IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO. 2008/25274

In the matter between :

BROWNLEE, MICHELE (born DU PLESSIS) Plaintiff

And

BROWNLEE, NOEL GRAHAM Defendant

JUDGMENT

BRASSEY AJ:

INTRODUCTION

1. Marriage is, typically, born out of such love and solemnized with such hope that its termination by divorce cannot but be tragic. But the death of this marriage, or at least the manner in which the last rites have been pronounced over it, represents a tragedy of an especially painful sort.

2. So much was rightly acknowledged by counsel for one of the parties and would, I think, have been evident to anyone sitting in court throughout the days, sometimes seemingly endless, when which the evidence was presented, challenged and minutely examined in argument. I cherish no hope that this judgment will diminish the acrimony between the parties, for I suspect only time can do this; but, beyond settling the outstanding issues between the parties (which is of course my primary task), I do entertain the hope, vain though it may be, that what I say will reduce the risk of a repetition of this tragedy.

THE MARRIAGE AND ITS CONSEQUENCES

3. The plaintiff, a widow with a son of fourteen, married the defendant on 24 October 1998 in Johannesburg. In the early years the commitment between them was so strong that the defendant agreed to adopt Sheldon, the son, with whom he had by then formed a strong bond. The process of adoption was not pursued, perhaps because the parties considered that a change of name would suffice, but in September 2000 Sheldon took the surname of Brownlee in consequence of an official entry in the Births and Deaths Registration Act 51 of 1992.

4. In 2007 the plaintiff and the defendant, on a visit to the Eastern Cape, looked over St Andrew's College in Grahamstown. Excited by what they saw, they completed and signed, as father and mother, the application forms for his admission to the school as a boarder. The application was successful. At the beginning of 2008 he took up a place in Grade 8 at the school and, if all continues as originally contemplated, he can expect to matriculate and leave the school in three years time.

5. Education at senior level at a private school is, according to the plaintiff, the path the parties envisage for Jaimee, the daughter born of the marriage in March 2002.

6. At present she is a day scholar in a state-funded school and lives with her mother. There is no quarrel with this arrangement, for these and other matters of parental rights and responsibilities are, happily, the subject of agreement between the parties.

7. It was shortly after Jaimee was born that the defendant began to stray. According to the plaintiff, he would go out on his own and return, late at night, in a drunken and repellent state. Her pronounced disapproval of his conduct had little effect on his conduct and seems to have done nothing to improve the relationship. At some point – the date is unclear – the defendant embarked upon a secret, long standing relationship with another woman, a liaison that he may or may not have augmented by other dalliances.

8. Her suspicions aroused, the plaintiff hired a private detective and together they raided the flat he had acquired for his affairs. Enough was found there to confirm her suspicions and the defendant was put on terms to leave the matrimonial home, which he did in mid-2008. The plaintiff lost no time in bringing divorce proceedings and, acting with commendable speed, the lawyers contrived to secure a hearing of the matter, hotly contested though it was, in just over a year.

THE ISSUES

9. Matters of custody and access having been all but completely agreed, the case presented to the court concerns the patrimonial entitlements and obligations of the parties. Some items, such as the maintenance payable for Jaimee, have been conceded and they will be recorded in the order ultimately made by me. One claim is, moreover, formally contested but is met by no defence that is valid in law. It is

the claim for repayment of an amount of R191 000, together with interest, paid by the plaintiff to the defendant under a scheme designed to maximize the income of the plaintiff's erstwhile mother in law. The defendant admits that the payment took the form of a loan that was repayable on demand and, demand having been made at the end of August 2008, the defendant has no legal right, questions of set-off aside, to refuse to repay it. All that is contested is the duty to pay interest on the amount, but the law is clear on the point, and plaintiff is entitled to *mora* interest from the date of demand, which is 31 August 2008.

10. What the defendant does contest is the plaintiff's claim for maintenance for herself; he says she earns, or will be able to earn, enough to be self-supporting. Also contested is the plaintiff's claim that he should pay Sheldon's school fees for so long as the boy remains at St Andrew's College. In addition the plaintiff claims that the defendant should make corresponding payments for Jaimee at the point when she becomes old enough to go to senior school.

11. In addition, the plaintiff has a fairly significant claim under the so-called system of accrual. One defence originally mounted to this claim was for forfeiture of benefits, to which the plaintiff responded by a defence in equivalent terms, but these contentions were jettisoned during the trial. As matters stand, the defendant, while accepting the application of the accrual principle, contends that the plaintiff's claim reflects an inflated assessment of the value of his estate at the date of trial.

12. In issue, finally, is the question of costs. It is a matter on which I shall have quite a lot to say at the end of this judgment.

No contractual right

13. In the particulars of claim, the plaintiff pleads that the defendant, by agreement, undertook a general duty to maintain Sheldon and that this specifically encompassed a duty to pay his school fees. In the course of preparing for trial, the plaintiff abandoned the general claim for maintenance and elected to proceed only for the school fees. In making this concession, she was, I have little doubt, persuaded by the prevailing principle that a spouse has no general duty to support a child born of another marriage unless the child is, in consequence of formal adoption, deemed to be his or her own.

14. In proceeding for the school fees, however, the plaintiff placed reliance on the agreement to pay maintenance that, she contended, was implicit in the defendant's agreement to pay Sheldon's school fees. The plaintiff said that the agreement constituted a contract that bound the defendant to pay the school fees until Sheldon left St Andrew's school. She based this conclusion on the defendant's endorsement of the decision to send Sheldon to the school and his formal undertaking, expressed in the application form, to be jointly and severally liable for the school fees that she, as applicant, was under an obligation to pay. In addition, she pointed out that the defendant had in fact made some payments to the school, but in argument this point was rightly accepted as neutral on the issue of contractual liability.

15. None of this supports an inference that, as between the two spouses, the defendant made a contractual commitment to pay the school fees. The decision was the product of a domestic arrangement and so does not sustain the inference that the defendant's concurrence was given with intention to contract. Pothier, according to RH Christie *The Law of Contract* 4 ed (2001) 34, illustrates the extra-contractual nature of such arrangement by giving an example, instructive in the present case,

of a father's promise to reward his son who does well at college. This, Pothier makes plain, may be an undertaking of sorts, but it does not generate a binding contract since it is not given *animus contrahendi.*

16. Still less does the defendant's promise constitute an undertaking to pay the fees for so long as the plaintiff elects to keep Sheldon at the school. An undertaking so far-reaching in effect would have subjected the defendant, whatever his financial position, to the unfettered discretion of the plaintiff, and such an arrangement is scarcely probable between spouses even when (as these were not) they are on the best of terms. In terms of the application form, Sheldon's enrolment at the school was subject to a term's notice. If, contrary to my finding, the defendant was under a contractual obligation to pay the fees, the obligation would endure only until the expiry of a term following the fact of repudiation. This would be so even if the defendant gave the plaintiff no formal notice of his intention to terminate the contract. In *Honono v Willowvale Bantu School* 1961 (4) SA 408 (A), a schoolmaster was obliged to treat his summary dismissal, unlawful in itself since no misconduct was proved against him, as though it were expressed to expire at the end of the period, an entire term, for which notice might lawfully have been given.

The duty of maintenance and support

17. But the matter does not begin and end within the parameters of the law of contract. The defendant's obligation to pay Sheldon's school fees was pleaded as a species of maintenance, and the question that now presents itself is whether the defendant has the obligation to support Sheldon in this way.

18. In the passage from *Christie* I have referred to, Pothier is said to put the father's promise of a reward on the footing that it is 'only the expression of polite sympathy or made by way of a compliment', but Pothier then goes on to say that it is 'an offer to render assistance when called upon.' Brought up to date, as Christie

says the example must be, this is suggestive of some kind of duty of support, and the facts of the present case bear out such a duty emphatically. By agreeing to give Sheldon his name, the defendant impliedly represented to Sheldon, to the plaintiff and to the world at large, that he proposed to stand in relation to the boy as a father to a son. Confirmation of this, if confirmation is required, is to be found in the documents pertaining to Sheldon's schooling, including but not confined to the St Andrew's application form, to which he appended his signature as 'father' without reservation or qualification.

19. The representation, far from being made lightly, was given with all the solemnity that compliance with the formalities entails. Documents had to be completed, signed and sent off; the family had then to wait for the outcome; and the defendant was doubtless as happy as the rest of the family to celebrate the successful outcome of the process. In assuming the role of parent, the defendant was, according to the un-contradicted evidence of the plaintiff, simply giving effect to his feelings towards the boy, with whom he had formed a loving relationship. Little wonder, then, that the spouses saw no need to proceed with formal adoption; by conveying to one and all that he regarded Sheldon as his son, the defendant, supposing always that he was honest and trustworthy, dispensed with the necessity to translate appearance into fact.

20. During the course of the marriage the defendant, it seems, faithfully performed the functions and discharged the duties of a father in his dealings with Sheldon. His willingness to agree to Sheldon's enrolment in an expensive private boarding school and bear at least his share of the costs testifies eloquently to this fact. Being willing to place himself, literally, *in loco parentis* when the family was still intact, it is scarcely right for him to renounce his obligations now that he has fallen out with his wife. Considerations of propriety and morality would be offended if he did, and while they do not determine the law, they certainly inform it. Section

28(1) of the Constitution states, *inter alia*, that every 'child has the right … (*b*) to family care or parental care, or to appropriate alternative care when removed from the family environment'. Sheldon, having become the ostensible son of the defendant, had the right expect him to provide the family and parental care that the section contemplates.

21. To find that the defendant is obliged to pay Sheldon's school fees I do not have to conclude that he was *de facto* adopted, that such a relationship is or should be recognized under the operative statute, or even that he is under a general duty to maintain the boy. It is enough that I conclude, as I have, that the defendant held himself as Sheldon's father; that both Sheldon and his mother relied on this representation; and that, in pursuit of the obligations implicit in this ostensible relationship, the defendant joined with the plaintiff in deciding to place Sheldon in St Andrew's College and undertaking to pay the school fees that the decision entailed. To find that, in such circumstances, the defendant bears the obligation to contribute towards Sheldon's private school tuition gives due recognition to the constitutional rights and protections to which children are entitled in terms of the clause in the Bill of Rights I have cited above. The defendant had in effect promised to do this, and the law would be blind if it could not hold him to his promise.

No need to characterize the relationship as a *de facto* adoption

22. One can, if one wishes, say that the defendant, by making the promise, assumed a duty to support and maintain Sheldon. As a fact, this is so, but the words are typically employed to designate duties arising out of status relationships recognized in family law and, as I have already said, I see no reason to say that Sheldon must be treated as though he were the defendant's child by adoption.

23. Were it necessary for me to make this finding in order conclude that the defendant is bound to look after Sheldon, I should have little hesitation in doing so. As the decision in *Flynn v Farr NO & others* 2009 (1) SA 584 (C) shows, courts do recognize *de facto* adoptions and treat them, at least for some purposes, as the equivalent of legal adoptions. At para 44 of the judgment, the court, quoting from a decision in the High Court of American Samoa (*Estate of Tainanau Fuinaono (deceased)*) that a remarkably resourceful counsel had contrived to unearth, stated that an 'equitable virtual or *de facto* adoption … exists when a descendant performs parental duties towards a child in his household and that child performs filial obligations *in rerum* exactly equivalent to a formally adopted child.' In *Flynn* the court was asked to find, on the basis of this decision, that a *de facto* adoptive child was, like the *de jure* equivalent, entitled in law to inherit from the intestate estate of his adoptive father. To make this finding, the court had to interpolate the applicable statute so that it might, by the process of reading in sanctioned by the principles of constitutional construction, be made to govern adoptive relationships created *de facto* as well as *de jure*. The court held that no such interpolation was justified.

24. In argument before me, the defendant's counsel treated this decision as authority for the proposition that a *de facto* adoptive relationship enjoys no recognition in our law and thus cannot provide a basis for concluding that the adoptive parent is under a duty to support the child in question. I do not read the decision as going as far as that; rather, I see it as ultimately establishing no more than that, firstly, a *de facto* adoption cannot always be equated with a *de jure* one and, secondly, that it should not be recognized for the purposes of intestate succession. The context in which a claim based on *de facto* adoption is made is important and the practical implications of the claim must be considered. So much was clear from the affidavit filed by the National Department of Social Development and quoted at length in the judgment: in it, the deponent pointed out that, if the law were to equate the two

relationships for all purposes, the rights of the natural parent might potentially be compromised, the protections against child exploitation provided by the statutory procedures governing *de jure* adoptions might be by-passed, and the value of certainty implicit in the current system of formal recognition would be undermined. In the case then before court, matters of context and implication militated against recognition of the factual adoption: the relationship between putative father and son had consequences for third parties – the heirs whose entitlement to inherit was regulated by the Act - and the court held that the legislature, in deciding to confine the class of beneficiaries to *de jure* members of the family, had made a policy choice that could not properly be attacked as unreasonable or irrational. In the case before me, none of these important considerations comes into play: the point of concern is simply the rights of putative father and son *inter partes*.

25. To be sure, some passages in the *Flynn* judgment do tend to suggest that a *de facto* relationship should not be given legal recognition where, as here, nothing prevents the creation of the its *de jure* equivalent. In making this point, the court invoked the decision in *Volks NO v Robinson & others* 2005 (5) BCLR 446 (CC) (and see, in the same vein, *Singh v Ramparsad & others* 2007 (3) SA 445 (D)). In *Volks* the Constitutional Court declined to recognize the cohabitation of a couple as a marriage when they could, had they so chosen, have duly solemnized their relationship under law. The decision was, however, handed down after the same court's judgment in *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC), in which the court recognized a Muslim marriage, effective at common law but not solemnized within the contemplation of the statute, as enough to make the parties 'spouses' within the contemplation of the very statute with which *Flynn* was concerned. Within this domain context and consequence are everything.

26. What are the distinguishing features of the present case? First, it is clear from the evidence that the parties agreed upon a *de jure* adoption but neglected to proceed with this step for no better reason than that they saw no need for it. In *Volks*, moreover, the parties had the capacity to make the choice whereas, in the present case, Sheldon's affairs are entrusted during his minority to a third party, his mother. Non-compliance with statutory formalities was not seen to be an insuperable obstacle to the recognition of the an adoption pursuant to customary law in *Metiso v Padongeluksfonds* 2001 (3) SA 1142 (T), and I see no reason why it should operate as a barrier when all that is at stake are the rights and obligation of putative child and father *inter se*. In the instant case there are no competing claims of paternity - Sheldon's natural father is dead – and, on the facts, there can be no suggestion that the adoption is abusive or exploitative.

27. Counsel for the defendant cited *Botha v Botha* 2009 (3) SA 89 (W) in support of the submission that a defendant is under no obligation to support the child, whether minor or major, of his spouse by another union, but in the case there was no issue of promise or *de facto* adoption. She helpfully referred to *Heystek v Heystek* 2002 (2) SA 754 (T) as well, a decision that might have been thought to be against her case, but correctly distinguished it one basis that the decision was concerned with the duty of support *pendent lite*.

Scope of the duty

28. In the present case, in any event, the issue is not whether the defendant has a general duty to support and maintain Sheldon, but whether he must be required to contribute to the boy's school fees. Above I have concluded that, in consequence of his promise to treat Sheldon as his son, he does have such a duty. The duty can, however, go no further than the one that the defendant would owe his natural son. In the present context, it does not require the defendant to do more than help keep Sheldon at St Andrew's College for so long as the family, striking appropriate

balances, can be expected to afford the fees. If the burden becomes excessive, as I believe it has, the defendant should only be expected to contribute towards an appropriate but less expensive alternative. In the present case, this entails private schooling as a day boy provided, as appears to me to be so, this option is available and sustainable.

29. At what level should the contribution be made? From the evidence it is clear that Sheldon's natural father bequeathed a significant amount to his wife and, were he alive today, I have little doubt that he would expect (as it were) to pay his share of the schooling. In taking up this stance he would be recognizing that in law he has, aside from his moral responsibilities, a duty of support that is transmitted to his estate upon death. The plaintiff has a comparable duty and should, out of her own earnings, also bear a share of the schooling. Taking this approach, I consider it would be fair if the defendant were to contribute 1/3rd of the cost of Sheldon's schooling at a day-boy rate for the three years that have still to elapse before Sheldon matriculates. From the evidence the fees for a day boy at a private school are in the region of R60 000 per year, so his obligation under this head is to pay one third of this amount for three years – R60 000 precisely.

30. Since the separation the plaintiff has borne all Sheldon's school fees (so far amounting to just short of R80 000). Consistent with what I have held above, the defendant must pay for some of these fees. Since it has only now become clear that a boarding school education is too costly, I consider that it would be fair if he bore approximately half this charge. In consequence, the defendant must pay an amount of R100 000 towards Sheldon's education. This amount, together with the contribution of R120 000 that the plaintiff must make, will be put into a separate bank account and be earmarked for use as contemplated. The plaintiff can of course supplement the account or the drawings from it if she wishes to keep Sheldon at boarding school. In terms of my order, she will be given the right to

administer the fund, but must account to the defendant, upon request, for the manner in which the fund is being used.

31. I turn now to the question of Jaimee's education at a private school. The plaintiff says I should make provision for this now, but I cannot say what the financial position of the parties will be at the point, some years from now, when the girl is ready to go to senior school. I believe that this matter should be left over to be regulated when the occasion arises.

MAINTENANCE FOR THE PLAINTIFF

32. In the course of her evidence, the plaintiff set out her earnings and said that, even if the amount tendered by way of maintenance for Jaimee were brought into account, the amount would not be enough to defray her expenses.

33. Cross-examination by counsel for the defendant seemed to be directed at showing that some of her listed expenses were too high if judged by some supposedly objective standard of reasonableness. If this was indeed the approach, then I must say that I think it is wrong. Fairness is the test and, in the absence of factors justifying a deprivation of the right to be maintained, the proper approach is to postulate that the parties should each continue, following divorce, to live in the style to which they have become accustomed for so long as this was permitted by the resources at their disposal. If, as so often happens, the capital and income are insufficient to meet this standard, then each should abate their requirements accordingly. In this limited sense the touchstone is subjective: the issue is not what people generally would regard as reasonable, a standard far too amorphous to be useful, but what the parties have come to depend on, subject always to the criterion of affordability.

34. In a case such as the present, the first step is to determine the claimant's past and potential income from employment or any other source – that is, current and potential future earnings – in order to determine whether they are or will become sufficient to maintain the prevailing lifestyle. The next step is to decide whether the other spouse earns enough, after making proper provision for the maintenance of a comparable lifestyle, to make good any shortfall in the claimant's income that is exposed by the initial assessment. In the process, due allowance has to be made for much more than just the party's personal expenditure: for instance, the cost of providing for dependants has to be brought into account, and this may range beyond those with a legal claim and embrace moral claims by siblings, parents and even friends. If the available funds are sufficient to meet both sets of demands, well and good; but if not, each party must make a sacrifice in order to accommodate the legitimate demands of the other. The process is somewhat indeterminate, for a persons' expenses from month to month are variable and the traditional list must never be regarded as more than a general projection of needs. In *Hard Times* Charles Dickens portrays a character, Gradgrind, who is obsessed with facts and figures to the exclusion of the people they are supposed to serve. If there was a place for such mechanical thinkers 150 years ago, their utility is much diminished today.

35. That said, the court must have facts to work with, and with facts I was plentifully provided. In the course of cross-examining the plaintiff, the defendant's counsel wrested some concessions from her and when the dust had settled, it emerged that she had a shortfall of some R6 500 in her monthly income. The spotlight then turned on the defendant's financial position, especially his income, but he provided no direct evidence on this issue, being content to rely on concessions made by the plaintiff. Since no admission was made concerning his monthly income, he was forced to accept the evidence on the issue (assuming always that it was reliable) least advantageous to his case. This proved to be a completed application for

vehicle financing, a document of undeniable solemnity, in which he put his net earnings at R60 000. What net meant in the circumstances is debatable, given that he gave the same figure for his gross earnings, but I cannot conclude that it was ever intended to exclude the very expenses that had to be incurred in order to produce the income to which he was attesting (such as bond repayments on rent producing properties). In these circumstances, I do not think it is unfair to hold him to his statement and, once this is done, his earnings are undeniably sufficient to make good the shortfall for the plaintiff contends.

36. On the basis of this reasoning I consider that the defendant should pay the plaintiff maintenance in the sum of R5 000 per month. That said, I do not think that the payments should be made for the indefinite future. The plaintiff impressed me as a person of considerable talent and I have little reason to doubt that, even taking into the fetters on her career that result from having to discharge of her duties as the principal custodian of the minor children, she will be able to make good the shortfall by her own enterprise fairly soon. I also bear in mind that the plaintiff has capital resources at her disposal that will be swollen by the amount she receives in terms of this judgment in consequence of her claims underf the accrual system. In all the circumstances I think that a cap on this maintenance of three years will meet the requirements of the case.

THE PLAINTIFF'S ACCRUAL ENTITLEMENT

37. Under the accrual system contemplated by the Matrimonial Property Act 88 of 1994, the parties have an interest in the amount by which each other's estate improves in value over the marriage. The interest is purely equitable for, questions of dissipation aside, it becomes exigible only 'at the dissolution of the marriage … by death or divorce' in terms of s 4(1) of the Act. Simply put, the effect of the

provision is that each party receives, in terms of the operative order, a half share of the amount by which the other spouse's estate has increased in value during the course of the marriage.

38. On one thing the parties were agreed, and this was the applicability of the accrual system to the realignment of their respective estates; but what was hotly contested was the value to be assigned to the defendant's estate for the purposes of this claim. In opening address the plaintiff's case was put on the basis that the defendant had, since the separation, been hiding his assets so as to reduce his liability under this head. In addition it would be contended, so I understood, that he had been squandering assets in the knowledge that might by these means attain the same result. On the basis of these submissions, I was invited to bring these amounts back into account for the purposes of the claim. Faced with a lengthy and by no means easy inquiry into this issue, I asked the parties why they did not simply take the date of separation as the point at which the valuation should be made. Besides considerations of convenience, this approach seemed to do justice to the principle underlying the system. It is that marriage is, if not a partnership, then at least a kind of joint venture in which, to put the matter loosely, the parties go some way towards pooling their resources and making them the subject of joint decision-making. Such relationships are the norm: see, for instance, the description of the relationship between the parties in the case, quite different though it is in its legal provenance, of *Buttner v Buttner* 2006 (3) SA 23 (SCA) at para 25. As the court said in *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 77B-C, likewise distinguishable in the nature of the claim, every marriage is a partnership in one sense of the word: the parties live together and contribute to each other's physical and mental well-being.

39. Defendant's counsel, no doubt understandably, firmly denounced this suggestion as contrary to law. She relied on *Reeder v Softline Ltd & another* 2001 (2) SA 844

(W), a case in which a wife sought an interdict to restrain the transfer of shares to her husband, with whom she was locked in divorce proceedings, on the grounds that he would dissipate the assets in question. The application was framed on the basis that she had a vested, rather than merely contingent, right to participate in the benefits of the shares. In refusing the application, Cloete J held that the wife has no vested right in the shares or their proceeds. At 848I-849B the learned judge explained the legal position in these terms: 'Subsection 3(1) of the Act makes it clear that the right of a spouse to claim half of the nett accrual of the other spouse's estate is acquired "at the dissolution of the marriage . . . by divorce or death" and ss 3(2) provides that (subject to the provisions of s 8(1)) "a claim in terms of ss (1) arises at the dissolution of the marriage."'.

40. The decision establishes the moment at which the contingent right becomes perfected and, in consequence, the spouses become invested with legally enforceable entitlements. This is, as the learned judge makes clear, at the moment when the divorce court makes the applicable order. What the decision does not do is establish the moment by reference to which the respective estates of the parties must be assessed. This problem is one of procedure, not substance, and owes its origin to the fact that litigation takes time to complete. On this matter the established principle is that the operative moment is *litis contestatio*, for that is the moment when the dispute crystallizes and can be presented to the court for decision. See, by way of analogy, *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (right of child to sue for pre-natal injuries becomes complete at *litis contestatio*, but not before).

41. Since *litis contestatio* is the lodestar for the applicable decision, transactions after this moment are irrelevant and should be left out of account. By saying this, I do not mean to suggest, of course, that the pleadings are fixed in stone; if they erroneously reflect the true state of affairs, they can (subject to the normal

exceptions) be corrected so that they accurately state the facts. What cannot be done, however, is to make amendments or otherwise tender evidence in order to bring transactions into account that occurred only after close of pleadings.

42. Besides expediting the trial, this principle will do much to limit the temptation to squander assets that some spouses seem to find irresistible. This is particularly true if it is coupled with the principle that a spouse cannot, by his or her conduct, willfully deprive the other party to the marriage of the benefits of the claim under the accrual system. So much is clear from the cases. Whether they extend beyond fraud an into the realms of recklessness (sometimes equated with fraud) is a matter on which, I suspect, the courts have yet to finally pronounce; see, for instance, *Govender v Chetty* 1982 (3) SA 1078 (C). For present purposes it is enough to say that transactions outside the ordinary course of household management will naturally be subject to careful scrutiny during the interregnum between anticpated separation and close of pleadings.

43. In the present case the pleadings in respect of the plaintiff's claim in convention closed once the time for the filing of a replication to the plea had come and gone, that is, fifteen court days after the plea was filed (see Rule 25(2)). On the papers before me, I cannot determine precisely when this occurred (for the original plea has been removed from the court file), but it must have been before the end of November 2008, since this is when the plea in reconvention was filed. The best evidence of the value of the defendant's assets at this point s to be found in his formal notice in terms of s 7 of the Matrimonial Property Act filed on 11 September 2008. It puts the net accrual of his estate at R3 167 688.01. Since the defendant did not give evidence, it is impossible to say whether this assessment was correct at the time or not, so I must take it for what it purports to be – an accurate admission, against interest, of the extent of the accrual in his estate.

44. As it happens, the parties came to an agreement in the course of pre-trial preparations on most elements of their respective estates, and this consensus is of course binding on me. The plaintiff does not ask me to find that the net accrual to the defendant's estate exceeds R2 186 440, and this (subject to what I say below) is the figure I propose to work with. From it I must deduct the loan that, in terms of this order, is repayable to the plaintiff, leaving a total of R1 995 440. The plaintiff's estate must be taken to be swollen by the same amount and its accrual becomes, on her version, R387 476 and, on the defendant's, R522 476.

45. Two items account for the difference. The first is the value of the household furniture, which the plaintiff puts no higher than R30 000. Since the defendant himself valued this item at this amount for insurance purposes, I see no reason why, in the absence of countervailing evidence, this figure should not be accepted. The second is a ring whose increase in value is agreed to be R65 000. The plaintiff contends should be left out of account as a donation under the Act, but on the evidence it appears that this ring was given to her by her late husband on the occasion of her engagement. Since the donation appears to fall under neither of the exemptions contemplated by s 5, the amount must be brought back into account. It follows that the accrual of the defendant's estate amounts to R452 476.

46. The difference between the two accruals is R1 542 964 and half of this is R771 482. This is the amount that the defendant must pay the plaintiff in terms of the accrual system.

47. From what I have said, it will be observed that I make no allowance for the capital amounts payable in respect of Sheldon's schooling. Since they represent the capitalized version of maintenance and support, they are, I believe, properly to be left out of account.

COSTS

48. In the opening paragraphs I said that the process by which this case had been resolved had been a tragedy. So it is, not so much because of the time taken to resolve the issues (as I have already said, the parties were commendably efficient in making the case ready for trail) but because of the legal costs that the parties will have to bear unless something is done to mitigate them. From the evidence it seemed to emerge that the cumulative costs will be at least R500 000 and may be as much as R750 000. That a sum of this nature might have been put to better use by the parties – for example, to defray the cost of private schooling for the children – goes without saying.

49. One of the matters that must be considered in a pre-trial conference is whether the dispute should be referred for possible settlement by mediation. In the present case the legal representatives of the parties had no hesitation in answering this question in the negative. As a result, the judge to whom this matter was originally allocated felt obliged to try to perform the role himself. Whether he is trained for the role is a matter into which I neither can nor wish to enquire. All that need be recorded here is that, in the course of the settlement process, he expressed views on the respective entitlements of the parties that prompted an application by the plaintiff for his recusal. In the normal way, the response of the other side should be neutral, for the issue is essentially one between the applicant for recusal and the court, but in the present case the respondent had no compunction in registering his opposition to the application. The case scarcely met the test for recusal, which is objective: a reasonable person is expected to know that judges are trained to divorce themselves from their preconceptions, especially those expressed in chambers. In the exercise of his discretion, however, the judge decided to grant the application lest the subjective apprehensions of the applicant should bedevil the effective resolution of the case.

50. When the plaintiff was busy testifying, I asked her whether the resolution of the case through mediation had been mooted by her legal advisers. She said it had not, but she went on to explain that she thought mediation would have served no purpose. Though this was her response to a question put by me, it is ultimately a matter on which, not being an expert, she can entertain no informed belief. Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

51. In *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002 the learned judge had had the following trenchant remarks to make about the case before him, and they are well worth quoting at length:

> ‘What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as "completely cuckoo" to have engaged in such expensive litigation with so little at stake. At the time of writing this judgment I rightly do not know whether any, or if so what, attempts have been made to settle this case and the remarks that follow are of general application. I raise that matter again in this judgment to make the point, as firmly as I can, that this is a paradigm case which, if it could not have been settled by the parties themselves, customer and dealer, then it behoved both solicitors to take the firmest grip on the case from the first moment of instruction. That, I appreciate, may not always be easy, but perhaps a copy of this judgment can, at the first meeting, be handed to the client, bristling with righteous indignation, in this case the

> customer who has paid a small fortune for a motor car which does not meet his satisfaction, and the dealer anxious to preserve the reputation of his prestige product. "This case cries out for mediation", should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations that, I accept, may well have taken place in this case, though, for obvious reasons, we have not sought to enquire further into that at this stage. Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent. At the time this dispute crystallised, the car was practically brand new. It would not have been vastly different from any demonstration car. The commercial possibilities are endless for finding an acceptable solution which would enable the parties to emerge, one with some satisfaction, perhaps a replacement vehicle and the other with its and Audi's good name intact and probably enhanced, but perhaps with each of them just a little less wealthy. The cost of such a mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.'

52. If mediation is appropriate in commercial cases, how much more apposite is it in family disputes. They engage the gamut of emotions, from greed through pain to vengefulness; they generally involve the rights of children, majors as well as minors, who can only experience fear and bewilderment at the breakdown of the structures of love and support on which they, as family members, have come to depend; and the division of the estates of the parties, intertwined as they invariably are, can be very complex and are frequently made the more so by the parties' bloody-mindedness and duplicity. Throughout the process, moreover, the legal

costs come out of the common pot and, since they deplete the assets that can be used for the advancement of members of the family, must be the subject of continual concern and anxiety. Divorces proceedings are by their nature 'traumatic events': see *Clemson v Clemson* [2001] 1 All Sa 622 (W) at 627

53. Lawyers who might be thought to know better can sometimes be heard to disparage the practice of family law, but in my experience, which I readily admit to be limited, they are required to display levels of skill and judgment that outshine many of their supposedly more successful counterparts in the more fashionable fields of law. Special responsibilities rest on them, as Blieden J fully appreciated in *Hemson supra*:

> 'The Court expects attorneys acting on behalf of such people, as professional people and officers of the court, to display objectivity and sound common sense in assisting their clients. Fortunately most attorneys perform this task admirably. However there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition. As happens in most wars of attrition by the time the war has come to an end both sides have lost. There is now permanent hatred between the parties and their joint assets have been consumed to pay legal fees'.

54. The responsibilities are especially difficult to discharge when the matrimonial bar is small and the practice of family law is so inbred. A limited number of practitioners perform the role and, while some rub along together well enough, others rub each other up the wrong way. Acrimony between legal representatives, which can carry over from one case to the next, easily produces an over-identification with the client's cause and an attitude of win-at-all-costs. These emotions can act as a complete barrier to settlement. I cannot say whether the attorneys in the present case fell foul of this vice, but the correspondence suggests that they might have. Lawyers create the illusion that clients are solely responsible

for the stances that are adopted in litigation, but of course their advice is profoundly influential and shapes the demands being made and strategies used to achieve them. With this in mind, the lawyers have much to answer for when a party requires the other ‘to vacate the matrimonial home forthwith’; when requests for particulars are deflected on the grounds of petty mistakes in the formulation of the questions; when there are interminable skirmishes over documents that result, eventually, in the production of bundles totalling almost 1000 pages, few of which have any direct bearing on the matter at hand; and when the parties threaten each other with criminal proceedings and respond by saying that the threat is being dismissed ‘with the contempt it deserves’. In a very real sense, this was a case in which, if the parties did not need mediation, the legal representatives certainly could have profited by it.

55. I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent. For present purposes it is unnecessary, indeed undesirable, for me to say more about the general imperatives that favour mediation as a means of settling cases. I do not even feel the need to say much more about the need for mediation in family disputes. But I can say with confidence that the parties would have been well served if they had submitted this dispute to mediation and then fought out, if fight they must, the one or two issues of fundamental concern to them.

56. A single instance drawn from the proceedings is enough to make the point tellingly. In the course of argument, I put the point to the parties that I have made above: namely, that by the manner in which the inheritance is used, Sheldon’s natural father can, as it were, make a posthumous contribution to his education.

57. Employing this principle might, I suggested, justify the conclusion that the defendant should bear one third of the costs of the boy's schooling and the plaintiff should shoulder the balance out of income and inherited capital. The suggestion met with the defendant's immediate approval and the plaintiff, albeit somewhat more grudgingly, acknowledged that it would certainly be equitable. No longer, it will be observed, was this an issue of principle entailing a consideration, through the process of judging, of rights and duties; now it was a practical problem with an eminently practical solution that, emerging out of potential consensus, placed a premium on the dignity of the parties as autonomous adults and provided an affirmation, symbolically important, of the bond that in happier times developed between the defendant and his putative son. How much richer would this solution have been had it emerged out of a consensus-seeking process rather than in adversarial proceedings in which positions were taken up that gave every appearance of callousness and cruelty.

58. This is but an instance of what mediation might have achieved. In fact the benefits go well beyond it. In the process of mediation, the parties would have had ample scope for an informed but informal debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached. Everyone would, in the process, have been spared the burden of two wasted days trying to settle in judge's chambers and four further days in which the *minutiae* of assets and liabilities and income and expenses were interrogated.

59. In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.

60. In the course of the hearing, I asked counsel whether I had the power to cap the fees that the lawyers might derive from the case, and it was agreed that this is indeed my right. I can find nothing in the conduct of counsel to warrant such a move – they take their instructions from the attorney - but I am persuaded that the failure of the attorneys to send this matter to mediation at an early stage should be visited by the court's displeasure. On this basis, I propose to limit the fees they can recover from their clients to the costs they can tax on a party and party scale. The client retains the right to pay more, but the attorney should not ask for this unless the client has obtained the advice of an independent practitioner.

61. In the matter of costs as between the parties, I have an overriding discretion. From what I have said, it will be clear that I disapprove of the way the dispute has been ventilates, and I cannot believe that the parties are blameless on this score. The plaintiff, who made a very impressive witness, made unreasonable claims in the litigation (forfeiture of benefits being among them) and the defendant was anything but candid about his earnings. It is true that the defendant made an open tender which the plaintiff has beaten, but not by much. I can see no reason why either should bear the costs of the other, and this is the order I propose to make.

ORDER

I make the following order, much of which is by consent.

1. The marriage between the parties is dissolved by this decree of divorce.

2. The parties shall each have parental rights and responsibilities in respect of the minor child, Jaimee, but subject to the following conditions:

2.1. She shall continue to reside with the plaintiff;

2.2. Subject always to her reasonable religious, academic, sporting and social requirements, the defendant will be entitled to contact with Jaimee as follows:

2.2.1. in the course of transporting her to school every Tuesday and Thursday morning;

2.2.2. on weekends from Friday afternoon at 14H00 until Sunday afternoon at 16H00 –

2.2.2.1. alternately with the plaintiff unless Mother's day falls on the weekend in question;

2.2.2.2. and on the weekend in which Father's day falls;

2.2.3. from 14H00 until 18H00 on the Thursday of the week in which he has no weekend contact with her;

2.2.4. on alternate public holidays, provided that reasonable measures shall be taken to coordinate this access with weekend and holiday entitlements;

2.2.5. during alternate short and long school holidays, provided that –

2.2.5.1. the December / January holiday will be shared equally

2.2.5.2. she will spend each alternate Christmas and Easter with the defendant;

2.2.6. on his and Jaimee's birthday for half her after-school waking hours;

2.2.7. by means of reasonable telephonic and e-mail communication;

3. Each party shall consider the views and wishes expressed by the other before taking a decision that might significantly affect Jaimee's wellbeing, including decisions on her education and training, her religious and cultural beliefs, and her sporting, cultural and extra mural activities.

4. The Defendant shall pay to the Plaintiff by way of maintenance for Jaimee:

4.1. An amount of R4000,00 per month before the first day of the month which shall be adjusted each September by reference to the change in the Consumer Price Index;

4.2. All reasonable medical, dental, orthodontic, ophthalmic, hospital, therapeutic and related expenses secured, in part at least, by maintaining her at his expense as a beneficiary of the current Liberty medical scheme or one of a similar nature for medical aid scheme.

4.3. All reasonable expenses arising out of –

4.3.1. her primary and secondary school education, including school fees, school levies, aftercare (including the costs of the aftercare provided by the Plaintiff's mother but limited to the actual costs so incurred), school uniforms, books and stationery, extra lessons and any remedial therapy;

4.3.2. her tertiary education if she is eligible and shows an aptitude for it.

4.4. The reasonable cost of extramural activities and attendant clothing and equipment.

5. The plaintiff shall open bank account –

5.1. dedicated to defraying the costs of Sheldon's schooling at a private school

5.2. into which –

5.2.1. the plaintiff shall immediately contribute R120 000

5.2.2. and the defendant shall immediately contribute R100 000

5.3. and which will be administered by the plaintiff in consultation with the defendant.

6. The defendant shall pay to the plaintiff –

6.1. by 30 September 2009, the sums of –

6.1.1. R771 482 and

6.1.2. R191 000 plus *mora* interest from 1 September2008;

6.2. maintenance at the rate of R5 000 per month

6.2.1. as from 1 September 2009

6.2.2. to endure until 31 August 2012.

7. Each party shall bear his or her own costs –

7.1. which may encompass disbursements (including counsel's fees),

7.2. but, as to the fees claimable by the attorney, shall not exceed the costs recoverable on a party and party basis –

7.2.1. as taxed

7.2.2. or, following advice received from an independent legal practitioner, as agreed.

Brassey A J

25 August, 2009