The 8th Annual Eugene Dupuch Distinguished Lecture

“Law In A Changing Society: Reconstructing Marriage”

By

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Introduction

Plato asks Socrates: “teacher can you tell me what is love?” The teacher said, “young man, I certainly can. But first, go to the wheat field, pick the most golden grain of wheat and come back; you can go through them only once and cannot turn back to pick.”

Plato went to the field and found a nice grain of wheat. But he wonders: maybe there is a better one. Then he saw another…but maybe there’s an even more perfect one waiting.

Later, when he reached the end of the field, he realized he had missed the most golden grain of wheat. He regretted, and returned to Socrates with empty hands.

“My son, this is love… you keep looking for a perfect match, but you later realize that you have already missed the person”

Plato asks again, “teacher, can you tell me what is marriage?”

And Socrates once again said, ‘young man, I certainly can. But first, go to the wheat field, pick the most golden grain of wheat and come back; you can go through them only once, and cannot turn back to pick”

Plato went back to the wheat field. Careful not to repeat the previous mistake, he picked an acceptable grain, and returned to the teacher.

“This time you brought back a wheat. You looked for one that is just nice and you believe this is the best one you can get… this is marriage.”

Good evening! It is my esteemed privilege to deliver the 2016 Eugene Dupuch Distinguished Lecture.

As you are aware, my topic is: “Law In A Changing Society: Reconstructing Marriage.” This topic I submit, covers a jurisprudential matter of considerable public interest, and also focuses, to some extent, on a key strand of one of our honourand’s most significant contributions: social justice and equality under the law.

Eugene Dupuch did not shun controversy, nor did he lack courage to do what was right and so, as we cogitate on our topic tonight, let us remember him as a fearless advocate for change, who bejeweled our national life.

Indeed, I hope tonight to ride his coat-tails of courage to get me to the end of this lecture.

But before delving into my topic, I wish to emphatically state: first, that this is meant to be a scholarly discussion and not a bane of any political or other objective; and second, that I speak solely from a personal perspective: the Court of Appeal does not endorse this message.
I consider tonight a happy augury. For despite the major societal changes affecting the institution of marriage globally, there has been no real marriage reform in The Bahamas since 1987.

The primary issues I intend to explore this evening are what is marriage? Has marriage changed? Have our marriage laws adapted to the changes if any; if not do they need reconstructing? And if so, how are they to be re-fashioned?

But first, I begin with the deceptively simple question:-

**What is marriage?**

It sounds an easy enough concept to define, and indeed Socrates, in the passage I read, attempts to do so by a very simple illustration, but as most historians, philosophers and others readily admit, it is not so simple.

The difficulty I suggest stems from the fact that marriage is ante diluvian, transcending civilisations and cultures. It is grounded in legal traditions which reflect long standing philosophical and religious beliefs; yet it is still evolving.

Indeed, marriage is described by the authors of the third edition of family law, texts, cases and materials as: “multifaceted: at once a religious institution, a contract between the parties, and a legal status from which particular rights and responsibilities flow...”

And K.O’ Donavan in his contribution intituled ‘Family Law Matters’ published in the Pluto Press, London in 1993, described marriage as an institution in which the alteration of the rules by the partners is not possible. He said, and I quote: “we are up against something not easily analysed in institutional terms. Marriage has contractual and institutional elements, but it is also sui generis, a law unto itself.”

As for the religious aspect of marriage; with the introduction of divorce, civil marriage, and the almost universal introduction of same sex marriage, marriage has been taken progressively further away from Christian doctrine, and its ecclesiastical roots.

Moreover, it is recognised that with these changes, marriage now goes well beyond its earlier purpose of legitimizing sexual relations and securing legitimate heirs.

In *Cossey v The UK*, App No 10843/84 ECHR (1993), following the decision in *Corbett v Corbett* [1971] 2 All ER 3, this shift was clearly identified by Justice Martens. He said: “marriage is far more than sexual union, the capacity for sexual intercourse is therefore not essential for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to marry. That is because marriage is far more than a union which legitimizes sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both partners and third parties; it is a societal bond, in that married people ( as one learned writer put it) represents to the world that this is a relationship based on strong human emotions, exclusive commitment to each other and
perseverance” it is, moreover a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one.”

While we may all agree with the aesthetic features of marriage as described by Justice Martens, it is nevertheless difficult to define it juristically. Indeed, its juristic nature will depend on the marriage laws in any particular society.

And so, permit me to refine the question to: what is the juristic nature of marriage in The Bahamas?

The first Marriage Act of The Bahamas was promulgated on 31 October 1837. It validated marriages formerly solemnized in The Bahamas before justices of the peace and religious leaders who were not priests of the Church of England.

A substantive Marriage Act followed in 1839. This act formalized the requirements for a valid marriage for all Christian denominations; legitimized de facto marriages; regularized the unions of slaves, apprentices and free persons of color; and created the first official public register of marriages.

Substantive reforms to the 1839 Act did not occur until the Marriage Act of 1908. Those reforms proscribed that to have legal effect all marriages solemnized in the colony must comply with the provisions of the act; a requirement which did not exist prior to 1908.

The 1908 Act was amended on a number of occasions culminating in its last substantive revision in 1987. Interestingly, none of the permutations of the Marriage Act included a definition of marriage. Moreover, to obtain state authorisation to marry, there was not, and currently is not, any requirement that the parties to a marriage must be respectively male and female.

For completeness, I should mention here that a definition of marriage does exist in the Maritime Marriage Act of 2011. That Act specifically provides that marriages solemnized on Bahamian ships on the high seas shall be exclusively between a man and a woman.

This provision however, has not been specifically incorporated into the Marriage Act, and arguably cannot be imported to apply to marriages other than those celebrated on Bahamian ships on the high seas.

In the absence of a statutory definition of marriage in the Marriage Act, I looked expectantly to the English common law for possible assistance.

Marriage in the English common law was based on the Judeo Christian belief that God, having promised to make Adam a help mate, made Eve from his rib and ordained them man and wife; and from the biblical admonition that what God has joined together, let no man put asunder.

From that perspective, Lord Penzance in Hyde v Hyde in 1866 declared as follows: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others".
While many authors consider this statement to have been made obiter, it was applied and incorporated into English common law via the later cases of *Bethell, Bethell v Hildyard* (1888) 38 Ch 220; and *Nachimson v Nachimson* P 1930 217.

It has long been presumed that all aspects of the Hyde definition were received into the law of The Bahamas via the 1799 Declaratory Act. This Act is widely considered as the vehicle by which the common law of England was incorporated into Bahamian law, and to some extent that is indeed true.

Section 2 of the Declaratory Act in part states, “the common law of England, in all cases where the same hath not been altered by any of the acts or statutes enumerated in the schedule to this act or by any act (except so much thereof as hath relation to ... ecclesiastical matters), is, and of right ought to be, in full force within The Bahamas, as the same now is in that part of Great Britain called England.”

Notably, at the date of the Declaratory Act, the definition of marriage was not a part of the English common law, as *Hyde v Hyde* was not decided until 1866.

Moreover, and more importantly, the provision in section 2 appears to except from its application, the law relating to ecclesiastical matters.

Up to the passage of the English Divorce and Matrimonial Causes Act of 1857, matrimonial matters were governed by ecclesiastical law and fell within the purview of the ecclesiastical courts.

It was not until then that the matrimonial jurisdiction was transferred to the new temporal divorce court. As a result of this transfer, matrimonial matters were no longer considered ecclesiastical matters.

Inexorably, if we consider the Declaratory Act as prospective and continuing in its application, then arguably when marriage ceased to be an ecclesiastical matter, the exception in section 2 no longer applied in relation to marriage, and therefore the common law definition of marriage in *Hyde v Hyde* became a part of our law.

There is arguably however, an equally cogent, but alternative view, that in as much as section 2 appears to have excepted ecclesiastical matters, the English Divorce and Matrimonial Causes Act was ineffectual to amend section 2 to remove that exception, and to bring the common law definition of marriage within the purview of the section.

Consequently, the argument remains unresolved whether the English common law definition of marriage was ever received and incorporated as a part of our law by the Declaratory Act.

I also considered whether the definition may have become a part of our law by adoption by our courts, but despite an exhaustive search, I could find no such authority.
Admittedly, sections 20 & 21 (1) (c) of the Matrimonial Causes Act, empower a court on the petition of either party to declare a marriage void on the ground that the parties to the marriage are not respectively ‘male and female’.

And indeed, I have heard many argue that these provisions define what marriage is in The Bahamas. However, I retort respectfully that while these and other provisions of the Act may be some indication of that premise, neither sections 20 and 21, nor any other provisions of the Act, substantively provide that marriage is exclusively between a man and a woman. Indeed, the purpose of sections 20 and 21 appears to be, the protection of an innocent spouse from the misrepresentation and fraud of the other.

Significantly, sections 20 and 21 are only activated post the celebration of the marriage, and only on the petition of either party to the marriage. In the absence then of any statutory provision that a marriage which is not between a male and a female is void ab initio, a same sex marriage is arguably valid unless or until declared void.

In light of this, the proposition that the provisions of the Matrimonial Causes Act declare that marriage is exclusively between a man and a woman is arguably unsustainable on a true construction of the relevant provisions.

Further, it bears noting, that as long ago as 1991, Parliament, via an amendment to the Sexual Offences Act, decriminalized sexual intercourse between consenting same sex adults in private. And so: considering all of the above, if the argument that there is no statutory definition of marriage; no statutory requirement that the intended parties to a marriage must be exclusively male and female; and no reception or adoption of the English common law definition of marriage holds, it would arguably follow that the laws of The Bahamas do not discriminate on the basis of sex; and facilitates not only marriages of every description but consummation of the same.

If indeed there is no law which embodies a qualification that parties to an intended marriage must be respectively male and female, then arguably same sex, trans gender or inter sex couples could not legally be refused authorisation to marry in either a civil or religious ceremony, and if refused, may well be entitled to mandamus ordering the relevant officials to grant them permission to marry.

This scenario is not far-fetched and similar issues have arisen before courts in the Commonwealth. The New Zealand case of Quilter v Attorney General [1997] NZCA 207 is such an example. In that matter, three lesbian couples challenged the decision of the registrar to refuse to accept notices of intended marriage, and to issue them the licences necessary to marry.

New Zealand’s Marriage Act did not define marriage, and contained, like ours, only the formal requirements preliminary to the celebration of a marriage. Their challenge however was based on the argument that they were deprived of their right to choose a partner, and the court held that to deprive a person of personal choices was not discriminatory.

The Quilter case, albeit distinguishable from the scenario posited above, in terms of the relief sought, is nevertheless instructive in showing that there have been challenges to a Registrar
General’s ability to refuse a marriage licence where there was no qualification that the couple intending to marry had to be respectively male and female.

If in The Bahamas, such a couple succeeds in obtaining permission to marry, marries, and remains happy, and neither party petitions to have the marriage declared void on the basis previously mentioned, their marriage would conceivably be valid.

But even if the common law definition of marriage was incorporated into our law by the Declaratory Act, or even if the suggestion that section 21 of the Matrimonial Causes Act substantively provides that marriage is exclusively between a man and a woman, this may not be sufficient to close the door to non-traditional marriage.

Such a provision or definition, though shielded from attack by Article 26(4) (c) of the Constitution, might nevertheless quite possibly be open to challenge, on the basis that it breaches one of the other fundamental rights and freedoms provisions of the Constitution.

While it is acknowledged that the existence of the right to marry in the Bahamian Constitution is not expressly stated, it is arguable that the right is subsumed in a few of the fundamental rights enumerated in it, consistent with the reasoning of the US Supreme Court in the recent case of Lawrence v Texas and Obergefell et al v Hodges, Director Ohio Department Of Health et al.

I am the first to acknowledge that unlike the American Constitution, our fundamental rights provisions do not contain a specific right to family life or to the pursuit of happiness, though interestingly, the right to family life was included in our 1963 Constitution.

That notwithstanding, our Constitution, like the US Constitution contains other fundamental rights, such as equal protection of the law; protection of privacy; protection of freedom of religion; and protection of the freedom to associate, which the US Supreme Court also considered, and determined there was a Constitutional right to marry in the US.

It is therefore not outside the realm of possibility that some courageous and astute Bahamian advocate might succeed in convincing a court that the right to marry is located in one or more of the aforementioned fundamental rights.

I would even impudently suggest that an amendment of the Constitution similar to what Jamaica did in 2008, declaring that no marriage other than one between a man and a woman is recognized and of legal effect, may similarly be susceptible to constitutional challenge.

The idea that a Constitution may be held in contravention of itself is not at all as preposterous as it sounds. Indeed, that very question is currently before the CCJ in the Belizean case of The AG and Minister of Public Utilities v Dean Boyce Trustees of the BTL Employees Trust. In that case, the government of Belize amended the Constitution to give the government the right to expropriate privately owned shares in one of the local utility companies. The constitutional amendment did not provide the right to be heard; neither did the amendment mandate reasonable compensation.
The amendment was held by both the Supreme Court and the Court of Appeal to have contravened Article 17(1) of the Belize constitution.

In any event, the recognition of non-traditional relationships is undoubtedly the human rights issue of our time. And inexorably, in interpreting the fundamental rights and freedoms provisions of our Constitution on any such challenge, a court will be constrained to give due consideration to the view of the privy council in the 1979 case of Minister of Home Affairs v Fisher.

There, the Privy Council opined that a broad purposive approach should be taken when interpreting constitutional rights; the board admonished that the austerity of tabulated legalism should be avoided; and the constitution interpreted in a manner to give recognition to the dignity and equality of all persons.

As previously suggested, the issue of whether nontraditional marriage is a part of our marriage law, may well boil down to whether there is a constitutional right to marry.

Consequently, I trust the issue will be debated with less acrimony, and more tolerance than the issues in the recent referendum, and that proponents and opponents will desist from the homophobic, xenophobic and misogynistic rhetoric which characterized that debate; continuing in this vein will only lead to the kind of tragedies witnessed in Orlando this past weekend.

Bahamian society has changed. We are now a multi-cultural and multi faith society, in which many do not ascribe to Judeo Christian beliefs. And in determining the way forward it may well be necessary to give serious consideration to whether there is any longer any reason why the contours of contemporary secular marriage should continue to be shaped by Judeo Christian doctrine.

Logically, any debate on the issue should sensibly and pragmatically center on one principle and one only: equality of treatment under the law.

In that regard, we might ask ourselves whether people of same sex orientation, transgender persons or intersex persons should be allowed to have driver’s licences? Should they be allowed to hold business licences? And should they be allowed to acquire and sell real property?

Surely, the thought that a person can be deprived of the ability to participate in these normal every day activities on the basis of their sexual orientation or preferred gender, would be revolting to most of us, and undoubtedly, most of us would agree that this would not be right.

For those of us who agree it would not be right, the question is: why should marriage be any different?

Why should sexual orientation or gender identity deprive two consenting adults of the right to enter into a contract of marriage?

This issue of the recognition of non-traditional marriage I know, may be blasphemous to some and uncomfortable for others, but given our changed society as noted, our belief in the freedom of the individual and equal protection under the law, can we in good conscience continue the ambivalent
stance of accepting these principles as pertaining to some on the one hand, and on the other, opposing their application to others?

Given the apparent uncertainty, can we confidently and conclusively contend tonight that marriage in The Bahamas can only be celebrated between a man and a woman?

Digressing somewhat, let me say that I found the debates in the lead up to the referendum particularly those surrounding bill four and its purported ability to open the door to same sex marriage amusing. As you can see, the door may well have been open before 7th June, so that the defeat of the bill simply left it open.

Adding sex to Article 26 and the attending proposed definition would neither have opened nor would it have closed the door to same sex marriage, as it had absolutely nothing to do with marriage.

In fact, its amendment would have protected Bahamian men and women from discrimination in every area of the law EXCEPT possibly in laws relating to marriage, and other specified matters of personal law.

But continuing the discussion as to the juristic nature of marriage in The Bahamas, I turn to another flaw in the Marriage Act, which inevitably also affects the question of who can marry.

The Marriage Act declares that a marriage celebrated by persons within the prohibited degrees of consanguinity or affinity is void. But that notwithstanding, it does not proscribe what the prohibited degrees of consanguinity or affinity are.

Despite this glaring omission, the Act requires parties intending to marry, to prove there is no impediment of kindred or alliance.

This lacuna was recognized by our Supreme Court as far back as 1985 in the case of Phillips v Hewitt [1985] BHS J.No 53 53, but no effort has been made to ameliorate it.

The Hewitt case concerned the question of whether Laura Hewitt was lawfully married to her first cousin James Russell Hewitt and could inherit his property.

The judge found in paragraph 20 of the judgment that none of the counsel present in court was able to advise the court as to where the prohibited degrees of consanguinity and affinity could be found in Bahamian law.

And in the end, he decided that as there were no laws or rules to the contrary, the English position obtained in The Bahamas, and first cousins could marry.

From a reading of the case, it is clear that the learned judge imported the Canon Law rules of the Church of England on affinity incorporated into English law by the Marriage Act of 1540, and in force at the time of the Hewitt’s marriage in 1938.
He applied these rules using section 32 of the 1960 Supreme Court Act, which provided that “subject to any rules to be made under this act and to the laws in force in the colony, the jurisdiction of the court of probate, divorce and matrimonial causes and proceedings may be exercised in conformity with the law and practice, so far as they are applicable, for the time being in force in England which shall be deemed to be hereby extended to the colony”.

The prohibited degrees of affinity rules have since been replaced in England by rules under the English Marriage Act of 1949 and the Marriage (Prohibited Degrees of Relationship) Act 1986; and indeed, section 32 of our Supreme Court Act of 1960 was replaced by section 15 of the Supreme Court Act of 1996, which allows the application only of former English rules of practice and procedure, and not former law.

Consequently, it appears that we can only say with certainty through its adoption by the judge in Hewitt, that the affinal rule that first cousins can marry is a part of our law.

And so, apart from knowing that first cousins can marry in The Bahamas, the position with blood and other affinal relations is unclear. Consequently when section 19 of the Marriage Act requires couples intending to marry, to show that there is no hindrance or impediment of consanguinity or affinity to obtain a licence to marry, the question is, just what are they being required to prove.

The only prohibition remotely relating to the issue is the criminalization in the Sexual Offences Act, of sexual intercourse between a person and their parent, child, brother, sister, grandparent, grandchild, uncle, aunt, niece or nephew, and between any person and an adopted child, step child, foster child, or ward who are minors. The caveat to importing any such provision into the Marriage Act is that sexual intercourse and marriage are not mutually inclusive, neither are sexual relations easily policed.

Remarkably, the only statutory provision in our law which speaks to marriage of blood or affinal relatives is the Deceased Wife’s Sister Act of 1907 which permits a man to marry his deceased wife’s sister.

And so, even if we accept that marriage in The Bahamas is only between a man and a woman, the question remains: who within these parameters can marry; can an uncle marry his niece? Can a father marry his daughter? Can a step-father marry his step daughter?

In addition to the aforementioned legal issues identified, the issue of recognition, and the essential validity of foreign same sex marriages is also likely to task the courts in the future.

In that vein, I can think of four possible scenarios: 1. Evasive marriages: where parties leave The Bahamas to get married abroad, and return to The Bahamas to live. 2. Persons who marry in a same sex jurisdiction and move to The Bahamas to live; 3. Visitor marriages: where the couple or a member of the couple is living temporarily in The Bahamas; 4. Extra territorial cases: where parties never lived in The Bahamas, but the marriage is relevant to litigation, as in the Philips v Hewitt case where one member dies intestate and the other seeks to inherit property located in The Bahamas.
I suggest, based on prevailing legal authority, that the essential validity of a non-traditional marriage will depend on whether it violates the public policy of The Bahamas; and that will in turn depend on whether the marriage falls within the purpose of a domestic invalidating rule such as a prohibition against recognition of same sex marriage, among other considerations. And arguably as noted there is no such prohibition!

In the English case of Cheni v Cheni [1963] 2 WLR 17, a marriage between a man and his niece, was declared valid notwithstanding they were within the prohibited degrees of consanguinity and the marriage was against English public policy.

Jocelyn Simon P’s dictum in Cheni is instructive. He said: “the true test in withholding recognition on the ground of public policy was whether the marriage was so offensive to the conscience of the English court that it should refuse to give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners, and reasonable tolerance. In my view it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilization… in my judgment, injustice would be perpetrated and conscience would be affronted if the English court were not to recognise and give effect to the law of the domicile in this case.”

These issues are illustrative of the myriad of legal challenges we can expect to face in The Bahamas in relation to the trans-border effect of non-traditional marriage; and aptly indicate the challenge the law faces in adapting to a changing society.

Another area of our marriage law in need of reform, is the absence of provisions for grant of ancillary relief to an innocent party where a marriage is declared null and void under section 21(1) (a) of the Matrimonial Causes Act.

In Fitzgerald v Fitzgerald, a case decided in the Court of Appeal recently, a man and woman went through a ceremony of marriage while the man was still married. The purported marriage lasted for some 34 years, and on the breakdown of the marriage on the allegation of adultery on the part of the wife, the wife and co-respondent filed answers to the husband’s petition asserting that the marriage was void on the ground that it was a bigamous marriage.

The wife obtained an interim order of maintenance pending suit which was never perfected, and not consistently obeyed by the husband.

The husband amended his petition and prayed for a declaration that the marriage was null and void. The declaration was granted.

Eight years after the declaration, the husband applied for a discharge of the interim order. The wife sued for enforcement of arrears under the order; and for provision of further ancillary relief.

Before the Supreme Court, the husband challenged the jurisdiction of the court to hear the application for ancillary relief on the ground that the court was functus after the grant of the
declaration of nullity. The court did not agree and moved to hear the wife’s application for ancillary relief.

On appeal, the majority, though empathetic of the wife’s position, agreed with the husband that the Matrimonial Causes Act did not provide for ancillary relief to a party to a marriage declared void pursuant to section 21 (a) of the Act.

The court found that the language of section 21 and other relevant sections of the act was susceptible to no other interpretation.

The hardship of the court’s decision in that case is regrettable, for in addition to the long marriage, and the financial hardship faced by the wife, there were two children whose status, but for the intervention of the Status of Children Act and the Inheritance Act, would have been one of illegitimacy with no right to inherit from their father’s estate.

In its decision, the court suggested legislative intervention to treat parties to void marriages the same as parties to valid marriages dissolved by divorce; and I reiterate here the need to amend the law to avoid any further hardship.

If we needed any precedents for doing so, the UK has so provided in its Family Law Act of 1996; and so have Jamaica, Barbados and Trinidad & Tobago.

Undoubtedly, any reflection on the institution of marriage, must involve a consideration of divorce as an important feature of marriage, as it involves the dissolution of a valid marriage which allows one or both parties to marry during the life of the other.

Our divorce law is vintage, and continues to be based in the 1879 Matrimonial Causes Act with its last substantive amendment in 1983. The act proscribes that one must show significant fault before a divorce can be granted.

It is axiomatic that a fault based system ties the hands of parties who have committed no matrimonial offence, but are mutually unhappy. To exit, one party must construct fault to obtain the divorce and swear not to have connived or condoned the offence.

That party might also have to sacrifice some interest in property or even the custody of the children since the conduct of the parties is a factor to be considered in determining these issues.

And then there are the hardship cases, where an innocent spouse studiously abstains from committing any matrimonial offence and refuses to petition for a divorce notwithstanding that party accepts that the marriage has manifestly broken down. Albeit a pyrrhic victory for the innocent spouse, neither is able to move on.

After presiding over numerous divorce cases during my many years in the judiciary, I am persuaded that divorce founded on matrimonial fault, not only aids, and abets abuse of the system, but also exacerbates the bitterness and unhappiness of divorcing couples, adding significantly to the distress of children.
Indeed, our Commonwealth Caribbean neighbours Jamaica and Barbados long ago moved on to a no-fault divorce system, and have established one ground of divorce namely the irretrievable breakdown of the marriage. A petitioner in both countries only has to show that the parties have lived separate and apart for 12 months immediately preceding the presentation of the petition.

On the basis of the aforementioned views, I submit that divorce is ripe for change in The Bahamas. Of course, while it is easy to so conclude, it is more difficult to say what should take its place.

I found instructive, the criteria published by the 1996 UK Law Reform Commission for evaluating a good divorce law. The commission suggested that such a law should: “buttress rather than undermine marriage; and that the empty shell of a broken marriage should be destroyed with the maximum fairness and minimum bitterness, distress and humiliation.” With this, I wholeheartedly agree.

Consequently, I envisage divorce reform in The Bahamas to include a change from fault to no-fault divorce, using the single ground of irretrievable breakdown of the marriage; and maintaining the present careful and dignified judicial proceedings as part of the process for obtaining a divorce.

I also envisage the divorce process to include counselling and information sessions similar to those prescribed by the UK Family Law Act, 1996 to encourage reconciliation wherever there is a prospect of success.

Additionally, I envisage conciliation or mediation as part of the process to promote agreement to minimise distress to the parties, and to maintain as good a continuing relationship between them and any children affected, as is possible.

Notwithstanding that the legal status of cohabiting couples is not truly within the compass of this lecture, I feel moved to address it since there are so many couples who choose to cohabit together in committed relationships outside the formal state of marriage, and who may be severely disadvantaged when these relationships end.

I submit that, consideration should be given to legally recognizing, and addressing property division and other issues resulting from the breakup of these relationships.

The Court of Appeal in the 2013 case of Collie v Marr had to decide issues of property division in the case of a same sex cohabiting couple, in the absence of any statutory provisions on the subject.

In that case, a same sex couple had been in an intimate relationship for almost two decades and acquired a considerable amount of real and personal property. Some of the property was acquired in their joint names, but significantly, the home in which they cohabited was in the sole name of one party.
On the dissolution of the relationship, that party claimed he was the sole legal and beneficial owner of the home on the basis that he had paid the deposit on the property, and had paid the mortgage for the five years the couple cohabited there.

The common intention test applicable generally to co-habiting couples laid down in *Stack v Dowden* [2007] UKHL 17 was applied in determining whether the party in whose name the property was conveyed should be awarded sole ownership of the property.

The essence of the principle is that in the case of cohabiting couples where the property is in the sole name of one, the other must show that it was the common intention between them at the time of acquisition that they should beneficially share the property.

The non-owner in the instant case, was neither able to show he contributed any money for the purchase or construction of the home, nor was he able to point to anything the sole owner said or did at the time the property was acquired, from which an intention to benefit him could be inferred.

In fact, the owner’s position was that he acquired the property both as a home for himself, and to enhance his position in his quest for permanent residence.

This contrasts with the legal position vis a vis married couples, as reflected in the well known and widely applied case of *White v White*, in which Lord Nicholls, in his leading judgment enunciated what has become known as the sharing principle. Therein Lord Nicholls stated:-

“... 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.”

*White v White* has been applied in Bahamian cases to the extent that it elucidates the concept of fairness which is the lynch pin of section 29 of our Matrimonial Causes Act. This section provides that a court must do what is fair in all the circumstances of the case, and to put the parties so far as it is practicable and having regard to their conduct just to do so in the financial position they would have been in, if the marriage had not broken down.

And so, without legislative intervention, non-married, but cohabiting couples in The Bahamas are deprived of the benefit of this fair sharing principle.

Jamaica, Barbados and Trinidad and Tobago have intervened and now have statutory provisions which give relief, albeit only to opposite sex couples in a cohabiting relationship provided that relationship subsisted for not less than five years.

**Conclusion:**

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In conclusion, and to add some levity to the occasion, I leave you with George Bernard Shaw’s skeptical, but amusing, view of marriage.

He said: “there is no subject on which more dangerous nonsense is talked and thought than marriage. If the mischief stopped at talking and thinking it would be bad enough; but it goes further, into disastrous anarchical action. Because our marriage law is inhuman and unreasonable to the point of downright abomination, the bolder and more rebellious spirits form illicit unions, defiantly sending cards round to their friends announcing what they have done... the stupidity is only apparent: the [marriage] service was really only an honest attempt to make the best of a commercial contract of property and slavery by subjecting it to some religious restraint and elevating it by some touch of poetry. But the actual result is that when two people are under the influence of the most violent, most insane, most delusive, and most transient of passions, they are required to swear that they will remain in that excited, abnormal, and exhausting condition continuously till death do them part.”

If my presentation has been fair and balanced, and explored with sufficient clarity as to be cogitable, then hopefully, it will have made you more aware of the difficulties inherent in our marriage law, and of the complex issues the courts are likely to face in determining: what is marriage in The Bahamas.

Hopefully too, you will now understand that the juristic nature of marriage in The Bahamas may not simply turn on whether there is a definition of marriage in the Marriage Act, or whether the English common law definition of marriage was received as a part of our law, but that it may ultimately turn on whether marriage is a constitutional right guaranteed to all.

I trust you will also now be satisfied that both the Marriage Act and the Matrimonial Causes Act require amendment as noted; and moreover, that the present divorce regime should be replaced with a more modern form of family law which will result in more harmonious relationships between former spouses, and between them and their children.

It is my sincere hope, that as we discuss and determine how to reconstruct our marriage laws to meet the needs of our changing society, we faithfully adhere to our country’s motto to move: forward, upward, onward, together.

Thank You.