IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 29 OF 2016

ASTRY GALVEZ	Appellant
v	
RAMON GALVEZ	Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Franz Parke	Justice of Appeal

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D Arzu-Torres for the appellant.
O Sabido SC for the respondent.

17 October 2017, 29 November 2018.

AWICH JA

[1] I concur in the judgment and orders proposed by my brother, Ducille JA. I have nothing to add.

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AWICH JA

DUCILLE JA

[2] This is an appeal from an order declaring that the Appellant (Wife) had a 15% interest in certain property registered in the name of Respondent (Husband), specifically No. 463 King's Park Registration Section, Belize City ('the King's Park property"); and

Parcel No. 2122 Vista Del Mar, Ladyville, Belize District ('the Vista del Mar property") respectively, and declaring no interest in the property at Starfish Crescent, Belama Phase 1, Parcel No. 2271 Caribbean Shores Registration Section, Belize City ("the Starfish property"). The learned trial judge ordered that the Vista del Mar property be transferred into the Wife's sole name. The Husband was also ordered to pay $38,000 to the Wife, being the value of the balance of the Wife's 15% interest. The Wife now challenges that declaration and consequent order as error in the learned trial judge's exercise of discretion under section 148 of the Supreme Court of Judicature Act, Chapter 91 (SCJA).

The facts

[3] The parties cohabited for approximately four years between 2003 and 2007. They married in 2007 and divorced in 2014. The Husband is now fifty-five years old and is a diabetic and cancer survivor. The Wife is now thirty-four years old and has certain health concerns as well. The parties have two children, now aged thirteen and eleven years old. The Husband is a businessman with several businesses that included juke box and pool table rentals and rental apartments. He also owned two bars or clubs referred to as MJ's and small MJ's. The Wife is a stay-at-home mother. She continues to reside with the children in the top floor apartment of the building at the Starfish property. The Husband is now in another relationship and lives at the King's Park property. That property consists of six rental apartments and a two-storey building that has a warehouse below and living quarters above. The Starfish property also houses four other apartments, and is one of the Husband's sources of income.

[4] The property on which the Starfish apartment building stands, was acquired by the Husband three years before his marriage to the Wife. Construction of the apartment building began before the marriage and was completed either before or shortly after the parties married. In any event, the Husband said that the parties were already living there at the time of the marriage.

[5] The Husband claimed that the acquisition of the Starfish property and the subsequent construction of the apartment building on it were facilitated by a loan to him from Atlantic Bank. He also claimed that the Wife made no financial or non-financial

contribution to the purchase, to construction of the apartment building or to the furnishing of their apartment. However, the Wife alleged that she obtained a $15,000.00 loan from First Caribbean International Bank and gave the money to the Husband to help with the construction. She also alleged that she withdrew savings from her credit union savings account and gave it to the Husband. The Husband denied this.

[6] The parties and their children moved into the top floor apartment at the Starfish property after an incident caused them to relocate from their former place of residence. The family's new residence was the entire top floor of the Starfish property apartment building, which according to the Husband was originally intended to comprise two separate rental apartments.

[7] The Wife filed the Originating Summons herein, claiming Declarations as to her beneficial interest of one-half of eight separate parcels of land under section 16 of the Married Women's Property Act, Chapter 176 and/or under section 148:01 of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize. The wife also sought a Declaration that she was beneficially entitled to a one-half share in certain personal property including three motor vehicles, 33 pool tables, 38 juke boxes, and two bank accounts, all of which were held in the Husband's name. Additionally, the Wife also sought a Declaration that she was solely entitled to the contents of the matrimonial home. In the alternative, the Wife sought; "that the aforementioned real properties be settled or transferred equally or equitably between [the parties] as the Court may determine. The Wife also sought costs.

[8] The learned trial judge made the declaration and order first stated above, but made no order as to costs. The Wife was dissatisfied and now seeks an order setting aside the decision of the lower court. She also seeks an order reflecting her "interest in all the properties, real and personal that were the subject matter of the action" in the lower court. She presented the following Grounds of Appeal:

(1) The learned Trial Judge erred in the law in the exercise of her discretion under s.148 of the Supreme Court of Judicature Act in finding that the Appellant did not have an interest in the matrimonial property situate at Starfish Crescent, Belama Phase 7,

Belize City and more particularly described as Parcel No. 2271 Caribbean Shores Registration Section.

(2) That the Learned Trial Judge erred in law in the exercise of her discretion under section 148 of the Supreme Court of Judicature Act, in making the orders that she did as to the properties that comprise No. 463 King's Park Registration Section, Belize City and Parcel No. 2122 Vista Del Mar, Ladyville, Belize District in that it is unjust and inequitable in all the circumstances, in that she failed to take into consideration the Appellant's direct and indirect contribution or failed to give sufficient weight to them and also to weigh all the other factors enumerated under section 148 of the Supreme Court of Judicature Act.

(3) That the decision is unjust and inequitable in all the circumstances in that the Learned Trial Judge erred in that she failed to sufficiently weigh the direct and other indirect contributions made by the Appellant and to take into consideration the other factors enumerated under s. 148:05 of the SCJA in regards to all the properties listed in the Appellant's claim.

(4) The judgment of the learned trial judge is against the weight of the evidence.

[9] The law pertaining to this appeal is contained in section 148A of the Supreme Court of Judicature Act, Chapter 91 (SCJA). Clear guidance on the application of this section was posited by this Court in the case of **Thomas Vidrine v Sari Vidrine**, **Civil Appeal No. 2 of 2010.** In that case, Barrow JA likened the new section 148A and its application to the Australian and Barbados legislation rather than the English position. (Section 79 of the Family Law Act 1975 in Australia and section 57 of the Family Law Act, Cap. 214 in Barbados). Even so, it is to be noted that the **Vidrine** court pointed out that, unlike Belize, the Barbados and Australia legislation “broaden[ed] the property alteration guidelines by including a number of maintenance factors.” Referring to Rule 65 of the Belize Matrimonial Causes Rules, Barrow JA said further that “the Supreme Court “has jurisdiction to consider maintenance for a wife only upon presentation of a separate

petition for maintenance filed after decree nisi." And such was apparently done in the present case. That concerns us only insofar as it falls to be considered as "other circumstances" under section 148(5)(i) of the SCJA, and will be dealt with below. In this case, counsel on both sides referred the court to **Vidrine** as authority for their various positions. Counsel also referred the Court to several other authorities, some of which we will review in part, and others which we decline to review since they deal more expansively with matters not at issue in the type of application brought by the Wife.

Ground 1: The learned Trial Judge erred in the law in the exercise of her discretion under s.148 of the Supreme Court of Judicature Act in finding that the Appellant did not have an interest in the matrimonial property situate at Starfish Crescent, Belama Phase 7, Belize City and more particularly described as Parcel No. 2271 Caribbean Shores Registration Section

[10] With all due respect to the Wife and her learned counsel, this ground is immediately answerable by stating that discretion does not arise for discussion in relation to the Starfish property. Section 148A (1) of the Supreme Court of Judicature Act, Chapter 91 provides that

> **"**Notwithstanding anything contained in this Part or in any other interests in law, a husband or wife may during divorce proceedings make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage."

Hafiz-Bertram JA in **Elena Usher v Osbert Usher and Claudette Grinage, Civil Appeal No. 40 of 2010** said, "[a] marriage ends upon dissolution by a court of competent jurisdiction and not upon separation…What comes to an end upon separation is cohabitation and it is my respectful opinion, that the subsistence of the marriage does not depend on cohabitation of the parties." Further," [t]he word "subsistence" is a simple word and it means 'to be in force or in effect' as shown in the Oxford Dictionary, Tenth Edition. In the case of Waters v Waters [1967] 3 All ER 417 the learned judge interpreted 'subsistence' to mean that the marriage continues to exist until it is validly dissolved by a court of competent jurisdiction or where one of the parties dies."

[11] In **Vidrine**, Barrow JA referred to "the deliberate exclusion in [section] 148A of pre-marriage property from the court's jurisdiction" and said that "the underlying interest of section 148A is in the fact that such property was acquired as a fruit of the marriage or was part of the marital acquest as it has been called by Lord Birkenhead in **Miller v Miller [2006 UKHL 24]**."

[12] There is some slight suggestion in **Vidrine** that a party's contribution to the other party's pre-marriage property might yet be taken into account. In that case, Barrow JA remarked that there was some evidence, albeit conflicting, as to the wife's contribution to "enhancement of the property." However, in that case, there was no indication from the court below 'so as to give a sense of the degree to which the wife's contribution physically or financially improved the property." Further, "the focus at the hearing was on the contribution the wife made to enhancement rather than on identifying what was created and came into existence during the subsistence of the marriage…" Additionally, the court stated that

> "[i]t may be best to treat all of these contributions to or in relation to the [pre-marriage property] in the round: financial, non-financial and simply as a wife whose presence and active interest in improving what became the matrimonial home was itself a meaningful contribution to this property and this space. And though, because this was pre-marriage property, the wife's contribution in relation to this property can yield her no interest in the property itself, nothing prevents the court from taking this contribution into account as a general non-property-specific contribution as a wife under subsection (5)(e)."

The **Vidrine** Court concluded that the declaration in the lower court was based on the wife's contribution "as wife and hardly, if at all, focused on identifying physical improvements to [the] property during the subsistence of the marriage."

[13] In the current case, the Starfish property was neither created nor did it come into existence during the subsistence of the marriage. The learned trial judge stated that

> "It is clear that any direct monetary contributions made by Mrs. Galvez would have been towards development of the property only. In any event those same contributions could equally and adequately be considered under the JA (sic) … It is clear and settled law on the principles and guidelines enunciated in **Vidrine v Vidrine** … that only property acquired during the currency of the marriage could be considered."

Further, the learned trial judge addressed the parties' prior common law union and the wife's contentions that the Starfish property was the matrimonial home and a marital acquest. She stated that "had The Starfish Property been bought while a common-law union existed (i.e. after five years of cohabiting) it could easily have been considered under the JA (sic) and in this present application." Section 148D of the SCJA states that "common law union" or "union" means the relationship that is established when a man and woman who are not legally married to each other and to any other person cohabit together continuously as husband and wife for a period of **at least** five years." (emphasis added). Here, the parties' prior common law union fell a year short of the five-year requirement, and as such any property acquired during that period cannot properly be considered to be "marital acquest." The words "at least" seem to indicate that the time period is to be strictly construed.

[14] The learned trial judge also considered whether the Starfish property was bought in contemplation of marriage or was held in trust, and referred to the cases of **Pitzold v Pitzold**, Action No. 3 of 2010, and **Beverly Gentle v Norman Gentle, Action No. 7 of 2007**. In **Pitzold**, Legall J, referring to Lord Denning MR in **Ulrich v. Ulrich** 19681 AER 67, said

> "Section 16 of [the Married Women's Property Act (MWPA)] does not suffer from the limitation of section 148A … which limits the jurisdiction of the Supreme Court to property acquired during the subsistence of the marriage. Under section 16 monies contributed by parties before marriage, with a view to purchase property which is intended to be a family asset, are in the same position as monies contributed by them after marriage. When the marriage takes place the property

becomes their joint property; becomes an asset belonging to both of them."

For the purposes of the present case, it will not be useful to discuss section 16 of the MWPA in detail except to reiterate that, as was stated in **Pitzold**: "section 16 "is a procedural section and does not prevent actions between spouses for declaration of rights."

[15] In **Pitzold**, the wife had claimed a declaration that she was entitled among other things, to a two-third share of certain properties. Before the marriage and in contemplation of her upcoming marriage, the wife, who was Jamaican, sold property she had in Jamaica and moved to Belize. The parties were both engineers and were salaried employees when the husband left the matrimonial home. That home had been purchased jointly by them after marriage, and they each paid half of the mortgage. However, between the time that the husband left in 2006 and the divorce in 2009, the wife had paid all the expenses and taxes for the property. The parties had no children. The court acknowledged that the wife brought money into the marriage, yet still altered the rights of the parties so that they each retained about a 50% interest in all the property acquired during the subsistence of the marriage. The wife retained the matrimonial home and the obligation to pay the mortgage. She was also granted another property that the parties had purchased jointly, and the husband retained another property that had been acquired by the parties during the marriage, and in respect of which both parties had made payments during the marriage. The parties were granted a 50% interest each in the proceeds of sale of a time share that they jointly owned.

[16] In **Gentle**, Hafiz J (as she then was) referred to the cases of **Pettitt v Pettitt, [1970] AC 777** and **Gissing v Gissing, [1971] AC 886,** and stated that "[i]t is now accepted that the important point in these two cases is that the Court cannot simply find a trust because that would be a fair result. Also, the courts cannot find an intention to create a trust where the evidence is that no such intention exists." The facts in **Gentle** were that the parties had cohabited in a common-law union, first in Texas and then in Belize, since 1989. The wife moved into the Texas house, in which the husband had lived with a former

wife until they divorced. The parties married in 2002 and divorced in 2007. There were no children. The husband received a gift of some property from his mother, registered it in his name, obtained a mortgage, and constructed a house on it. Both parties continued to live in the house after the divorce, and the wife sought, inter alia, a declaration that the husband held the property in trust for them in equal shares. She claimed that she had made contributions to both properties. Hafiz J found that "the evidence adduced by [the wife] fail[ed] to show the existence of any common intention that she should share in the ownership of the … property. There is no evidence of any mortgage payments made to the Texas property nor to the [Belize] property. There is also no evidence that [the wife] contributed to the improvement or conservation of the Texas Property or to the [Belize] Property. I find that Mrs. Beverly Gentle has failed to prove that Mr. Gentle holds the [Belize] property on trust for himself and her in equal shares."

[17] Similarly, in **Pitzold**, there was also a question regarding money sent by the wife to the husband while he was a still student abroad. The wife claimed that the money was intended to help the husband with his education and also to purchase property. That court held that there was no evidence of common intention that the beneficial interest in the properties purchased would be shared. A similar conclusion was reached in **Grant v Edwards and Another [1986] Ch 638; 2 All ER 426**.

[18] In the instant case, the learned trial judge considered the evidence that the Starfish property was bought by the husband in 2004 prior to the marriage. She also examined the Wife's assertion as regards various sums of money that the Wife alleged that she contributed to the construction of the building, and the Husband's denial of that assertion. The husband argued in this appeal that the Wife's contention that she made financial contributions were "made up." We do not need to address this more than to say that the learned trial judge believed the Husband and found that the property had not been bought in contemplation of marriage. There is ample support in the record for her finding of fact. She said

> "[t]he facts, as I find them, are that [the Husband] alone bought The Starfish Property prior to their marriage but during cohabitation. They never intended it to

be their matrimonial home. He intended it to be a wholly commercial property. Its very design supports this. I find that he made adjustments to accommodate the expanding family after he feared for their safety. They moved in before construction was completed although they were living elsewhere, comfortably, for a number of years. The urgency of the move which [the Wife] admits, indicates that the property was never purchased in contemplation of marriage. Having so found it becomes obvious that this property is excluded from consideration both under JA and the MWPA."

Since the Starfish property was not purchased during the marriage or acquired in contemplation of marriage, was not acquired during common law cohabitation for the prescribed number of years, and was not the subject of a trust in favor of the Wife, this ground of appeal fails.

Ground 2: The Learned Trial Judge erred in law in the exercise of her discretion under section 148 of the Supreme Court of Judicature Act, in making the orders that she did as to the properties that comprise No. 463 King's Park Registration Section, Belize City and Parcel No. 2122 Vista Del Mar, Ladyville, Belize District in that it is unjust and inequitable in all the circumstances, in that she failed to take into consideration the Appellant's direct and indirect contribution or failed to give sufficient weight to them and also to weigh all the other factors enumerated under section 148 of the Supreme Court of Judicature Act.

[19] This ground of appeal combines four separate items for analysis: the exercise of judicial discretion; direct and indirect contributions; unjust and inequitable conclusions; and the sufficiency of weight given to other factors. They will be dealt with seriatim.

Discretion

[20] Section 148A sets out the guidelines that the court should follow in the exercise of its discretion, and provides in relevant part as follows:

(2) In any proceedings under subsection (1) of this section, the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) in addition to making a declaration under subsection (2) of this section, the court may also in such proceedings **make such order as it thinks fit** (emphasis

added) altering the interests and rights of either the husband or the wife in the property, including,

(a) an order for a settlement of some other property in substitution for any interest or right in the property; and

(b) (b) an order requiring either the husband or the wife or both of them to take, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The Court shall not make an order under subsection (3) of this section, **unless it is satisfied** (emphasis added) that, in all the circumstances, it is just and equitable to make the order.

[21] One of the chief complaints about the exercise of judicial discretion is, as was referred to by one writer, that "determination will depend to some extent upon the perception of the judge, his experience and his personality." (*H. A. Finley, Judicial Discretion in Family and Other Litigation, 5 MonashULawRw 221 (1976)).* Appellants will often avail themselves of such argument where a seemingly arbitrary figure or percentage is awarded. For example, in **Proverbs v Proverbs**, (2002) 61 WIR 91, the judge in the lower court ordered the husband to pay the wife $30,000.00, and the Court of Appeal was unable to determine "on what basis … [the trial judge] arrive[d] at the sum …" In **Horsley v Horsley** (**1991) FLC 92-205** the Full Court was unable to discover the reasoning behind the trial judge's decision that the wife should receive 42% of the parties' joint assets and the husband 58%. In **Merriman and Merriman (1993) FLC 92-422** the Full Court also could not ascertain why the trial judge had determined that the wife should receive 25% of the parties' assets. **I**n **Bennett and Bennett [1990] FamCA 148; (1991) FLC 92-191** the Full Court considered a similar argument and referred to a number of cases including the judgment of the Full Court of the Supreme Court of Victoria in **Sun Alliance Insurance Ltd. v. Massoud [1989] VicRp 2; (1989) VR 8** and in particular to the passage in the principal judgment of Gray J. where he said

"The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if:-

(a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or

(b) justice is not seen to have been done.

The two above stated criteria of inadequacy will frequently overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected."

In **Bennett'**s case the Full Court went on to say:

"It is unnecessary to decide, in this case, whether the inadequacy of her Honour's reasons was itself an error of law requiring her decision to be set aside, in that we have already determined that the appeal should succeed on the merits. The weight of judicial authority, however, suggests that it might well amount to such an error. At the very least the failure to give adequate reasons places a duty on an appellate court to scrutinise the decision with particular care.

In the absence of adequate reasons, the Full Court is not obliged to uphold a judgment merely because the result may be said to fall within the wide ambit of the Judge's discretion. In general, the appellate Court should be able to discern either expressly or by implication the path by which the result has been reached."

[22] The Court concluded that ``[t]he important thing is that the appellate court must be placed in the position of being able to follow the trial Judge's line of reasoning, as must the parties, if they are to be satisfied that justice has been done."

However, even where a "line of reasoning" can be followed, at the end of the day, final declarations and awards are solely within the province of the judge, which one would hope is based not only on her evaluation of the evidence and the statutory considerations, but also on her perception and experience. As Finn J stated in **Bramley v Farmer**, **(2000) FLC 93-060**, "no amount of enumeration of, or indeed of evaluation...can ever explain exactly why a particular figure, or more usually a percentage, is eventually arrived at."

[23] "Judicial discretion" was quaintly explained in **Rooke's Case**, (1598) 5 Coke Reports 99b as follows:

> "discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, 'talis discretio discretionem confundit."

A more succinct definition can be found in Black's Law Dictionary (7th ed. 1999) 479, as:

> "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

[24] In this appeal, the Wife presented certain arguments in support of the contention that the learned trial judge erred in the exercise of her discretion. Although the arguments were presented in relation to Ground 1, which has already been disposed of, they remain relevant to the discussion on the other Grounds. First, the Wife drew our attention to **Assicurazoni Generali Spa v Arab Insurance Group B.S.C. 2002 EWCA Civ 1642**, in support of the following position: that "[t]he principles governing the review by the Appellate Court of decisions involving the exercise of discretion by the trial judge include that: (i) it is the Appellant's burden to establish that the trial judge was wrong in his/her finding and (ii) where the findings of fact of the judge in the court below included a dependence on the credibility of the witness as observed by him or her, the Appellate court will only interfere with a finding of fact if the Court is satisfied that the judge was plainly wrong."

[25] Although **Assicurazoni** was decided on facts quite different from the current case, the general principles hold true. The court in that case stated that "If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in **G v G (Minors: Custody Appeal) [1985] 1 WLR 647** warrants attention. In that case Lord Fraser of Tullybelton said "… the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is

different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[26] Similarly in **Rodgers & Rodgers (No. 2) [2016] FamCAFC 104**, the court said

> "[i]f we are to conclude that her Honour's decision is "plainly wrong" or "falling beyond the bounds of a reasonable exercise of discretion" because of something other than a shared "second opinion", we should be able to answer an additional question: "plainly wrong or unjust by reference to what?". That additional question is difficult enough in any discretionary environment. It is made all the more difficult in respect of the s 79(4) discretion (and the satisfaction of the relevant criterion made more onerous) because here, as is almost always the case, the contention does not have a reference point. It is not contended that her Honour's result offends any "guidelines" (as that expression in used in *Norbis*) and, as is ubiquitous, neither is a range of results said to be comparable to this case's circumstances offered as a reference point. We are unable to persuade ourselves that, without more, her Honour's assessment is "plainly unjust" or "plainly wrong". Our disquiet is, then, without more, insufficient to justify interference with her Honour's assessment."

In that case, the judge in the lower court, in order to achieve a net value of the property in question, had failed to also deduct some future tax liability."

[27] Concepts of what is "fair" or "just and equitable" appear both in the definitions recited above and in the legislation. Additionally, in **Proverbs**, Sir David Simmons CJ, citing **Bolden v Bolden** (unreported), stated that "there will not be interference with the exercise of a discretion unless it has been shown that 'there was error' or that 'the order is unreasonable or plainly unjust.'"

In **Usher**, Hafiz-Bertram JA stated that

> "[t]here were errors made in both law and fact. In such circumstances, the appellate court may exercise its own discretion in substitution for that of the learned trial judge. See the case of **Bellenden (Formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 at 345** which was relied on by Barrow JA in **Vidrine v Vidrine**.
>
> In **Bellenden**, Asquith LJ said:
> We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact, plainly wrong, that an appellate body is entitled to interfere."

In **Vidrine** also, Barrow JA stated that the appellate court is entitled to exercise discretion afresh where "the decision appealed was based on a wrong principle, a wrong approach and a mistaken view as to the extent of the jurisdiction."

The view entertained by the learned trial judge as to the extent of her jurisdiction having been addressed above in discussion of Ground 1, it therefore falls to this court to consider whether, in relation to Ground 2, the learned trial judge made errors of fact or law, or based her decision on a wrong principle or approach.

Errors of fact

[28] No errors of fact have been alleged by the Wife in this case, that have not been addressed by the disbelief of the learned trial judge in relation to certain matters. For example, the learned trial judge did not believe that the sums of $10,000.00 and $15,000.00 comprised financial contributions by the Wife towards the Starfish property construction. The learned judge pointed out the Wife's conflicting testimony about those sums and said that she was "minded to believe Mr. Galvez's testimony that these withdrawals were for Mrs. Galvez's own personal use."

[29] Similarly, the learned judge believed the Husband's testimony that the Starfish property was never intended to be the matrimonial home because the Wife also had conflicting testimony about the parties' common intention in relation to this property that was acquired by the Husband prior to the marriage.

With respect to the Wife's non-financial contributions, the learned trial judge said

> "I do not believe that she worked as the second in charge or that she worked consistently or extensively. But I am convinced that despite her youth, in her role as wife, she did assist Mr. Galvez in his business ventures and that has value. She said her ideas helped to improve the small MJ's so it earned more. It is accepted that his profits from both MJ's and his other businesses aided his ability to purchase the matrimonial properties. Those properties are therefore partly the financial product of the parties common endeavour."

Also,

> "She divided her time somewhat between her husband's business and home. She did homework with the children, was their personal chauffeur and she took care of the home. Mr. Galvez seemed to ridicule her for the decorative items she bought. That however, was an admission that she took interest in the house and attempted to make it a home. That too has value. He was a busy businessman who worked long hours. Her attention to the business of the home no doubt freed him to attend to those other endeavours. Even now, she has the primary care and control of the children."

Error of law

[30] The Wife does however, challenge the trial judge's exercise of discretion as an error of law. The Wife contends that the orders made in the exercise of the learned trial judge's discretion were unjust and in inequitable in all the circumstances. Section 148A (5) of the SCJA provides that "[i]n considering whether it is just and equitable to make an order under subsection (3) of this section, the court shall take into account the following:

(a) the financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the non-financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, including any contribution made in the capacity of housewife, homemaker or parent;

(c) the effect of any proposed order against the earning capacity of either the husband or the wife;

(d) the age and state of health of both the husband and the wife, and the children born from the marriage (if any);

(e) the non-financial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage (if any);

(f) the eligibility of either the husband or the wife to a pension, allowance, gratuity or some other benefit under any law, or under any superannuation scheme, and where applicable, the rate of such pension, allowance, gratuity or benefit as aforesaid;

(g) the period when the parties were married and the extent to which such marriage has affected the education, training and development of either of them in whose favour the order will be made;

(h) the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother;

(i) any other fact or circumstances that in the opinion of the court, the Justice of the case requires to be taken into account.

[31] Review of the learned trial judge's discretion starts here with an assessment of her evaluation of the subsection (5) factors, and also with **Vidrine**. Counsel for the Wife directed our attention to the guidelines in that case, where, as he correctly pointed out, there is a two-step process to be followed where an application for alteration of property interests is concerned. First, the pertinent property, that is the property acquired during the subsistence of the marriage, must be identified and valued. Only then should the court

should employ its discretion, using the parameters set out in section 148A (5). Discussion under Ground 1 indicates that the learned judge identified the Kings Park and Vista del Mar properties. She also identified other property, the disposition of which is not at issue in this appeal. What is clear is that the Starfish property was excluded. As to valuation, the learned trial judge said in relation to the King's Park property that "[i]t has been valued by a valuator at $538,000.00." And as to the Vista del Mar property, "[the Husband] values it himself at $50,000.00 and says it is charged to Atlantic Bank. There is no evidence provided to the contrary."

Subsection (5) (a) and (b) – the contributions

[32] With regard to the acquisition, conservation and improvement of the properties, the learned trial judge found that "[i]t is clear that Mr. Galvez made all the financial contributions towards the acquisition of the properties." Some of the wife's argument in this respect was as follows:

> "that the learned judge failed to properly assess the factors and failed to give due weight to the indirect contribution of the Appellant as a wife and worker in the various businesses of the Respondent. It is clear from the evidence that the Appellant worked in the businesses of the Respondent, benefited as wife from the business financially and with her help the Respondent was able to successfully manage the businesses at a profit."

Contribution as a wife and worker

[33] The learned trial judge thoroughly examined the Wife's testimony, noting that even though the Husband said that the Wife never helped in the business, the Wife asserted that "In her role as a wife she did administrative work for her husband's business" and that she was "second in charge." The learned judge then proceeded to set out in detail the several claims of the Wife as to the actual work she did for the businesses. These included selling tickets at the door, checking the liquor and other stocks, emptying the juke boxes, depositing money and helping to upkeep the rental properties. However, the learned judge did note that her testimony was contradictory as to the days and times that she supposedly worked. The learned judge also noted that she did not hire or fire workers

and had no idea as to how purchases for the business were made. The learned judge then stated that "I did not find Mrs. Galvez to be forthright in many aspects of her testimony, but I believed her when she said she assisted in the business but was never paid a salary." Further, the learned judge stated that the Wife

> "took care of the home. Mr. Galvez seemed to ridicule her for the decorative items she bought. That however, was an admission that she took interest in the house and attempted to make it a home. That too has value. He was a busy businessman who worked long hours. Her attention to the business of the home no doubt freed him to attend to those other endeavours."

Taking the learned judge's assertion into account, together with her other findings of fact mentioned above, it is clear that the learned judge not only considered the Wife's indirect or non-financial contribution as wife in the businesses, but assigned significant weight to it in arriving at her conclusions.

[34] With regard to direct contribution, the learned trial judge seemed to find that the Wife's testimony was less than reliable in relation to direct or financial contributions. The learned judge stated that

> "[the Wife's only stated financial contribution was around $25,000 or $30,000 which she said she gave her husband to help with the construction of The Starfish Property. Her evidence in this regard is contradictory and unreliable. A portion of which ($15,000) she says was a bank loan which he repaid in part. She changed the reason for this loan under cross-examination. $5,000 she intended to be a loan to him but he never repaid. $5,000 was for paying workers and buying construction material after the construction had been completed. For all these reasons I do not believe that she made any of these contributions towards the development of the property. I do believe that she spent some money on household accessories but that will better be considered under her non-financial contributions as a wife."

[35] In **Vidrine**, the court reasoned that "[the]wife was obviously a mature and accomplished professional whose position calls for no protection." Further, that "was not

a case of a wife who confined herself to the historical, traditional role of women in our society of the stay-at-home wife and mother." There, "[t]he wife had been a financial services provider earning over US$100,000.00 annually and had other professional occupations." In addition to that, there was a time when she managed a bar and grill that was located on one of the properties, and had even invested $10,000.00 in the business. She owned 50% of the shares.

[36] Unlike **Vidrine**, the wife in the present case does seem to be the traditional sort of wife. The learned trial judge seems not to have considered "the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother" as a separate circumstance from the wife's position as "wife and/or mother and in raising any children born from the marriage." She stated that "[t]he children are however school age now and do not require her constant attention. She has asked that this position be protected so it will be considered. However, I do not believe she needs much protection in this regard." Although there is some overlap in subsections (e) and (h) of section 148A (5), the learned judge appears to have conflated the subsections and not to have realized that the legislature must have deemed "the position of a woman" as worthy of separate consideration. For this reason, we will exercise discretion afresh in relation to this factor alone, that is, subsection (5) (h).

Subsection (5) (c) - earning capacity

[37] The learned trial judge, while not specifically addressing the effect of her proposed order on the parties' earning capacity, seemed to address it by implication when she stated that "Mr. Galvez will continue to earn as he has. Although he would reach retirement age twenty years earlier than Mrs. Galvez, he is the owner of his business ventures and can continue to manage for years beyond retirement if his health allows. Even then he can still earn while not being integrally or in any way actively involved in the businesses. Mrs. Galvez earns nothing at present but she does have good earning capacity when one considers her self- proclaimed skill, experience and age. When all is considered I am of the view that Mr. Galvez has a greater earning capacity than she does."

Subsection (5)(d) – Age and Health

[38] The learned judge addressed the parties' ages and health, noting in particular that the Husband was a cancer survivor and a diabetic and that he looked older than his years. She also noted the Wife's incurable STD and heart arrhythmia, but found that since the Wife presented a doctor's report recommending forty-eight hours of rest for the heart condition, that the condition "did not seem in anyway debilitating." The learned judge concluded that "[w]hen one considers Mr. Galvez's age as opposed to Mrs. Galvez she is certainly in a better position."

Subsection (5) (e) – role of wife and/or mother and in raising children

[39] In **In marriage of Waters v Jurek (1995) 126 FLR 311, 321,** Fogarty J stated that "[i]n most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests – as individuals and as a partnership. The parties make different contributions to the marriage, which the law recognises cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Homemaker contributions are to be given as much weight as those of the primary breadwinner."

In this case, the learned trial judge said

> "I find as a fact that Mrs. Galvez did not quit her job to become a homemaker. The tone and content of the [resignation] letter she exhibited partly informs this finding. Although she states that the decision was in the best interest of her family and career she does not end there. She continues to say she feels she "fulfilled her duties to the best of my abilities. I wish I could say it has been a pleasure. But then I would be lying..." There is a cheek and an arrogance in this statement that leads me to believe that Mrs. Galvez was experiencing other problems which caused her departure."

The learned judge also considered the Wife's evidence about being a stay-at-home mother. The Wife had claimed issues with a nanny, a child with attachment issues, and

compliance with the Husband's wishes in this regard. The learned judge appeared to find that the Wife's evidence "made no sense at all" particularly as the Wife had continued to work until her son was almost a year old, and that she later claimed that she stayed at home for health reasons. The learned judge continued:

> "The children are however school age now and do not require her constant attention. She has asked that this position be protected so it will be considered. However, I do not believe she needs much protection in this regard. I believed Mr. Galvez when he said she quit because she could not get along with her co-workers."

Based on the learned judge's fact-finding, it is clear that her conclusions under this subsection are reasonable.

Subsection (5) (f) - pensions, gratuities, benefits

[40] The learned trial judge considered this, finding that "[n]o evidence of pensions or allowances exists for either party." She also noted that the parties' health insurance benefit was lost when the Wife quit her job "much to Mr. Galvez's dismay. He said it happened at a time when he needed coverage as he was very ill."

Subsection (5) (g) - length of marriage and effect on education, training and development

[41] The learned judge found that there was nothing to indicate the level of education of either party. However, she mentioned that the Husband was a "self-made man" and the Wife had been "gainfully employed in a position of responsibility …" she concluded that there was "no indication from either party that this marriage affected [the Wife's] education, training or development."

Subsection (5) (h) - the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother

[42] We acknowledged above that the learned trial judge did not give this subsection any separate consideration. We note also that even counsel for the Husband drew this to our particular attention. In fact, he correctly framed the main issue before this court when

he said “that the main question here is whether 15% was adequate given 148A(5) (h).” In **Vidrine**, the court seemed to accept that this factor “speaks to the weaker position of a woman in a marriage.” That court did not accord any “great weight” there, because the wife in that case was a “mature and accomplished professional whose position calls for no protection.” In this case, we are constrained to exercise our discretion afresh and assign some weight to this item, since there is no evidence to indicate that the Wife is an ”accomplished professional.” In fact, the learned trial judge found that “[t]he intricacies of business seemed to be beyond her.”

Subsection (5) (i) – any other fact or circumstance

[43] The learned trial judge considered three items under this subsection. First was the actual length of time that the parties cohabited, resulting in a union that was four years longer than the marriage. Second, the learned judge referred to “maintenance considerations” but did not develop this point except to note that “such issues do not fall to be considered during an application for division of matrimonial property” and that the Husband had other rental properties from which he earned an income. We realize that this appeal is not concerned with the entirety of the learned trial judge’s declarations and orders. Such matters as the award of the contents of the matrimonial home and the vehicle are not at issue here. However, since we note that elsewhere in her judgment, the learned trial judge did recite, in relation to the Wife that “[h]er survival is currently reliant on Mr. Galvez’s court ordered maintenance for the two children, loans and other assistance from her family members” we accept that the learned judge must have taken such “other” matters into account. As to the sufficiency of other factors, the **Vidrine** court stated that

> “[t]he provision would seem to require a party who wishes to rely on an additional fact or circumstance to show that the justice of the particular case requires the stated factor to be taken into account. It is the duty of a party, both to himself or herself and to the court, to point to a particular fact or circumstance as present in the case and show that the justice of the case requires it to be taken into account. This is the difference between the factors listed in sub-s. (5) and additional facts or circumstances that a party asserts. In the case of the former the court is required

to take them into account; the premise of the legislation is that the justice of the case requires them to be taken into account. In the case of the latter – additional facts or circumstances – the court must be persuaded to consider them by being persuaded that the justice of the case requires the fact or circumstance to be considered. There is no legislated premise."

In this case, the Wife does not point to any factor other than those listed in the subsection, rendering the learned judge's consideration of the three additional factors mentioned above, entirely gratuitous.

Wrong principle or approach

[44] In **House v. The King (1936) CLR 499**, the court stated

"[i]f the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

In **Norbis v Norbis [1986]161 CLR** 513, the court stated that

"[t]he reference to "wrong principle" in "**House**" no doubt refers to a binding rule rather than a guideline ... A failure to apply a guideline does not of itself amount to error, for it may appear that the case is one in which it is inappropriate to invoke the guideline or that, notwithstanding the failure to apply it, the decision is the product of a sound discretionary judgment. The failure to apply a legitimate guideline to a situation to which it is applicable may, however, throw a question mark over the trial judge's decision and ease the appellant's burden of showing that it is wrong. However, in the ultimate analysis and in the absence of any identifiable error of fact or positive law, the appellate court must be persuaded that the order stands outside the limits of a sound discretionary judgment before it intervenes."

But, in **Mallet v Mallet (1984) 156 CLR 605**, Gibbs CJ stated that

> "... it is understandable that practitioners, desirous of finding rules, or even formulae, which may assist them in advising their clients as to the possible outcome of litigation, should treat the remarks of the court in... cases as expressing binding principles, and that judges, seeking certainty, or consistency, should sometimes do so. [However,] [d]ecisions in particular cases of that kind can, however, do no more than provide a guide; they cannot put fetters on the discretionary power which the Parliament has left largely unfettered. It is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case.

[45] In this case, the failure of the learned trial judge to apply a legitimate guideline or to have due regard to a matter which the Act required her to consider, that is to say, to consider and apply subsection (5) (h), does indeed "throw a question mark" over her decision. As an appellate court, we cannot be entirely sure that her failure in this respect had no impact on her eventual order, and especially on the percentage arrived at.

[46] The Wife also argued, citing **Usher**, that the learned trial judge should have taken the global approach in assessing the contribution of the parties and placed greater weight on the Wife's direct and indirect contributions. The reason for this, she argued, is that there was no evidence of any mortgage or charge, or the amounts of same, on the King's Park and Vista del Mar properties. The global approach is usually contrasted with the asset-by-asset approach. There is no requirement for a court to follow either one or other of these approaches in a particular case. In any given case, what matters is convenience and the "just and equitable standard." In **Vidrine**, the court determined that there was "no room for taking an overall approach in dealing with the properties because the dates of their acquisition relative to the subsistence of the marriage require separate consideration to be given to each."

[47] The court in **In the Marriage of Zyk and Zyk [1995] FLC 92 -644, at p 82-509 to 82- 510** explained the global approach as follows: "

> "[t]he global approach enables the Court to assess the contributions aspect of the section 79 exercise in an overall way by considering the parties' contributions to their property as a whole although factoring into that exercise the circumstance, if it be so, that they may have made varying contributions to the total property at trial or which formed part of the history of their property during the marriage. It is the generally preferred and the generally adopted approach. It enables a broad approach to be taken to the varying contributions of the parties over the years of their marriage and in particular it usually has the advantage of more easily dealing with and giving proper recognition to paras. (b) and (c) contributions. However, where the contributions to the components of the total property are disparate, caution needs to be exercised in this approach and the overall conclusion tested against the requirement that the orders be "just and equitable".

Further,

> ["t]he asset by asset approach enables the Court to assess separately the parties' contributions to particular assets or groups of assets. It is the less preferred approach largely because it can at times be an artificial exercise and also because it can create difficulties in the proper evaluation of paras. (b) and (c) contributions. But there are a number of circumstances where it may be appropriate to do so, for example an inheritance received post separation, or where the financial relationship of the parties during the marriage was such that they treated some property as exclusively the property of one party to which the other made no, at least no para. (a) contributions to it. It may be convenient in cases like that to treat that property separately rather than assess the overall contributions of the parties to the totality of their property."

In **Norbis,** the court stated that:

> "[f]or ease of comparison and calculation it will be convenient in assessing the overall contributions of the parties at some stage to place the two types of

contributions [financial and homemaker/parent] on the same basis, i.e. on a global or, alternatively, on an "asset-by- asset" basis. Which of the two approaches is more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient."

[48] Both **Zyk** and **Norbis** were cited by the court in **Usher**. However, as Hafiz-Bertram JA stated, "section 148 does not state which method is to be used when the factors are being considered for the alteration of property rights …" She stated further that "If there were properties to be considered that were acquired after separation, then I would have treated those properties differently, that is, on an asset by asset basis." In any event, it would appear that whatever approach is taken, it is entirely up to the preference of the particular judge in any given case. We can find no authority directing us to utilize the global approach in order to place greater weight on the Wife's contributions. As regards evidence of mortgages and/or charges, the learned trial judge noted that the Husband's indebtedness was in the form of bank loans and credit card accounts - $1,245,203.01 to one bank and $63,482.67 to another. She did note, however that "[w]hat is lacking is what debt is attached to which property. Without this the court cannot ascertain what equity, if any, exists for any of the mortgaged properties."

[49] In this case, it should be pointed out that the marriage in **Usher** was a long one – nineteen years, and the parties had cohabited for twenty-three years in total. Additionally, there was a multiplicity of property, both real and personal, to be evaluated. In this case, the marriage was relatively short – seven years. There are only two properties under consideration in this appeal, since the Starfish property was pre-marriage property. Accordingly, we find no merit in the Wife's argument and cannot say that the learned trial judge utilized a wrong approach.

Ground 3: That the decision is unjust and inequitable in all the circumstances in that the Learned Trial Judge erred in that she failed to sufficiently weigh the direct and other indirect contributions made by the Appellant and to take into consideration the other factors enumerated under s. 148:05 of the SCJA in regards to all the properties listed in the Appellant's claim.

Ground 4: The judgment of the learned trial judge is against the weight of the evidence

[50] These grounds can be dealt with together and are repetitive of points already raised and we see no merit in reiterating the several points of discussion in relation to direct and indirect contributions and other factors in section 148A (5). However, there is yet analysis to be undertaken with regard to the contention that the decision is "unjust and inequitable in all the circumstances." Such circumstances must include the weight attributed to the evidence as a whole, but also the 148A (5) factors discussed above. It is to be noted that the cases do not attempt to explain what is meant by weight. The decisions utilize such terms as "real weight" (*see e.g.* **Usher**). Black's Law Dictionary defines "weight of evidence" as "the persuasiveness of some evidence in comparison with other evidence." In this case, as already indicated, the learned trial judge considered evidence from both parties and made her findings accordingly. She accepted some assertions made by each party and disbelieved others. Counsel for the Wife has not drawn this court's attention to any specific instances where the learned trial judge did not carry out this function.

[51] The terms "unjust and inequitable" are less capable of definition and probably refer simply to overall fairness within the confines of section 148A (5). Fairness" must, however, be distinguished from "equality." In **Vidrine**, Barrow JA said that "[i]n Belize … there is no justification for relying on equality as a yardstick…"

In the present case, counsel for the Wife asserted that "the learned trial judge's decision "[was] not supported by fairness and equality having regard to her role, the Appellant's role, as mother, wife, business partner, the business earnings and the capacity of the Respondent. We must remain mindful that where a marriage has been broken down a court in ordering any distribution of assets must ensure a fair and just outcome." Counsel for the Husband argued that "a decision based on fairness … is not what the legislation intended. It's not an issue of fairness. It's an issue of evaluating each party to arrive at an equitable solution … based on evidence which was before the court…"

There are misconceptions in both arguments. Equality is not indicated by the statute on the one hand, and fairness, or rather unfairness, is a concept that is implicit in “unjust and inequitable.”

[52] The court in **Mallet** stated that “an appellate court is not entitled to substitute its own decision for that which is the subject of appeal merely because it prefers a different result or even merely because it thinks that a different result would be more just and equitable. The better approach seems to be that taken in **Bevan & Bevan, (2013) 279 FLR 1.** In that case, the court determined that an enquiry about whether “it is just and equitable to make an order” was one that should be undertaken only after the process of “ascertain[ing] the assets, liabilities and financial resources of the parties … consider[ing] the contributions of the parties [and] consider[ing] the current and future prospects of the parties relevant under … the Act.”

[53] In a recent case, **Hurst & Hurst [2018] Fam CAFC 146** the Family Court of Australia when considering whether the lower court’s decision was “unreasonable or plainly unjust” referred to **Rodgers & Rodgers (No 2) [2016] FamCAFC 104**, where that court said

> “[i]f we are to conclude that her Honour’s decision is “plainly wrong” or “falling beyond the bounds of a reasonable exercise of discretion” because of something other than a shared “second opinion”, we should be able to answer an additional question: “plainly wrong or unjust by reference to what?”. That additional question is difficult enough in any discretionary environment. It is made all the more difficult in respect of the s 79(4) discretion (and the satisfaction of the relevant criterion made more onerous) because here, as is ~~almost~~ always the case, the contention does not have a reference point.”

The **Rodgers** court confessed to “being “unanimous in our disquiet” at the trial judge’s … assessment” but said that

> "[i]t is not contended that her Honour's result offends any "guidelines" (as that expression in used in *Norbis*) and, as is ubiquitous, neither is a range of results said to be comparable to this case's circumstances offered as a reference point." The court concluded that "[w]e are unable to persuade ourselves that, without more, her Honour's assessment is "plainly unjust" or "plainly wrong". Our disquiet is, then, without more, insufficient to justify interference with her Honour's assessment."

In **Hurst** also, the court found that the trial judge had erred by failing to take into account certain relevant considerations, but still declined to make the "unjust" assessment. The parties in that case had each received inheritances that were used for the benefit of the family. The marriage was a long one – about 38 years – and the parties had four children. The youngest still lived with the wife and the wife also took care of another child, who, though of age, had psychiatric issues. The trial judge's error arose when she said in relation to one of the inheritances – a vacant piece of property - "[i]t cannot be said that the wife has made any contribution to this property other than indirectly by the rates and slashing costs being paid." The trial judge further commented that the property had increased in value over the fourteen years that the husband owned it and that any money used to maintain it was "modest" and was money that" would otherwise have been available for the benefit of the family."

[54] The trial judge in **Hurst** had thus sufficiently failed the weigh the wife's contribution. One of the grounds of appeal in that case was that the percentage distribution was "upon the facts unreasonable or plainly unjust." The court, though clearly unhappy, referred to **Rodgers** and stated that "[w]e have earlier identified specific discretionary error. In the absence of specific reference points we are not willing to conclude more generally as [the particular ground of appeal] asserts."

[55] In the present case, we identified one of the 148A (5) factors that the learned trial judge omitted from her consideration. But, based on **Rodgers** and **Hurst**, this, without more, is not sufficient to justify a conclusion that the decision is unjust and inequitable in

all the circumstances. Like the court in **Rodgers**, we might ask whether the learned judge's declaration of a 15% interest in the relevant properties is "unjust by reference to what?" The learned trial judge did not say whether she engaged in any comparisons. However, the **Vidrine** court declared a 30% interest for the Wife in a marriage that lasted eight years, and where the husband had already paid "a substantial sum of money to the wife." In **Usher**, where the marriage lasted nineteen years, produced children, one of whom was a minor living with the wife, and where the wife also carried on a horticultural business, the wife was awarded 40% of the net assets. In **Proverbs,** a four-year marriage with no children, the wife was awarded $20,000.00 in respect of her interest in the matrimonial home. The court in that case, declined to apply a percentage in what was considered to be a "small money case." The court specifically assigned $5,000.00 of that sum to the statutory factors, and stated that "it is the order that must be just and equitable and not just an underlying percentage." In **Pitzold**, the parties were each awarded a 50% interest. The marriage had lasted seven years, the parties were both employed as engineers and had contributed more or less equally to the marital assets.

[56] Unlike the **Proverbs** court, here the learned trial judge did not apportion any part of the declared interest to the statutory factors, but perusal of other cases demonstrates that this is not an unusual occurrence. The **Vidrine** case was referred to by the learned judge in her decision. But, since the declaration in that case was in respect of a marriage of similar length, but resulted in a higher percentage, we are led to assume that the learned trial judge did not assign as much weight to some of the subsection (5) factors as did the court in **Vidrine**. in fact, the learned judge specifically stated that she did not think that the wife deserved much protection under subsection (5) (e). In **Vidrine**, the court made its determination based on

> "evaluat[ing] two matters as carrying the most weight. On the one hand, the contributions the wife made in relation to this property were very largely to the businesses that were conducted on the property rather than in respect of the property itself… on the other hand, the contributions made by the wife as wife, housewife and homemaker … even if not fully elaborated in the judgment would have significantly benefited and positively impacted the husband, the home and

the family unit in a general way at a time when the husband was engaged in the acquisition, conservation and improvement of the [property]."

In this case, the learned trial judge seems to have assigned the most weight to the Wife's contribution as a wife and worker in the Husband's business. However, due to the omitted consideration of subsection (5) (h), we now exercise discretion afresh and assign an additional 5% to the learned judge's declaration of interest to reflect the adjustment of this lapse.

Costs

[57] The Wife alleged that the learned trial judge "gave no consideration to costs whatsoever though… [she did say] that she would determine the issue of costs if the parties were not in agreement." The parties never indicated agreement, and no order as to costs was made. The Wife argues that "[i]t is trite law that costs follow the event. The Appellant prevailed albeit to some limited extent with the grant of a 15% interest in the properties. Therefore, the Appellant is rightly entitled to her costs in this court and in the court below." The Husband's position was that it was "not clear whether in the court below the learned trial judge failed to exercise her discretion or exercised her discretion to make no order as to costs." The Husband also pointed out that the Wife did not file a bill of costs in the lower court, as is provided for under Rule 90 of the Matrimonial Causes Rules. Counsel for the Wife directed our attention **to The Attorney General of Belize et al v The Maya Leaders Alliance et al, Civil Appeal No. 27 of 2010**. In that case, the respondents, being "the bigger of the two partial victors" were granted 70% of their costs in both courts. However, unlike the present case, there the respondents had succeeded on three out of five grounds of appeal. That is not so in this case. In the words of Morrison JA in **The Maya Leaders** each party in this case, "has had a measure of success only … [Therefore,]"it i appropriate for the costs to be apportioned as between the parties to reflect this outcome." Morrison JA also stated that "the award of costs is always a matter for the court's discretion in the circumstances of the particular case under consideration."

We exercise that discretion and order that each party bears his or her own costs here and in the court below.

Conclusion

For all the foregoing reasons, we consider that it is just and equitable to vary the order of the lower court to account for our consideration of subsection (5) (h). Accordingly, the order below is varied to reflect that the Wife shall have a 20% interest in the Vista Del Mar and Kings Park properties. Therefore, the Vista del Mar property, free from any encumbrances shall be transferred into the Wife's sole name; the sum of $69,000.00, being the balance of the 20% interest over and above the value of the Vista del Mar property shall be paid by the Husband to the Wife within six months of this order. The parties shall bear their own costs in this court and the court below.

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DUCILLE JA

PARKE JA

[58] I concur in the reasons and the orders proposed, in the judgment of Ducille JA, which I have read in draft.

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PARKE JA