40,000.00 or EC$102,000.00 per year after the US$10,000.00 bursary awarded to him is applied. The tuition over's boarding, educational expenses, food and medical services that are available on campus. It is undisputed that both parties agreed to send Khallil to Boarding School. It is also undisputed that the Respondent has taken an extension on the mortgage to cover this expense, and that he is servicing this debt alone.

[119] The younger child Nile, is attending a private school in St. Kitts and the Respondent at present pays this tuition of approximately EC$9,000.00 in addition to school expenses of EC$1800.00 annually for books and uniform. The Respondent also testified that at the present he spends approximately EC$1,800.00 monthly on food for himself and Nile as well as an additional average sum of EC$416.00 monthly on lunches and recreational activities. He also spends an additional sum of EC$500.00 on clothing for himself and the children of the marriage.

[120] The Petitioner has accepted during the hearing that she has an obligation to maintain her children but she contends that no order should be made requiring her to pay maintenance as she is unable to make those payments, having regard to her earnings.

[121] I have also noted that both of the parties were not entirely forthcoming with all their earnings and expenses in this matter. I did make a finding that the Respondent earns more than he has stated. How much more, the court has been unable to determine. I do note however, that he has always assumed the obligations to meet the expenses for the

children including the recent Boarding School tuition. He has always been able to pay all these expenses in relation to the children on his earnings.

[122] With regards the Petitioner, I am satisfied that she is able to generally take care of most of her personal needs on her earnings. Having regard to the fact that I have made an order for possession, I did also find that it was necessary that the Respondent pay to her the sum of EC$1100.00 per month for spousal support so that she may be able to secure reasonable accommodations for herself and the child Nile who I have ordered will live with her. As I noted in connection to this spousal support order, I was inclined to make a larger support order, but I considered that the Respondent was meeting most of the children expenses, and that this would generally remain so, and that the Petitioner does have some credit from her earnings. Having regard to this, I do not find that she is in a position to contribute in the same way as the Respondent for maintenance of these children at this time. I have considered that she will have the care and control of Nile and that that will require her to expend some money on his daily upkeep and on those everyday things that arise when one raises a child. I have put a notional sum of EC$600.00 as her input for the maintenance of Nile. She will also buy his school books and his uniform.

[123] In these circumstances, the Respondent will continue to make the monthly payments he has been making on the mortgage extension for Khallil expenses in Canada. He will also pay to the Petitioner the sum of EC$800.00 per month as maintenance for the child Nile. With regards the annual tuition for Nile, the Petitioner shall contribute the sum of EC$2000.00 and the Respondent shall pay the balance. These maintenance orders shall be revisited at the end of three years or at such earlier time that either of the children cease attendance at his respective school.

Substantive Issue No. 5 - Spousal Support

[124] The Petitioner claims to be entitled to an order for spousal support under section 15 of the **Divorce Act.**

[125] In an application for spousal support, the court is to be guided by the factors that are set out in section 15 of the Divorce Act. In particular the court should take into consideration the condition, means needs and other circumstances of the each spouse including, the length of time the spouses cohabited, the functions performed by each spouse during cohabitation and any agreement or arrangement relating to the support of each spouse.[20]

[126] The court is not to have regard to any misconduct of either party but any such order to be made should recognize any economic advantage or disadvantage arising from the marriage or its breakdown.[21] Such an order, if one is to be made, should apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouse with regard their ability to maintain their children. The order should also relieve any hardship of the spouse arising from the breakdown of the marriage, and so far as possible promote the economic self sufficiency of each spouse within a reasonable time.[22]

[127] It is clear that the section requires the court to consider the reasonable needs of the spouses, as well as whether the applying spouse is able to support herself on her present earnings. In this context the court should have regard to her age, health and future earning prospects. I have noted the difference in opinion with regards to the standard of living that the spouse was accustomed to during marriage. I am of the view that such a consideration should be given more weight where a Respondent to such an application has considerable means. I agree that it is the usual case it would be unavoidable that the standard of living enjoyed by the family during the marriage will diminish following the divorce.

[128] In closing written submissions on behalf of the Petitioner that the 'Respondent would have fashioned his case to the extent that the Petitioner was not in need of any spousal support as she basically had/has her entire salary to her disposal. The Petitioner on the other hand argued to the contrary. It is the case of the Petitioner that this is not a factor which the court would respectfully consider in deciding whether a spouse was entitled to spousal

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[20] Section 15 (4)
[21] Section 15(4) and(6)
[22] Section 15(6)

support." The Petitioner relied on the statement in **Miller's** case that a 'claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation."

[129] I do not agree with the Petitioner that any question of 'compensation' can arise under section 15 of the **Divorce Act** of St. Kitts and Nevis. Section 15 speaks to an order for the 'support' of the spouse. Other jurisdictions, including the United Kingdom, may have moved on to seek to give a spouse 'compensation' for the years spent together having regard to the financial means of one vis-à-vis the other. As **Miller** held *inter alia*, 'a periodical payments order could be made for the purpose of affording compensation to the other party as well as meeting financial needs.' This is not applicable to St. Kitts and Nevis. The order is for the maintenance of the spouse not to give her compensation.

[130] I have considered the section 15 factors and have found that an order for spousal support is appropriate in this case. The following is my analysis on this matter.

The Length of Cohabitation, the Function Performed by each Spouse, and the arrangements for Spousal Support.

[131] These parties began living together when the Petitioner moved back to St. Kitts in 1999 to live permanently with the Respondent at his rented apartment in Mattingley Heights. Following her return to Canada for the birth of her first son, she returned to St. Kitts in 2000 when they began to live in the 'matrimonial home'.[23] After they were married in 2003 they continued to live there even after their divorce in 2013. They presently still live together in the matrimonial home. Having regard to the period, I am of the view that both of these parties would have been accustomed to a certain standard of living.

[132] At all the material times, the Respondent has always worked at TDC. Over the years he has risen in ranks and today he is a director. In this marriage, he has been the substantial financial provider. The Petitioner has also worked for most of the marriage, except during maternity leave, and when she was away studying in Barbados for her Masters. It is

[23] This is according to the Respondent in his affidavit dated 16 August 2013 – see paragraph 6.

undisputed that during the marriage the parties had the assistance of a nanny/helper, but there were moments when the Petitioner did all the tasks in the household.

[133] There has been no arrangement for support in the usual sense. These parties however, decided even before marriage that the Respondent would take care of all the major expenses associated with the household. After the first child and marriage and then the second child, it was decided that she would take care of minimal expenses associated with the household and the children.[24] What is significant support for this finding is the fact that the Respondent deposited EC$1000.00, on a monthly basis into an account for the Petitioner's use for household expenses. He expressed this as his contribution towards food for the household. I also note that Petitioner contributed monthly towards the food expenses in the sum of EC$500.00.

[134] I have earlier detailed the court's findings on the parties' earnings, and their respective abilities to maintain themselves. Having regard to all of that, I am of the view that an order should be made that the Respondent pay spousal support to the Petitioner.

Recognizing Economic Advantage or Disadvantage; Promoting the Self-Sufficiency of Each Spouse Within a Reasonable Time; Apportioning Financial Responsibilities, and Relieving Economic Hardships.

The court is required in this process to seek in any order that it makes, to recognize any economic advantages or disadvantages to the Petitioner arising from the marriage or its breakdown.

[135] I agree with the submissions of the Respondent that economic disadvantage under the Act, is not the same thing as one party being in a less favourable financial position than the other. 'The disadvantage referred to in the Act is more in the nature of a spouse's incapacity to properly sustain themselves as a result of, the marriage or its breakdown.'

[24] I note that he paid for the licensing of the vehicle and allowed her the use of a credit card. I accept this evidence. See the affidavit of the Petitioner dated 17 September 2013 at paras 32 and 33.

These parties clearly have considerable differences in their present earnings. It would not be proper to simply reason on that on the basis of his greater earnings, the Respondent should therefore be ordered to pay spousal support, or pay more by way of such support.

[136] Nonetheless I agree with the fact that the Respondent paid all of the major expenses in the marriage will prima facie give rise to some economic disadvantage for the Petitioner following the divorce. She will now have to pay these expenses for herself. She will no longer have the benefit of someone else providing and or paying for accommodation, nor for gas for her vehicle. Neither will she will she have the benefit of discounts she received at the Respondent's place of employment, nor any annual vacation paid for by the Respondent. She will also have lost the benefit of medical insurance coverage as the wife of the Respondent. Having regard to the order I will make regarding the possession application, the Petitioner will also have to seek alternative arrangements. She will also have to contribute to the maintenance of the younger child, Nile.

[137] On the converse, I do not find that the Respondent will suffer any or any significant comparable economic hardship following the breakdown of the marriage. The order that I will make will therefore recognize the economic hardships caused to the Petitioner as a result of the breakdown of the marriage.

[138] The order should also promote as far as possible the self-sufficiency of each spouse within a reasonable amount of time. I agree with the Respondent's submission relying on Mona Fay that this section is 'no doubt in recognition that, once a marriage has ended, either spouse should be able to move on with his life, and start afresh, without having to be permanently financially dependent on the other spouse. It is clear however, that the economic self-sufficiency of one spouse cannot and should not be achieved either at the expense of the other spouse or to his or her detriment. The purpose of the powers conferred on the court in proceedings for financial relief is to enable to court to make fair financial arrangements on or after divorce...". In these circumstances the order that the court will make will be of a limited, but reasonable duration, to promote the economic self-sufficiency of the Petitioner.

[139] I am also to attempt to relieve any economic hardship that may have arisen out of the breakdown of the marriage. In this regard, I do not agree that I should disregard the standard of living that the spouses would have been accustomed to during the marriage. Having regard to the fact that I am making an order for possession of the matrimonial home in favour of the Respondent, I consider that even though I am of the view that the Petitioner is in a position to support herself generally and that she would have some surplus which I have factored into the order I made as to maintenance for the younger child Nile, she would nonetheless require the support and assistance to secure for herself suitable living accommodations at least for a reasonable period. I would have made an order for the Respondent to pay no less than EC$2000.00, but again considering that I found that she would have some credit from her earnings I will only order that the Respondent pay the Petitioner a monthly sum of EC$1100.00 towards her support.

[140] In all the circumstances, this order is to last for a period of twelve months, when it shall be revisited by the court, or until the Petitioner sooner remarries, in which case the order shall expire.

Conclusions and Orders

[141] On the Respondent's application for possession of the matrimonial property, I hereby grant him possession. The Petitioner is to vacate the said property within 30 days. I, however find that the Petitioner is entitled to a 30 per cent share in the matrimonial property. This property is to be valued and 30 per cent of any equity in excess of the mortgage debt is to be paid to the Petitioner within twelve months of today's date.

[142] I find that the Respondent's contribution to the purchase of the motor vehicle, which is presently in the possession of the Petitioner, was by way of a gift to the Petitioner. I accordingly refuse to make any order that the Petitioner should either gave up this motor vehicle or have it sold and the proceeds divided. The Respondent is to take the

appropriate steps to transfer legal title to this vehicle to the name of the Petitioner within 30 days of this order.

[143] The Petitioner and the Respondent shall be granted joint custody and care and control of the child Khallil. They are also granted joint custody of the child Nile. However, the Petitioner shall have sole care and control of this child. The Respondent is to be granted liberal access.

[144] With regard to the maintenance of the children, the Respondent will continue to make the monthly payments he has been making on the mortgage extension for Khallil expenses in Canada. He will also pay to the Petitioner the sum of EC$800.00 per month as maintenance for the child Nile. The Petitioner shall contribute the sum of EC$2000.00 towards the annual tuition for Nile; the Respondent shall pay the balance. These maintenance orders shall be revisited at the end of three years or at such earlier time that either of the children cease attendance at his respective school.

[145] The Respondent pay the Petitioner a monthly sum of EC$1100.00 towards her support. These payments shall begin on the 1st day of May 2014, and shall thereafter be paid or before the 5th day of each month. This order is to last for a period of twelve months, when the court shall consider any application to make a new order, or until the Petitioner sooner remarries in which case the order shall expire.

[146] Having regard to the nature of this matter, and primarily to the fact that both parties have each filed two applications and there were some success on either side, each side shall bear his and her own costs. There shall be no costs awarded in this matter.

[147] Before I leave this matter, I wish to thank counsel on both sides for their assistance in this matter and for their detailed written submissions together with authorities that was very helpful to the court.

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Darshan Ramdhani
Resident Judge (Ag.)