

## WHAT DOES EQUALITY MEAN IN RELATIONSHIP TO PROPERTY DIVISION?

*(A paper presented to JEI in November 2011 by M E Birnie  
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*"Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case and, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."<sup>1</sup>*

1. The question in my view is, "is there such a thing as equality in relationship to property division ... can equality really be achieved?"

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<sup>1</sup> White –v- White [2000] 3 WLR 1571 per Lord Nicholls of Birkenhead Para 1

2. Equality is defined in the Oxford Dictionary as ...*"a state of being equal"*. "Equal" is also defined in the Oxford Dictionary as *"the same in quantity, quality, size, degree, rank etc..., as having the same rights and status"*. We also should briefly consider the concept of "equality before the law" which is said to be *"The doctrine that all persons, regardless of wealth, social status, or the political power wielded by them, are to be treated the same before the law"*.<sup>2</sup>
3. When one thinks of "equality" within the parameters of our discussions here today one thinks of treating the parties before the court equally regardless of their sex.
4. *As judges we are often called upon to make decisions to determine disputes in relation to provision for a party (usually the female) and the ownership of matrimonial property upon divorce and indeed upon the breaking up of a common law or intimate relationship.*
5. *Over the years the jurisprudence in this area of the law has developed from the state of where women could neither own or lay claim to ownership of property to the stage where the starting*

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<sup>2</sup> Webster's New World Law Dictionary Copyright © 2010 by Wiley Publishing, Inc., Hoboken, New Jersey.

*point of division of property or property adjustment orders is now that each party is said to be treated as owning everything equally.*

6. Mr Justice Adrian Saunders when he sat on the Eastern Caribbean Court of Appeal delivered the judgment in the British Virgin Islands in the case of **Stonich -v- Stonich**<sup>3</sup> which is considered to probably be the leading case in our jurisdiction in this area and in assessing what the law used to be, Justice Saunders said;

*“In assessing the respective contributions of husband and wife, there was a time when one regarded the fruits of the money-earner to be more valuable, more important than the childrearing and homemaking responsibilities of a wife and mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife who remained at home. Ironically, if the man’s business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple’s hard times”<sup>4</sup>*

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<sup>3</sup> BVI Civil Appeal no 17 of 2002

<sup>4</sup> Ibid para 28

7. Earlier in the said judgment Justice Saunders also said;

*“One of the useful features of the MPPA is that it gives the Court a broad discretion in apportioning assets built up over the course of the marriage. The ultimate and overriding objective that the Court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties. The wide discretion available permits the Court the ability to interpret fairness in light of prevailing societal standards.”<sup>5</sup>*

8. The law as it relates to division of property in this region has essentially been that which we have inherited from our English common law tradition. Our courts are clothed with power to divide and adjust property ownership, and in doing so they can be said to base their decisions on the premise that;

*“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”<sup>6</sup>*

9. The courts are given a wide discretion in making its decision in matters such as these and are required to consider all the circumstances and pay particular attention to the following

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<sup>5</sup> Ibid Para 27

<sup>6</sup> “Wheatley –v- Wheatley (BVI) HCVAP 2007/006 para 7 of head note.

factors which we are all conversant with and which are set out in various acts in the region.

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

*(b) the present and foreseeable future financial needs, obligations and responsibilities of each party,*

*(c) the standard of living enjoyed by the family before the breakdown of the marriage,*

*(d) the age of each party and the duration of the marriage,*

*(e) any physical or mental disability of either party,*

*(f) contributions made by each to the welfare of the family, including any contribution made by looking after the home under section 49,*

*(g) any order made under section 491, and*

*(h) the value to either party, of any benefit (for example, a pension) which that party will lose as a result of the dissolution of the marriage.*<sup>7</sup>

10. There is also the tail piece which is to be considered which requires the court to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other.

11. I now turn to the question of *what does equality mean in relationship to property division?* ... I would hasten to suggest that it is one of the greatest challenges faced by the court. The English Court, in the land mark English decision of **White v White**<sup>8</sup> considered their legislation which is similar to the legislation in our jurisdictions. Lord Nicholls in what has now become a much quoted judgment said –

*“... Before reaching a firm conclusion and making an order ..., a judge would always be well advised to check his tentative views against the yardstick of*

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<sup>7</sup> Section 23 & 26 of Matrimonial Proceedings and Property Act 1975 (BVI), Section 34(1) of Matrimonial Causes Act (Cap 176) (St Vincent), Section 25 of the Divorce Act 1973 (St Lucia), Section 25(2) of the Matrimonial Causes Act 1973 (Grenada), Section 26 *The Matrimonial Proceedings and Property Act RSA CM60(Anguilla)*, Section 13 of the Divorce Act 1997 (Antigua) Section 25 of the Matrimonial Causes Act 1973

<sup>8</sup> [2001] 1 All ER 1

*equality of division. As a general guide, equality should not be departed from, only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”*

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12. Recent decisions of the courts show that husbands and wives are now considered to be equal partners in a marriage and in the more recent English case of **Miller -v- Miller and Macfarlane -v- Macfarlane**<sup>10</sup> Lord Nichols in considering this had this to say;

*“This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasize the qualifying phrase “unless there is good reason to the contrary.” The yardstick of equality is to be applied as an aid, not a rule.”<sup>11</sup>*

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<sup>9</sup> Ibid para 25

<sup>10</sup> [2006] 3 All E R 1, [2006] 2 AC 618

<sup>11</sup> *para 11*

13. Our courts in the Eastern Caribbean have followed the decisions of **White -v- White and the Miller Case**. The approach in these cases was embraced and applied by Madam Justice Monica Joseph in the St Vincent Case of **Geoffrey Graham Bollers -v- Lyn Marie Cevene** <sup>12</sup>and in her judgment Justice Joseph said.

*“I think that the equality principle falls within the fairness principle referred to by Lord Nicholls, that is equality if this is fair, no equality if that is unfair. The fairness principle is to be considered within the ambit of the Act which sets out the factors, which themselves encompass the fairness principle.*

*I consider both principles – of equality and of fairness really move in the same direction: the direction that the evidence points to under the various factors mentioned in the act. On that route the court considers all the circumstances of the case, including whether there is disparity such as should be taken into account in determining contribution ...”<sup>13</sup>*

[29] The Court should not pay too much regard to a contribution merely because it is easily quantifiable in hard currency and too little to a contribution that is less measurable

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<sup>12</sup> St Vincent High Court Civil Claim no 11 of 2004

<sup>13</sup> Ibid Paras 11 and 12



but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman’s role in the home.

14. There are cases in which the courts are willing to depart from equality and that would be in the situation of special contribution and would do so only in very narrow circumstances

15. One of the factors that the courts seem prepared to consider departing from the assumption of equality is in considering the “LENGTH OF THE MARRIAGE”

16. The question of whether the principle of “assumed equality of contribution justifying equal division” would apply to marriages of a short duration was examined and discussed by Nicholas Moyston QC in the case of **GW -v- RW** <sup>14</sup>

17. Applying the principle of assumed equality of contribution justifying equal division is relatively simple where there is a marriage of more than twenty years ... the marriages

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<sup>14</sup> [2003] EWHC 611.

of long durations. There is also no problem in the marriage where both parties came into the marriage with nothing or similar assets, which assets have grown during the marriage. However the assumption of equality in marriages of short duration is challenging.

18. Moyston QC after reviewing the submissions, arguments made and cases on this aspect of applying the principle equality of said;

*“I find it fundamentally unfair to be required to find that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contribution for a period of excess of 20 years. ...*

*I therefore propose to allow some departure from equality under the first argument advanced ...”<sup>15</sup>*

19. The argument that was advanced before the court was that to find equality of value of contributions during a marriage which was in this case 12 ½ years would not necessarily lead to equality of division. The court looked at (and was persuaded by, in my view) the statement of Thorp LJ in (NAME OF CASE)

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<sup>15</sup> Ibid paras 43-44

*“a distinction must be drawn between an assessment of equality of contribution and order for equality of division. A finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the statutory criteria as well as the over arching search for fairness.”<sup>16</sup>*

20. It is clear that the question of equality is not to be assumed in marriages of short duration even though the emphasis is arriving at that which is fair in all the circumstances. The court is clearly prepared to move away from that assumption in looking at the length of the marriage as they are allowed to do by paragraph (d) of the factors to be taken into consideration by the court as provided by the MPPA.

21. I would also like to mention that the factors to which we are obliged to take note of in dealing with these matters are not to be reviewed in any order of preference, we are required to have regard to all of the factors and as in the case of **GW -v- RW**<sup>17</sup> specific attention could be made to a specific factor in guiding the court to make its decision.

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<sup>16</sup> Lambert -v- Lambert [2002] 3 FCR 673, [2003] 1 FLR 139 @ paragraph 38

<sup>17</sup> [2003] 2 FLR 108

22. In the St Vincent Case of **Geoffrey Graham Bollers -v- Lynn Marie Cevene** <sup>18</sup> Madam Justice Monica Joseph found that;

*“the respondent’s contributions to the welfare of the family for two and half years are not significant enough to point to equality in shares”*<sup>19</sup>

23. One of the realities of life in our region is that there are persons who live together in de facto marriages and acquire and develop economically as with parties to the traditional or nuclear family. There is the issue of children, property to be divided and shared. How does the court deal with these applications?

24. Where there is hope for equality in the division of matrimonial property, the same cannot be said for the division of property between persons who lived together in an intimate or de facto marriage. There are no statutory provisions in the Eastern Caribbean and in the absence of this, the courts “utilise the common intention, constructive trust to resolve disputes ...”<sup>20</sup>

25. The surviving partner or the partner after the relationship has been dissolved has to establish that he or she acted to her detriment on the basis of that there was a common intention between the parties that

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<sup>18</sup> St Vincent High Court Civil Claim no 11 of 2004

<sup>19</sup> Ibid (para 55)

<sup>20</sup> Gender Equality and Judging in the OECS and wider Commonwealth Caribbean by Tracy Robinson (Consultant) page 14

the person would have a share. The applicants in cases such as these are required to provide the court with evidence which would be accepted by the court that there was a contribution (to their detriment) coupled with the common intention to own. This is diametrically opposed to the position of the married person where there would be an assumption of equality.

26. Thomas J in the Antiguan case of **James N George & Wentworth Clifton George (Personal Representatives of the estate of James Isaiah George, deceased) -v- Eldicia Benjamin**<sup>21</sup> in adjudicating in a matter where a claim for an interest in property was being made by the defendant on the ground that she lived together with the deceased James George for a period of ten years and that she made substantial contributions to their life together and to the improvements of the property they occupied said,

*"The matter of the constructive or resulting trust is very much alive..."*<sup>22</sup>.

27. Justice Thomas quoted the dicta of Lord Bridge in **Lloyds Bank PLC -v- Rossett** when he said

*"The first and fundamental question which must always be resolved is whether independently of any inference to be drawn from the conduct of the parties in the course of sharing the house and managing their joint affairs there has at any time prior to acquisition or exceptionally at some later date been any arrangement or understanding*

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<sup>21</sup> Antigua & Barbuda Claim No ANUHCv2009/0271

<sup>22</sup> Ibid at para 24

*reached by 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 (win??) only be necessary for the partner asserting a claim to a beneficial interest 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 proprietary estoppel."*<sup>23</sup>

28. Justice Thomas went on to say;

*"It may be said that for the purposes of establishing constructive trust or proprietary estoppel the following must be satisfied or considered: the existence of a common intention to share the property arising from an agreement or by way of representation by one party to the other; the context in which the representation was made; the party claiming an interest must show that he or she acted to his or her detriment or significantly altered his or her position, the property in issue must be clearly identified."*<sup>24</sup>

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<sup>23</sup> Lloyds Bank –v- Rossett [1990]1 All E R 1111

<sup>24</sup> James N George et anor –v- Eldica Benjamin op cit para 28

29. In the Anguilla case of *Lois Dunbar -v- Paul S Webster*<sup>25</sup> Justice Louise Blenman in a very informative judgment reviewed the relevant legal principles which guide the court where there is a claim for a beneficial interest. Justice Blenman examined the court's traditional approach in the judgments of *Gissing -v- Gissing*<sup>26</sup>, *Burns -v- Burns*<sup>27</sup>, *Grant -v- Edwards*<sup>28</sup>, culminating in the decisions of *Lloyds Bank PLC -v- Rosset and another*<sup>29</sup> and the Antiguan decision in *Abbott -v- Abbott*<sup>30</sup> a privy council decision which was delivered by Baroness Hale. Blenman J made the following quotations from Baroness Hale's judgment,

*"Whether independently of any inference 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 time later date, been any agreement, an arrangement or understanding reached between the parties that the property is to be shared beneficially."*

**and**

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<sup>25</sup> AXAHCV0062/2009

<sup>26</sup> [1970] 2 All E R 780

<sup>27</sup> [1994] 1 All E R 244

<sup>28</sup> [1980] AC 638

<sup>29</sup> [1990] 1 All E R

<sup>30</sup> (2007) 70 WIR 183

*“The parties’ whole course of conduct in relation to the property must be taken into account in determining their shared intention as to its ownership.”<sup>31</sup>*

30. Justice Blenman was guided by and applied the principles as laid down in the aforementioned cases in looking at the totality of circumstances to find whether or not in their course of dealings a common intention between the parties could be imputed or inferred. Blenman J also looked at the evidence before her to see whether the claimant acted to her detriment or significantly altered her position in the belief that by so acting she was acquiring a beneficial interest in the property the subject of the litigation.

31. There are two other cases that I would like to make reference to and that would be the Privy Council decision of **Sharon Otway (Personal representative of the Estate of Thomas Otway deceased) and Sharon Otway -v- Jean Gibbs<sup>32</sup>** and **Helger Stoeckert -v- Margery Geddes (Executrix of the estate of Pul Geddes)<sup>33</sup>** both of these cases were brought by former female partners of the

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<sup>31</sup> Lois Dunbar -v- Paul Webster op cit para 38 & 39.

<sup>32</sup> Privy Council Appeal No: 30 of 1999

<sup>33</sup> (2000) 80 P. & C.R. D11 delivered on the 13<sup>th</sup> December 1999



deceased male partner for a share in the assets of the deceased male partner.

32. Both claimants in these matters lived with the deceased in common law relationships and were claiming a share in their estate. The Privy Council relied on the dicta of Lord Bridge of Harwich in *Lloyds Bank PLC -v- Rosset*<sup>34</sup> in support of their finding that there was no beneficial interest in favour of the claimant, the court found that there was no constructive trust to be inferred or determined to exist based on the verbal assurance of Dr. Otway to Miss Gibbs. In the *Stoeckert Case* there was even more than and in addition to the verbal assurances in this case the claimant Miss Stoeckert had unrestricted rights *inter alia* rights to withdraw from Mr. Geddes' overseas bank accounts and and the claimant sought to bring to the court a will made by the deceased during their life together naming her a beneficiary as evidence of common intention and this was not accepted as such by the Privy Council. It was held that this was not sufficient evidence to establish a common intention, this could not establish agreement, arrangement, understanding or common intention.

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<sup>34</sup> [1991] 1 AC 107

33. Therefore as it regards the unmarried partners from the decisions of the court it is clear that the court is prepared to adopt a more restrictive view in analysing the affairs of these parties and the claimants in these types of cases must prove that there was a constructive trust in their favour and that there was a common intention and that they acted to their detriment on the basis of the common intention. It is clear that unless there is evidence that there was payment of money or tangible contribution the courts are not willing to find an interest. The women in all the cases mentioned were unable to establish an equal share or interest in the assets after lengthy relationships.

34. My conclusion is that that upon examining the jurisprudence of division of property where there was a marriage there seems to be a move towards equality following the decisions of **White -v- White**, **Miller -v- Miller** and **Macfarlane -v- Macfarlane** and **Stonich -v- Stonich**<sup>35</sup>. However there being the need to exercise judicial discretion it is submitted that there is still room for the individual judge to apply his or her subjective view which continues to lead to uncertainty, which, it is submitted will continue.

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<sup>35</sup> Op.cit.

35. One can therefore ask the question should there be legislative intervention to create a more even playing field such as the legislation that exists in Canada, New Zealand and some North American states.

- The reality is that even though we look at and give more credence to the indirect contributions of the spouse who stays home and looks after the children do we as judges give it “equal” or adequate consideration?
- Do the awards made by our courts adequately take into serious consideration the economic burden borne by the spouse who has or retains custody of the children after the break up of the relationship (whether married or commonlaw).
- Do we take into consideration that in those cases where the wife/mother leaves her paid employment to take care of the family and the children that she loses her opportunity for advancement or increased earnings when she leaves the job and which she cannot take advantage of if and when she returns to the job arena?

36. Should we consider adopting the “community property schemes as exist in some North American jurisdictions and in New Zealand? Should the concept of matrimonial property be “Standardised”...what should be included and excluded... should this be dictated specifically by statute?
37. Should we continue to consider each and every case is to be decided upon its own merits and circumstances? Is that not the fairer way to go.
38. It is submitted that consideration ought to be given to the passing of legislation regarding the division of property upon the break up of commonlaw/intimate relationships such as exists in Guyana.