

**Court of Appeal Sitting  
Anguilla  
13<sup>th</sup> - 14th October 2008**

**Coram**

Hon. Chief Justice, Mr. Hugh Rawlins, (President)  
Hon Justice of Appeal, Mr. Denys Barrow, SC  
Hon. Justice of Appeal, Madam Indra Hariprashad Charles (Ag.)

**JUDGMENT TO BE DELIVERED**

**British Virgin Islands  
Lawrence Wheatley v. Raishauna Wheatley  
Civ. App. No 6 of 2007**

**Appearances:** **Appellant:** Miss Joyce Kentish holding for Appellant's solicitors  
**Respondent:** Miss Keesha Webster holding for the Respondent's solicitors

**Issue:** Civil Appeal – Family Law – Divorce – Ancillary Relief – whether the judge took into account all relevant considerations – whether the judge gave due weight to all relevant considerations - whether the court could take judicial notice of the law governing work permits – weight to be attached to an agreement on income - lump sum payment – whether inherited property is part of the matrimonial assets and ought to be included in the calculation of the lump sum – meaning of “secured to the satisfaction of the Court” - Child Custody – Matrimonial Proceedings and Property Act No. 6 of 1995 – Guardianship of Infants Act Cap 270.

**Result:** Two grounds of the appeal were allowed and all other grounds were disallowed with no order as to costs on the appeal:

**Reason:**

- (1) The learned judge had properly taken into account and given due weight to the statutory considerations and the relevant factual circumstances including the conduct of the parties during the marriage and at the trial (their credibility), the earning capacity of the parties, the respondent's employability both within and without the British Virgin Islands, the assets held by the appellant and the appellant's truthfulness regarding his financial position. The learned judge had also properly found that the parties enjoyed a good standard of living. In those circumstances, there was no basis upon which an appellate court could interfere with these findings and the conclusions reached in making the order for ancillary relief.
- (2) As a matter of law, the law governing immigration work permits and related matters was a question of which the court could take judicial notice.
- (3) The learned judge had due regard to the welfare of the children having considered all relevant factors and attached appropriate weight to them. The learned judge's discretion to award custody to the appellant was accordingly properly exercised.
- (4) In making the maintenance award, the learned judge was mandated under sections 23 and 25 of the **Matrimonial Proceedings and Property Act** (“the Act”) to consider a number of variables, including the income of the parties. The question of an agreement on income by the parties did not arise or was otherwise implicitly rejected by the learned judge.
- (5) The learned judge paid due regard to the appellant's job prospects in determining the maintenance award; and, in terms of quantification of the award, considered all the relevant evidence and had appropriate regard to the submissions of counsel. There was therefore no basis for interfering with the learned judge's maintenance award.
- (6) As a general rule, inherited property or non-matrimonial assets ought not to be shared by

the other party to the marriage. In determining whether inherited property should be included in the calculation of the lump sum award as an exception to the general rule, the court may take into account the duration of the marriage, whether a petitioner would have directly or indirectly benefited from the inheritance had the marriage subsisted and whether a petitioner's financial needs could be met without recourse to the property. In the circumstances of the case, having regard to the respondent's financial needs and to the fact that she would have benefited from the inheritance had the marriage continued, the learned judge properly exercised her discretion to include the inherited portion of the appellant's assets in calculating the lump sum award.

Dicta of Lord Nicholls in **White v White** [2001] 1 All ER 1; dicta of Munby J in **P v P** [2004] EWHC 1364; Dicta of Lord Nicholls and Baroness Hale in **Miller v Miller** [2006] 2 WLR 1283; dicta of Edwards J (as she then was) in **Darcheville v Darcheville** Claim No. SLUHMT 2003/0034; dicta of Lord Denning M.R. in **Trippas v Trippas** [1973] Fam 134 considered and applied.

- (7) Each party is entitled to a fair share of the available property and, as far as is reasonably practicable, is to enjoy the same standard of living as would have pertained had the marriage subsisted. Having regard to all the circumstances of the case including the situation of the respondent and the duration of the marriage, the awards in relation to the family assets and the gift shop were fair and adequate.
- (8) As to the sale and ownership of the gift shop, the learned judge made findings of fact which were duly explained so that there were no grounds upon which the appellate court could intervene. In terms of the value of the gift shop, the appellant was under a duty to secure a current valuation. Having failed to do so, the learned judge was entitled to estimate its value, which discretion was reasonably exercised.  
Dicta of Saunders JA (as he then was) in **Stonich v Stonich** British Virgin Islands Civil Appeal No. 17 of 2002 followed.
- (9) The power in section 23 of the Act to order payment of a lump sum to be "secured to the satisfaction of the Court" does not empower the court to order the charging of property of any kind, simpliciter. The learned judge was not, in the circumstances, entitled to order that the lump sum payment or the periodic payments be secured by a charge over the company's shares.
- (10) However, the court should, as a matter of approach and depending on the circumstances including what may have been said by the parties to the court, give the parties the opportunity to agree on the property to be charged as security. In the event the parties cannot agree, or if a party declares before there is any attempt at agreement that he will not charge any property, the court has the power to direct what property is to be charged, order the charging of that property and appoint a person to execute the charge, if a party refuses to do so. [per Barrow JA and Edwards JA [Ag.]; Thomas JA [Ag.] dissenting].
- (11) Section 25(1) permits the court to, inter alia, make an order transferring the property specified in such an order to which one party to a marriage is entitled, whether in possession or reversion, or to make orders creating a settlement. Such a transfer or settlement is however confined to the parties to the marriage and children of the marriage. It was accordingly outside the court's competence to make an order which sort to bind the appellant's sister who was not a party to the marriage.
- (12) The learned judge took all relevant considerations into account, and did not therefore err in awarding costs against the appellant in the court below.

#### **APPLICATIONS:**

**Oliver Macdonna (P.R. for Margaret Richardson (widow) deceased  
Benjamin Wilson Richardson (P.R. for John Richard Richardson,  
deceased)**

**Civ. App. No. 3 of 2005**

**Appearances:** **Appellant:** Mr. Mark Brantley holding for Mr. Victor Joffe, QC.,

**Respondent:** Mr. Martin Griffiths, QC with Mrs. Navine Fleming Kisob

**Issue:**

1. Application to strike out decision of a single judge
2. Application that the Order be stayed pending the final determination of the appeal.

**Result:**

The judgment was delivered by Rawlins, CJ.

1. The Application to review of a decision of a single judge which was filed on 13th October 2008, is discontinued and accordingly dismissed.
2. The matter of costs in the High Court proceedings is to be assessed under Part 65.11 of CPR 2000 by the Registrar.
3. The matter of the costs in the Application for review is adjourned to the next sitting of the Court in Anguilla.
4. The Applicant shall file and serve submissions within one (1) month of today's date.
5. The Respondent shall file and serve Submissions in Response within one (1) month of service by the Appellants.

The parties were reminded that costs may be settled between themselves.

**Viola Richardson, Collins Richardson, Audrey Brooks v. Albert Hughes  
Civ. App. No. 2 of 2008**

**Appearances:** **Appellant:** Miss. E. Troy instructed by Mr. J. Alex Richardson  
**Respondent:** Mr. Michael Bourne

**Issue:** Application for extension of time and Leave to Appeal Order of 25 April 2008

**Result:**

The Judgment was delivered by Rawlins, CJ:

1. The Application by the Intended Appellant for an extension of time within which to appeal and for Leave to Appeal, which was filed on 6th June 2008, is granted with no order as to costs.
2. The Intended Appellant shall file the Notice of Appeal in accordance with Part 62.5 (b) of CPR 2000.

**Reason:** There is an arguable case.

**BEFORE A SINGLE JUDGE OF THE COURT - IN CHAMBERS**

**The Hon. Mr. Hugh Rawlins, Chief Justice**

**Kervin B'Jorne Thomas v. Keithley Benjamin and ors  
High Court, Claim No.62 of 2008**

**Appearances:** **Appellant:** Mr. Mark Brantley and with him Mrs. Nicola Byer  
**Respondent:** No appearance. The application is ex parte

**Issue:** Application for Leave to apply by way of Certiorari for Judicial Review to quash decision of Commissioner of Police to dismiss Applicant and for stay of the decision and proceedings

**Result:**

1. Leave for judicial review is granted to the Applicant on the Application filed on the 12th September 2008 as amended on oral application by counsel for the Applicant.
2. The Applicant shall file the Claim for judicial review within 14 days of today's date pursuant to Part 54.11 of CPR 2000.
3. All subsequent proceedings shall be in accordance with CPR 2000.
4. The costs in the application shall be in the judicial review proceedings

**Reason:**

**HIGH COURT CIVIL APPEALS**

14th October 2008

Hon Justice of Appeal, Mr. Denys Barrow, SC  
Hon. Justice of Appeal, Madam Indra Hariprashad Charles (Ag.)  
Hon. Justice of Appeal, Mr. Michael Gordon, QC. (Ag.)

**Dr. Doreen Hodge v. Cable & Wireless (West Indies) Ltd. And ors  
Civ. App. No. 3 of 2006**

**Appearances:** **Appellant:** Mr. Patrick Thompson and with him Miss Eustella Fontaine  
**Respondent:** Mr. Martin Griffiths, QC and with him Mrs. Navine Fleming Kisob and Mrs. Nicola Byer

**Issues:**

1. The trial judge misdirected herself and erred in law in determining that the defamatory words were published on an occasion of qualified privilege.
2. The trial judge misdirected herself and erred in law in holding that the

Defendants were not actuated by actual malice such that the claim to qualified privilege failed.

3. The trial judge misdirected herself and erred in law in holding that the Defendants had not committed the tort of Intimidation.

**Result:**

The judgment was delivered by Barrow, JA.

1. The Appellant failed on Ground 1 because the trial judge was correct in finding that the defamatory words were those which conveyed that there was something wrong about the certificates that the Appellant had issued. The trial judge found that the company had a duty to communicate that sense of things to its employees and that the employees had a duty and an interest in receiving that information and that sense of things. The memorandum meant and communicated that sense and it was what was received by the employees.

2. The Ground that the bar to Appellant's medical services certification was relevant to qualified privilege was dismissed. It could only establish damage not whether the plea of qualified privilege was made out or not.

3. The Ground 2 that the company was actuated by malice was not made out. On the evidence in the court below, the Court had no proper basis to say that the trial judge was in any respect wrong in reaching the conclusions that she did.

4. Ground 3, that of the tort of intimidation, is dismissed because the words contained in the memorandum did not amount to a threat, an unlawful action, or threat thereof or require the employees to do anything in breach of contract or otherwise.

5. In dismissing the appeal, the costs are prescribed costs, being two-thirds of the costs awarded in the court below, that is, US\$68,642.00.

**Reason:**

**Homer Richardson v Attorney General  
Civ. App. No. 7 of 2006**

**Appearances:** **Appellant:** Mr. Horace Fraser  
**Respondent:** Mr. Patrick Patterson and with him Miss Eustella Fontaine

**Issues:**

1. Whether the trial Judge properly found that Appellant in his motion or by evidence failed to identify a discrimination within the ambit of Section 13 (3) of the Anguilla Constitution

2. Whether the trial judge erred in law in ruling that the provisions of CPR 2000, Part 56.7(4) are mandatory, thus discretion could not be exercised under Part 1 and inherently.

3. Whether the trial judge misdirected himself in law by holding that the Court could not enquire into the Governor's exercise of his powers without evidence

that the Governor acted unilaterally, capriciously or in a highhanded manner when in fact the Appellant's challenge was to the Governor's omission, failure or refusal to exercise his powers.

4. Whether the trial judge erred in law in ruling that the Appellant had an alternative means of seeking redress for breaches of his contractual rights, when at the material time there was no contractual relation between the Appellant and the Respondent and the Appellant's challenge was in relation to his reappointment to office, which is a constitutional matter.

**Result:**

The judgment was delivered by Barrow, JA.

1. The oral application to strike out is dismissed. The Appeal is allowed.
2. The decision of the trial judge is set aside.
3. The Fixed Date Claim Form should come on before the High Court in the usual manner.
4. The costs of this application are allowed at US\$3,000.00.
5. The costs of the court below follows that hearing.

**Reason:**

The decision which the trial judge gave amounted to a final judgment on the substantive issue so the Applicant did not require leave.