[2003–04 Gib LR 15]

CARUANA v. CARUANA

SUPREME COURT (Schofield, C.J.): March 12th, 2003

Family Law—financial provision—equality—fair to divide family assets equally on divorce unless good reason to contrary—unequal financial need may require unequal division

Family Law—financial provision—inherited property—individually inherited property may be allocated to party inheriting it but may on facts be fair to divide in same way as other family assets

Family Law—financial provision—costs—when claimant awarded less than claim, will usually be liable for costs but parties' overall conduct should be taken into account

The wife sought the division of the former matrimonial assets following divorce.

The parties were married for 25 years and had no children. They originally owned a flat in London but following the husband's appointment as senior dental officer for the Gibraltar Government, the parties moved into Government accommodation in Gibraltar. They also purchased land in Sotogrande, where they built a holiday home (using their own funds and a gratuity from the Gibraltar Government). When the husband moved to a different job, they lost their Government accommodation and the Sotogrande property became their matrimonial home.

In about 1990, the husband was diagnosed with multiple sclerosis, and in 1992 he stopped work. Their only income after that was payments from medical insurance schemes. The wife had no earnings after leaving London. In 1999, the family assets were increased by some £172,000 which the husband inherited from his mother.

Following the parties' separation in 2000 and then the granting of a *decree nisi* in 2001, the husband had sole control over the former matrimonial assets. He continued to receive payments from the insurance schemes, and the wife secured employment, but the difference in their future income, over the next 15 years (taking the parties to retirement age), was in excess of £150,000. They agreed upon a sum to be paid to the wife as maintenance and a consent order was made for this amount. The court ordered an increase in this sum at a later date, but the husband failed to pay it.

The wife had the opportunity to buy a flat for £100,000 and sought the

release of funds for this. The husband agreed to an immediate sale of the former matrimonial home but later changed his mind and decided to buy out the wife's share. This he did, and the wife duly bought the flat.

The total value of the assets (including the value of the property) was determined by an accountant as being £1,019,170.16 as of July 31st, 2002. The husband's future financial requirements were clearly altered by the fact of the multiple sclerosis. It was determined that his future nursing costs would be approximately £18,000 per annum (foreseeably commencing in about 10 years' time). Also, he claimed to need £150,000 for a suitable apartment—the difference between this and the value of the wife's property was explained by the fact that any property in which he resided would require adaptation for wheelchair access.

The wife initially sought 50% of the value of the former matrimonial home, and 35% of the remaining capital. However, during the proceedings she altered this claim to 50% of the family assets. She solicited an offer from the husband but he made no offer of any kind.

She submitted that (a) she was entitled to 50% of the family assets as an equal division of the assets was fair in the present case; (b) the amount which the husband inherited from his mother should be put towards paying for his future medical care; and (c) the husband should pay costs as he had made no offer and had been the cause of the proceedings being so protracted.

The husband submitted in reply, *inter alia*, that (a) the value of the assets had depreciated since the valuation and account should be taken of this when dividing them; (b) there was good reason for departing from the equal division of assets as his future financial needs were greater than those of the wife; and (c) the amount inherited from his mother should not be included as part of the total family assets.

Held, making the following order:

(1) If there were good reason to do so, the court should depart from the usual principle of equal division of family assets between husband and wife, as long as there was no discrimination between the respective roles of husband and wife (*i.e.* this usual principle was not a legal presumption, but a check to ensure that family assets were divided fairly). In the present case, fairness required that the very different financial needs of both parties should be met. The court had to pay regard to the fact that the husband's physical disability meant that in due course he would need to live in a residence suitable for wheelchair use, *etc.* and require nursing services. However, there was great disparity between the parties in terms of future income—the husband's income over the next 15 years was likely to be greater than the wife's by more than £150,000—and the court's division of the assets had also to take this into account (paras. 17–18; para. 24; para. 26).

(2) If it would be unfair in the circumstances for an inheritance to be treated as entirely separate from the other family assets, then the court should not allow the spouse to whom it was given simply to keep it.

Inherited property usually stood on a different footing from other family assets, and there was therefore a case to be made that the husband should keep his inheritance of £172,000, although it would not be appropriate to allow him to do so here, as keeping it separate from the other assets being divided would place too great a burden on the wife of contributing to the husband's future care. The inheritance should therefore be absorbed into the sum needed to pay for his future care and suitable accommodation. Taking into account the husband's greater financial needs, the wife's lower earning capacity and the inheritance, the husband would be awarded £281,000 more than the wife—*i.e.* he would receive £650,000 and she would receive £369,000 of the £1,019,000 (para. 19; para. 25; para. 29).

(3) The court had a wide discretion in deciding to whom to award costs. The starting point for the exercise of this discretion, however, was that if the applicant received no more or less than the offer/claim made, he/she would be at risk not only of not being awarded costs, but also of paying the costs of the other party. In the present case, the wife was awarded less than her claim of 50% of the total assets, but the husband's conduct—he made no sort of offer of settlement (even though following his declaration of the assets he was under a duty to make an offer and the wife had to solicit one) and he gave the impression of having delayed the whole process—meant that he should pay all the costs (paras. 30–31; para. 33).

Cases cited:

(1) *Gojkovic* v. *Gojkovic (No. 2)*, [1992] 1 All E.R. 267; [1991] 2 F.L.R. 233; [1991] F.C.R. 913, followed.

(2) *White* v. *White*, [2001] 1 A.C. 596; [2001] 1 All E.R. 1; [2000] 2 F.L.R. 981; [2000] 3 F.C.R. 555, followed.

Legislation construed:

Matrimonial Causes Ordinance (1984 Edition), s.32(1): The relevant terms of this sub-section are set out at para.15.

Ms. J. Evans for the petitioner;
H.K. Budhrani, Q.C. and *M. Turnock* for the respondent.

1 **SCHOFIELD, C.J.:** This is the wife's application for the parties' financial arrangements to be settled following the grant of a *decree nisi* on July 31st, 2001. The parties were married in Gibraltar on July 13th, 1976, having lived together for three years prior to their marriage. The wife left the matrimonial home on May 3rd, 2000, and issued the divorce petition on July 5th, 2000. The marriage therefore lasted 25 years and the union 28 years. The husband and wife are 52 and 50 years old, respectively. There are no children of the union.

2 Following their marriage, the parties went to live in London where the husband worked as a dental surgeon at King's College Hospital and held

various secretarial positions. They purchased a flat in Devonshire Court, Gloucester Terrace, London, W2. I say "they," although the husband's evidence is that he bought the flat and the wife's recollection is that it was bought in joint names. In the event I do not think anything turns on that for what is agreed is that the parties shared the household expenses. Also agreed is that the flat was purchased for £18,000 of which £10,000 was provided by the husband's parents and the rest was taken on mortgage.

3 In September 1981, the husband took up a position of senior dental officer with the Gibraltar Government and the parties moved with the job. Initially they resided in Government accommodation but then purchased a plot of land in Sotogrande, Spain, on which they constructed the matrimonial home, initially, so the husband describes it, meant to be a weekend, holiday or retirement home. The plot of land was purchased from the sale of a boat. The house cost in the region of £100,000 to build. This was financed from the proceeds of the sale of the London flat and a gratuity from the husband's contract with the Gibraltar Government. Again there is dispute over whether there was a substantial balance paid from savings, but, again, I do not consider anything rests on that.

4 In September 1987, the husband was awarded a permanent and pensionable contract as Consultant Dental Surgeon at St Bernard's Hospital, Gibraltar. There is dispute over the circumstances in which this occurred, which again I do not think has bearing on the outcome of this application, but the parties lost their right to Government accommodation and ended up residing permanently in their Sotogrande house.

5 In about 1990, the husband was diagnosed as having multiple sclerosis. Not surprisingly this has had a profound effect upon the life of the husband and, indeed, the lives of the parties. The husband stopped work in 1992, since when the parties' only income has been the proceeds of medical insurance schemes. The wife had not earned an income since the parties left London although she says that she worked as a groom for the husband's polo ponies, to save him expense, and that when she broached the subject of her getting a job on one occasion the husband set his face against the idea. The husband says that the wife never offered to work and he never asked her to or expected her to. The picture one gets is of a couple who have been comfortably-off financially, living in a substantial residence, extended and converted to suit their requirements, but with the spectre of the husband's medical condition and the inevitable deterioration in his condition hanging over them.

6 The matrimonial assets as at July 31st, 2002 are agreed as £1,019,170.16. This figure was arrived at through the services of an accountant, Mr. Drummond, who audited the family accounts. It is made up of £445,911.96, being the value of the former matrimonial home, investments in T.E.P.s amounting to £131,398.25, £125,210 in a Norwich

Union Investment Fund, an amount of £66,666 ascribed to the husband's interest in a discretionary trust, and £27,027.97 in sterling bank accounts. I should say here that in 1999 the husband inherited £172,000 from his mother which is absorbed in the total family assets of £1,019,170.16. The husband receives £1,674 per month from the insurance policies with the Medical Sickness Society, £50 per week of which expires on December 31st, 2011, when he is aged 60, and the balance expires in 2016, when he reaches 65. He also receives a National Health Service pension of £141 per month which expires on his death. As I say, the wife received no income for many years but after she left the husband she took a job with an estate agency which brought in about £500 per month. That job only lasted several months but fortunately the wife has managed to secure another post from which she earns £650 per month. There seems no reason why the wife cannot continue in some sort of employment until she is of retirement age. The parties are agreed that this is a suitable case for a clean break, the only issues being the present value of the family assets and how much of them should go to the wife.

7 When the wife left the matrimonial home she went to live with her mother. Initially the husband made three payments of maintenance to her of the peseta equivalent of £80 per week, but these payments ceased. The parties held several joint bank accounts but on their separation the husband closed them. There seems to be some dispute over the amounts in those accounts, but the evidence is that moneys were transferred into the husband's sole control and that since the parties separated the husband has had sole control over the family assets. On July 28th, 2000, the wife took out a summons for maintenance pending suit. In a substantial affidavit the husband explained that his income is limited and that any payment of maintenance would have to be made out of capital. He offered interim maintenance of £135 per week on the basis that he wanted to make his wife a "suitable and reasonable" offer of financial settlement. On July 31st, 2000, the parties entered a consent order before Pizzarello, A.J. that the husband pay maintenance to the wife of £135 per week. This order included a provision that proceedings be stayed for 28 days for the purpose of enabling the parties to negotiate a settlement.

8 Between April and July 2001, there was some activity in court on matters of disclosure and on December 3rd, 2001, the wife obtained, before me, an increase in maintenance to the sum of £1,125 per month commencing on November 1st, 2001. Included in that order were further orders on disclosure and an order that the husband return to the wife her car, which the husband had kept since their separation in May 2000. By that stage the wife had moved out of her mother's home and had rented a bedsit. She declared that she had the opportunity to purchase a small flat for the price of £100,000 and in correspondence between her solicitor and the solicitor for the husband she was seeking the release of funds to

enable her to buy it. In his affidavit in resistance to the application for an increase in the maintenance, the husband stated that he was willing to agree to an immediate sale of the matrimonial home and asked the court to defer consideration of the wife's application for a period of three months so that the court might view it in the light of any changed financial circumstances which would be brought about by the sale of the matrimonial home. In the event I saw no reason to keep the wife out of an immediate increase of maintenance and urged the parties to settle their financial affairs as speedily as possible.

9 On February 20th, 2002, the wife filed a summons because the husband had failed to pay the increase in maintenance pursuant to my order of December 3rd, 2001, and this despite numerous attempts to communicate with the husband's solicitor. A cheque arrived on February 22nd, 2002. Unfortunately that cheque had been drawn on an account with the Royal Bank of Scotland which the bank had unilaterally decided to freeze because of the litigation between the parties. When the summons was heard by Pizzarello, A.J. on April 8th, 2002, he ordered payment of the arrears of maintenance within seven days. He also made further orders of disclosure. In correspondence, the parties had been discussing the likely impact of the husband's medical condition upon a financial settlement and Pizzarello, A.J. ordered the husband to file, within 14 days of the date of the order, an estimate of his medical costs.

10 Following the husband's agreement to sell the matrimonial home, the parties agreed to instruct a valuer to value the property and to share his fees. Although agreement was reached in this regard in early December, 2001, it was only after much toing and froing, with the involvement of the registrar, that instructions reached the valuer in early April 2002. On April 15th, 2002, an offer to purchase the property for €635,000 was received by the husband. Within a week this offer had been increased to €691,163. The wife agreed to accept that offer and an acceptance was communicated to the purchaser's agent on April 25th, 2002. On May 29th, 2002, Pizzarello, A.J. ordered, on the wife's application, that the husband sell the matrimonial home to the prospective purchaser or alternatively purchase the wife's half share in the home for the equivalent of the offered price. The husband was given 21 days in which to comply with that order and the wife was given the costs of the application. On June 14th, 2002, the husband's solicitor notified the solicitor for the wife that the husband had opted to retain the property. A further order was made by Pizzarello, A.J. on June 20th, 2002, requiring the husband to pay the wife's half share of €345,581.50 into the Supreme Court by close of business on June 24th. I should add, for the sake of completeness, that there was further delay in the arrangements for the transfer of the wife's interest in the matrimonial home to the husband, and it took a further application to this court before the funds retained in court

could be released to the wife. This was finally achieved in September 2002. The value of the matrimonial home of €691,163 (or £445,911.96 in sterling terms) represents part of the family assets of £1,019,170.16, and the wife has had half of the value of the home of £222,995.98. There is a balance on the audit of assets at July 31st, 2002, of £573,258.20.

11 A further order of June 27th, 2002 required the husband to furnish Mr. Drummond, the accountant, with all necessary documentation within 14 days to enable him to prepare an audit of family assets. That audit was completed in time for this hearing, but not before further summonses were issued dealing, *inter alia*, with disclosure.

12 The husband continues to live in the former matrimonial home and his present outgoings are, more or less, covered by the income from his medical insurances. He now has a live-in lady friend. It is uncertain whether this relationship will be permanent and I have no details on whether the husband's friend contributes to the couple's income. I am therefore unable to speculate on whether the husband benefits or will benefit from the relationship in financial terms. The wife managed to purchase a two-bedroomed flat in Sotogrande for £100,000. This she did in August 2002, before the money from the matrimonial home reached her, by borrowing from her mother and uncle. Her outgoings are taken care of by her income and the maintenance from the husband of £1,150.

13 What valuation do I put on the balance of the family assets? The parties agreed that Mr. Drummond's audit should be conducted up to July 31st, 2002. The wife would have me accept the value of the family assets as of that date. The husband, on the other hand, argues that the value of the assets has gone down and produces a letter from the Norwich Union showing that, as of December 31st, 2002, the plan in the husband's name was valued at £112,543.94 as against a valuation of £125,210 put on the plan by Mr. Drummond.

14 I must say I have a problem with the husband's approach. First, I have to guard against a selective approach to valuation of the family assets. He produces evidence that one asset has reduced in value but he has had control throughout of all the information regarding all the assets. If he wished to put a case for a re-assessment of Mr. Drummond's figures he could have provided a proper and up-to-date audit for himself. Secondly, the delay in the completion of Mr. Drummond's audit is, from the evidence before me, largely if not wholly down to the husband. Had he been forthcoming with all material in a timely manner then the audit would have been completed at a much earlier date. Thirdly, whilst it must be acknowledged that investments based on the price of shares are likely to have taken a downward valuation in recent months they may well take an upward turn in the future. Be that as it may, I must acknowledge that there is a strong possibility that the family assets have reduced in value

since July 31st, 2002. The approach to their valuation I propose to adopt, in all the circumstances, is to accept Mr. Drummond's figures whilst bearing in mind that his valuation is, in all probability, a high valuation of the assets as they stand today.

15 The matters to which I must have regard in making my determination are contained in s.32(1) of the Matrimonial Causes Ordinance, as follows:

> "It shall be the duty of the court in deciding whether to exercise its powers under this Part in respect of a decree of divorce, nullity or judicial separation, and under sections 47(2) and 48 (insofar as it relates to section 47(2)), in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—
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> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
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> (d) the age of each party to the marriage and the duration of the marriage;
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> (e) any physical or mental disability of either of the parties to the marriage;
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> (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
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> (g) in the case of proceedings for divorce or nullity, the value to either of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring—
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> and so to exercise those powers as to place the parties, so far as it 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 had properly discharged his or her financial obligations and responsibilities towards the other."

16 In *White* v. *White* (2), the House of Lords considered s.25 of the Matrimonial Causes Act 1973, which is in very similar terms to s.32(1) of

our Ordinance. The one main difference between the English statutory provision and our own is that the tailpiece to s.32(1) is absent from the English provision. This is what Lord Nicholls of Birkenhead, with whose speech the other members of the House agreed, had to say about it ([2001] 1 All E.R. at 8):

> "As originally enacted in 1970, in section 5(1) of the 1970 Act, the list of factors to be taken into account contained a tailpiece. The tailpiece declared what should be the objective of the court when exercising the statutory powers to make financial provision orders and property adjustment orders. The court was so to exercise these powers:
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> > '. . . as to place the parties, so far as it 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 had properly discharged his or her financial obligations and responsibilities towards the other.'
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> This tailpiece was later deleted from the legislation, and nothing inserted in its place. In consequence, the legislation does not state explicitly what is to be the aim of the courts when exercising these wide powers. Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses (see Thorpe L.J. in *Dart* v. *Dart*, [1997] F.C.R. 21 at 29). The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children."

17 Clearly, in Gibraltar the legislature has stated explicitly what the aim of the courts must be in exercising their powers under s.32(1), but implicit in that aim is the element of fairness between the parties. Lord Nicholls went on, in *White* v. *White* (2), to say that in seeking to achieve a fair outcome there is no place for discrimination between husband and wife and in their respective roles. However, he shied away from enunciating a principle that in every case the "starting point" in relation to a division of assets of the husband and wife should be equality. He said (*ibid.*, at 9):

> "Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the

> yardstick of equality of division. As a general guide, equality should 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."

and further (*ibid.*, at 10):

> ". . . I do not accept Mr. Turner Q.C.'s invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division."

18 Lord Nicholls went on to consider earlier cases in which it appeared that the claimant wife's financial needs or "reasonable requirements" appeared to have been the determinative factor in arriving at the amount of an award. He had this to say (*ibid.*, at 11):

> "The statutory provisions lend no support to the idea that a claimant's financial needs, even interpreted generously and called reasonable requirements, are to be regarded as determinative. Another factor to which the court is bidden to have particular regard is the available resources of each party. As my noble and learned friend, Lord Hoffmann, observed in *Piglowska* v. *Pigslowski*, [1999] 3 All E.R. 632 at 642; [1999] 1 W.L.R. 1360 at 1370, s.25(2) of the 1973 Act does not rank the matters listed in that subsection in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to

her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division.

There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression 'reasonable requirements' in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognised, there is some overlap between the factors listed in s.25(2) of the 1973 Act. In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme."

19 It will be remembered that the family assets were increased by some £172,000 which the husband inherited from his mother in 1999. Lord Nicholls gave the following valuable guidance on how I should approach this question (*ibid.*, at 13):

"I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. A distinction along these lines exists, for example, in the 1985 Act and the New Zealand Matrimonial Property Act 1976.

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a

different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

20 In addition to the matter of the inheritance, a particular feature of this case, which s.32(1), and indeed fairness, require me to consider, is the physical disability of the husband and the likely effect which that disability will have on his financial needs.

21 Reports have been tendered from Dr. M. Maskill, a consultant physician whose patient the husband is, and Dr. R.J. Abbott, a consultant neurologist. Their reports are complementary. Dr. Abbott's diagnosis reads as follows:

"There is no doubt that Mr. Caruana suffers from multiple sclerosis. Approximately 10% of patients with multiple sclerosis have primary progressive multiple sclerosis. By definition Mr. Caruana does not suffer from this condition as he has suffered a number of relapses in the early states of his illness. At the present time he has shown features of secondary progressive multiple sclerosis with superimposed relapses and remission. This is sometimes known as secondary relapsing M.S. In this condition the patient continues to have occasional relapses where their disability deteriorates. However, unlike in benign multiple sclerosis following a relapse, the patient does not return to full mobility and on clinical examination there demonstrates evidence of persisting damage to his nervous system. In Mr. Caruana's case he has evidence of optic atrophy. He has evidence of upper motor neurone signs in arms and legs and evidence of cerebellar dysfunction in all four limbs. In particular his gait is ataxic and this is why he required to use a walking stick. He

> suffers from problems of sphincter dysfunction which particularly affects his bladder. He also suffers symptoms of fatigue which are made worse in hot weather. Symptoms often seen in patients for secondary progressive multiple sclerosis which cause malaise and disability which can be fluctuant from day to day."

The husband's prognosis is:

> "Mr. Caruana's disability has progressed significantly over the 10 years since he was first diagnosed as having this condition. At the present stage his activities are limited by fatigue, spasticity and ataxia. He is troubled by bladder and visual dysfunction. He appears to be cognitively intact. He suffers from secondary progressive multiple sclerosis. It is likely that he will continue to deteriorate neurologically in the future. It is highly likely that in between 5 and 10 years he will be wheelchair bound and requiring an indwelling urinary catheter. It is also possible that he will lose further vision and may become partially sighted. It is unusual for patients with multiple sclerosis to become completely blind however."

Dr. Abbott details the husband's future requirements as follows:

> "Mr. Caruana's disability will increase over subsequent years. He will require in the future to live in an environment adapted to his physical disability. It is likely that he will be wheelchair bound and will require an environment adapted for a wheelchair. As Dr. Maskill indicates, there is a possibility that ultimately he will become bed-bound and completely dependent on outside help. This does not happen in all cases of multiple sclerosis but there is in my opinion a 20% likelihood that this will happen in the next 20 years. If this does occur then he will be subject to complications of such inanition with a possibility of developing pressure sores, pneumonia and ultimately premature death.
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> If indeed Mr. Caruana does develop sufficient disability to require to live in a wheelchair he will be unable to live independently. He will not be able to easily drive himself around and will require an external carer. He may require to move into adapted accommodation with stair-lift, ramps, *etc*. Ultimately it is likely that he will become totally dependent upon others. This can happen within 5 to 10 years but it is more likely to be within 10 to 15 years."

Dr. Abbott reports that multiple sclerosis can have an effect upon a person's life expectancy. He says:

> "With regard to life expectancy in multiple sclerosis, in the majority of patients with moderate disability there is a degree of shortening of life expectancy related to the development of bladder problems

> and inter-current infection. Life expectancy in the majority of patients is expected to be normal but in patients who do develop significant disability and become wheelchair bound with bladder complications, there can be a shortening of life expectancy by between 5 and 10 years. There is no increased incidence in other neurological disorders in this condition."

22 I must endeavour to quantify the effect of all this in monetary terms. For several months now the wife's solicitor has been inviting the husband to assist us in this connection. On January 27th, 2003, the husband's solicitors sought to do so by way of letter. He said that at present there is no significant cost to the husband in the way of medical care which is not discharged in the context of his normal living expenses. Whilst the husband can cope for himself at present, should his condition deteriorate significantly then he will require nursing assistance. A nursing agency in Gibraltar would provide such services for £18,720. An agency in Algeciras will provide 24-hour assistance at a monthly rate of £1,500. It seems, therefore, that at present rates the cost will be in the region of £18,000 per annum. But this, of course, is not an immediate requirement and, it seems from Dr. Abbott's reports, will not be needed until the husband takes to a wheelchair, which one can estimate will be in about 10 years' time.

23 There is also the question of medication. At the moment the husband receives a dosage of steroids. This is not reflected as a cost which impacts upon this application. I do not know whether this is because the cost is insignificant or whether the cost is borne by someone other than the husband. In his letter of January 27th, 2003, the husband's solicitor refers to a drug called beta interferon which is a drug which could reduce the frequency of highly distressing and disabling relapses of multiple sclerosis. The annual cost at present of this drug is £12,000. However, Dr. Abbott says that there is no undisputed evidence that beta interferon or any other immunomodulatory therapy has a significant effect on the rate of secondary progressive multiple sclerosis such as is suffered by the husband. His opinion is that the husband is not a candidate for immunomodulatory therapy.

24 The financial quantification of the effect of the husband's medical condition is extremely difficult. It depends upon so many imponderables, including when, as seems likely, the husband becomes wheelchair-bound, the length of his life and whether his existing relationship with his lady friend is permanent. There is no evidence from which I can conclude that he will be financially responsible for medication. However, it is clear that there will be a substantial requirement for nursing care. From the evidence before me it seems that he will require such care in about 10 years' time. If the husband is wheelchair-bound for the last 15 years of

his life then by present-day costs he will require £270,000 and if he requires nursing care for 20 years the figure increases to £360,000. There must be an adjustment to the settlement to reflect this factor. This, and the question of the husband's inheritance, are the reasons why an equal division of the assets would be unfair.

25 I also bear in mind that the husband brought into the family assets the sum of £172,000 by way of inheritance. The husband ought to be allowed to keep it. However, as there will be a substantial adjustment in favour of the husband to reflect his nursing requirements the inheritance can be absorbed into that figure. The value of the inheritance should be put towards the husband's future care, rather than the wife having too great a financial burden in that regard. I should say that the £10,000 given to the husband on their purchase of the London flat was so long ago that I do not take it into account in the settlement. The husband has argued that the wife stands to receive £500,000 from the will of her mother and that this should be taken account of when assessing the financial settlement. There is no evidence that an inheritance will inevitably find its way to the wife. Evidently the wife's mother is hale and hearty. She could change her mind. She looks after the wife's seriously retarded sister and has another child who is not as well off as the Caruanas. I cannot pay regard to such an uncertain contingency as the wife's potential inheritance.

26 There is a great disparity between the parties in terms of future income and regard must be had to this (see s.32(1)(a)). The wife earns £650 per month and there is no evidence that she has the capacity to earn more. Presumably she can continue to work until retirement age. When maintenance from the husband ceases, on present figures the wife will have to dip into capital to the tune of £800 per month. On the other hand the husband receives £1,640 per month from the Medical Sickness Society and £141 per month from his National Health Service pension. This latter, small amount is payable for life and is a benefit which the wife will be deprived of by virtue of the divorce (see s.32(1)(g)). According to the husband's affidavit of August 27th, 2000, the Medical Sickness Society policies expire in amount as follows: £216 per month on December 31st, 2011, £1,316 per month on March 7th, 2016, and £108 per month on December 31st, 2016. Assuming that the wife can work for a further 15 years, I have calculated that the disparity in income between the parties over that period is in excess of £150,000. As I say, this is a matter which I must take into consideration.

27 Section 32(1) requires me to exercise my powers as to place the parties, so far as practicable, in the financial position in which they would have been if the marriage had not broken down. I do not think the conduct of the parties plays a part in my determination save for the question of costs, which is itself a substantial consideration, and save for the fact that

there was a period of time immediately following the parties' separation when the wife was kept out of reasonable maintenance. The amount she should have been paid was retained and forms part of the capital. Initially the husband made three payments of £80 each. He was ordered to pay £135 per week maintenance on July 31st, 2000, and as I understand it the figure was set as an interim figure, and at so low a rate, anticipating that the parties would come to a speedy settlement. It was only after further proceedings, resisted by the husband, that the maintenance was fixed at the realistic figure, on December 3rd, 2001. For some 17 months the wife was kept out of a reasonable amount of maintenance and kept out of her capital entitlement. She was reduced to living in a bedsit for several months. If maintenance had been fixed at an early stage at the reasonable figure, the wife would be about £10,000 better off today, but of course the family assets would have been reduced by a commensurate amount.

28 I do not think that the parties can be placed in the same financial position as they would be if the marriage had not broken down. The wife has already accepted life in a two-bedroomed apartment and the need to work. The husband has so far maintained his lifestyle in a four-bedroomed house with swimming pool, gardener, *etc.*, but it seems that he acknowledges that this lifestyle cannot be maintained if he is to provide for his future medical needs. Indeed, before me, Mr. Budhrani suggested that the husband will need £150,000 for a suitable apartment. The wife paid £100,000 for hers, but perhaps the difference of £50,000 between the parties' residential requirements, as suggested by Mr. Budhrani, can be explained by the extra needs of the husband caused by his physical disability. He will require a residence which caters for his physical needs and can accommodate a wheelchair.

29 Taking all the above matters into consideration and being as fair as I can as between the parties I consider that if I make an order which, on Mr. Drummond's figures, gives the husband £150,000 for future accommodation and £500,000 capital it meets the justice of the case. This leaves the wife with £369,000, or £146,000 of the balance of capital remaining, and means that the husband receives the sum of £281,000 more than the wife.

30 I must now turn to the question of costs. Useful guidance in this regard is gleaned from the English Court of Appeal case of *Gojkovic* v. *Gojkovic (No. 2)* (1), where Butler-Sloss, L.J. had this to say ([1992] 1 All E.R. at 271):

> "However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs *prima facie* follow the event (see *per* Cumming-Bruce L.J. in *Singer (formerly Sharegin)* v. *Sharegin* [1984] F.L.R. 114 at 119) but may be displaced much more easily than, and in circumstances

> which would not apply, in other divisions of the High Court. One important example is, as the judge pointed out, that it is unusual to order costs in children cases. In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved it is usual, and normally in the interests of both parties, that the applicant should obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is *prima facie* entitled to, and likely to obtain, an order for costs against the respondent. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs."

and further (*ibid.*, at 271):

> "There is, however, a minority of cases, of which the present appeal is an example, where the assets are substantial and an order for costs can (if appropriate) be made. In such cases the parties are likely to negotiate, and such negotiation, which may lead to a settlement, is much encouraged by the courts. The *Calderbank* offer, a letter containing an offer only revealed after the order is made, bears some resemblance to, but is not identical with, a payment into court. It takes its name from *Calderbank* v. *Calderbank*, [1975] 3 All E.R. 333, [1976] Fam. 93, (a claim by a husband) in which Cairns L.J. referred to an apportionment offer in Admiralty proceedings, and said ([1975] 3 All E.R. 333 at 342, [1976] Fam. 93 at 106):
>
> > 'If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the courts' apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded just on the same basis as if there had been a payment in. I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances as we have been concerned with.'"

and further still (*ibid.*, at 272):

> "It is therefore clear that *Calderbank* offers require to have teeth in order for them to be effective. This is recognised by the requirement in Ord. 62, r.9 (and the equivalent C.C.R. Ord. 11, r.10) as amended,

for the court to take account of *Calderbank* offers, and by analogy open offers, in exercising its discretion as to costs. There are certain preconditions. Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the applicant to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter-offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by *Calderbank* offers, both adopted by the husband in this case. It is a matter for the parties which procedure they prefer. There is a very wide discretion in the court in awarding costs, and as Ormrod L.J. said in *McDonnell* v. *McDonnell*, [1977] 1 All E.R. 766 at 770; [1977] 1 W.L.R. 34 at 38, the *Calderbank* offer should influence but not govern the exercise of discretion.

There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation, for instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs, or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way that wide exercise of discretion. But the starting point in a case where there has been an offer is that, *prima facie*, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it. That seems clear from the decided cases and is in accord with the Supreme Court and County Court Rules requiring the court to have regard to the offer. I cannot, for my part, see why there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case *prima facie* costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that *prima facie* position."

31 In this case the wife had to initiate proceedings because the husband failed to pay her proper maintenance and he took control of the family's finances. When those proceedings were instituted the husband offered a low amount of maintenance and declared that the purpose of his agreeing

to pay this amount "was to encourage the commencement of negotiations for suitable and appropriate financial settlement" but went on to ask the court to reject the wife's claim for maintenance and make an order for payment of a lump sum. That was stated in his affidavit dated August 17th, 2000, at which stage full disclosure had not been effected. The wife went on record as requiring by way of settlement half the value of the matrimonial home and 35% of the remaining capital. During the course of proceedings her position hardened to a request for 50% of all family assets. Of course the eventual award has not come up to these demands but in correspondence the wife solicited an offer of settlement from the husband. At no stage during the course of a case which has stretched over many months, unless perhaps informally and very shortly before the hearing of this matter, did the husband make any offer of settlement. It is as if he has been unable to bring himself to do so.

32 Mr. Budhrani has manfully tried to persuade me that the wife has conducted these proceedings in a hostile manner and that she has failed to accept the husband's declaration of his assets, thus prolonging and complicating the proceedings. This is an easy accusation to make by a party who has taken control of the assets and has refused to make an offer of settlement. At every turn the wife has needed the court to step in and the correspondence file is littered with letters unanswered by the husband's solicitors. It even required the drafting of a summons to force the husband to pay his share of the fee for valuation of the matrimonial home, many months after the report was agreed upon and the wife had paid her share of the fee.

33 The husband has at all times had sole access to the information necessary to quantify the family assets. It was his duty to make that quantification, by means of professional help if necessary, to provide that proof to the wife and also to make an offer of settlement. The evidence shows that he dragged his feet on the quantification and neglected to make any offer of settlement. If he had made an offer the high costs which the parties will have to meet in this case could have been avoided. It is insufficient for him to say he made a true declaration of assets. It was his duty to follow such declaration with an offer of settlement. In my judgment the husband will have to meet those costs.

34 There is one other matter which I ought to mention. It is clear, and has been so throughout the course of these proceedings, that this case should have been settled at a very early stage. Both Pizzarello, A.J. and I have on several occasions urged the parties in that direction and indeed the very first order, made some $2\frac{1}{2}$ years ago, included a provision for stay to enable the parties to settle the matter. During proceedings in chambers prior to the final hearing, I received a strong indication from counsel that they would appreciate an indication from me of what I regarded as an

appropriate figure of settlement. This was repeated at the hearing and so I took an hour in the privacy of my chambers to consider the material and I then made an indication to the parties. In the event the husband could not accept the indication although his counsel sought and obtained an adjournment over the weekend for consultation. At the adjourned hearing Mr. Budhrani asked that I recuse myself and pass the matter on to Pizzarello, A.J. His submission was that I had expressed my indication in such strong terms that the husband felt that his arguments would not receive impartial consideration.

35 I have on a number of occasions in proceedings of this nature adopted a procedure similar to the one I took in this case. It was welcomed by counsel and the parties and is meant to save costs. It should not be the case that arguments over the size of family assets and the proportion to which each party is entitled should substantially reduce the assets for distribution. It is the duty of the parties' legal representatives to advise their clients of the unwisdom of unnecessarily protracted proceedings, to warn them that recalcitrance can lead to condemnation in costs and to guide their clients to a settlement.

36 I assumed that such had occurred in this case and so I offered the parties a robust view, bearing in mind that the court has had to be robust through the course of this matter to take it forward. I thought counsel would welcome an expression of my view in terms which might bring results. I was not forewarned that a robust expression of my view would meet with an application for me to recuse myself. I refused the application for the following reasons. First, that the full hearing of the application involved arguments of counsel on the material I had considered in chambers, including counsel's skeleton arguments. There was no further material, such as *viva voce* evidence, upon which I had to form an impartial view. I could, without difficulty, give the material and arguments my impartial consideration, despite my indications to the parties. Secondly, to pass the matter over to Pizzarello, A.J. would involve further delay of the action, perhaps for a matter of months, when the case should have been resolved two or more years ago. Thirdly, I know that Pizzarello, A.J. had himself expressed his views that the matter should be settled. I did not know how forcefully he had expressed himself and I did not want him to be faced with a similar application so that the court would run out of judges. Lastly, I felt I could place little reliance on the husband's perception of my impartiality. I formed the view that any objective and fair resolution of this matter would be regarded by him as an unjust resolution.

37 I order that the husband pay to the wife the sum of £146,000 within 28 days hereof. In view of the history of this matter, and for the avoidance of doubt, if payment is not made before April 1st, 2003, the husband will

pay the wife, on that day, maintenance at the present rate of £1,125 out of their joint assets. If payment is not made before May 1st, 2003, the husband will pay such maintenance out of his share of the apportionment of assets on that day and on the 1st day of each month until payment is effected. As I have indicated, costs will go to the wife, which will be assessed if they are not agreed.

Order accordingly.