BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 4 of 2018

BETWEEN:

JJ	**Appellant**
AND	
SW	**Respondent**

Before The Hon. Sir Marston Gibson, K.A., Chief Justice, the Hon. Madam Justice Kaye Goodridge, Justice of Appeal and the Hon. Madam Justice Margaret Reifer, Justice of Appeal (Acting)

2018: April 19
October 16

Mr. Tariq Khan for the Appellant
Mr. Philip McWatt for the Respondent

DECISION

REIFER JA (ACTING):

INTRODUCTION

[1] This appeal principally challenges the judge's findings of fact in an application for the care and control of a minor made pursuant to the

provisions of the **Minors Act, Cap. 215 (Cap.215).** Collaterally, it touches on the exercise of the judge's discretion.

[2] Submissions made by the appellant, with respect to errors of law made by the judge, essentially relate to such findings of fact and/or exercise of discretion. It is notable in this regard, that none of the grounds of appeal accuse the judge of misdirecting herself on the applicable law.

FACTUAL AND PROCEDURAL BACKGROUND

[3] This matter was started in the High Court by a Fixed Date Claim Form filed 14 March 2014 by then claimant, (now respondent) SW, the father of the minor (TJ). The main concern of this claim was to formally terminate existing Magistrate's Court proceedings between the parties, and have the High Court adjudicate the issues surrounding TJ, specifically his custody, care and control which at that time was vested in his mother JJ, the appellant herein; to regulate JJ's future access to TJ; and to make provision for the payment by JJ of a reasonable sum for TJ's maintenance.

[4] At the time of this filing, TJ was thirteen years of age. He was born on 1 December 2001. He resided with JJ in the north of the island in a two-bedroom house. The other occupants of this residence were JJ's partner and TJ's only sibling then eight years of age, who was the child of JJ and her partner.

[5] Thereafter, between 2014 and 2015, followed several affidavits in support and affidavits in response, which detailed a burgeoning history of conflict and acrimony, consequent on the culmination of the relationship between SW and JJ after the birth of TJ. In addition to SW's five affidavits, there were affidavits, one from his sister and one from his mother, which was later withdrawn, together with four from JJ. These affidavits provided the court with a picture of a volatile and deteriorating relationship between the key parties to this matter. The unfortunate picture that emerges from these documents is that TJ became the centre point of a lamentable tug of war between the parties concerned, characterised by allegations and counter-allegations, and police and Child Care Board involvement.

[6] Both parties acknowledge the deleterious effects of these events on TJ's demeanour, conduct and educational performance, but predictably, each blames the other.

[7] The core complaint of SW and the members of his family is that TJ was being abused while in his mother's care, with reports going back as far as 2010. There are clearly expressed concerns that her use of corporal punishment to discipline TJ, even in the context of a culturally liberal approach thereto, has crossed the line of what is reasonable and acceptable.

[8] SW and his family member deposed to reports from TJ's school expressing concerns about the frequency with which marks and bruises were observed on his body, their own observations of the same and the involvement of the Child Care Board in investigating these complaints. Other complaints were generally concerned with what SW characterised as JJ's neglect of, and her poor attitude towards, TJ's educational needs. Exhibited school reports reveal a poor to moderate educational performance which was thought by all to be below acceptable standards for TJ.

[9] JJ's counter point is that the various complaints by SW and his family members are part of a strategy aimed at discrediting her in order to effect a reversal of the *status quo*. JJ generally appears to attribute SW's motivation to, *inter alia*, the acrimonious break-up and as observed, a consequential inability of the parties to engage in civil interaction in the interest of their co-parenting responsibilities. She also expresses the view that SW is motivated by the wish to avoid the payment of maintenance.

[10] As part of the judge's pre-trial case management of this matter, she made Orders in March 2014 and again in September 2014 directed to the Child Care Board to investigate TJ's parental, educational, living and other circumstances and to provide a report to the court.

[11] The first such report which was dated 23 May 2014, recommended to the court that the *status quo* remain: - that is, that care and control of the minor remain with JJ with access by SW. Both parents would, as is the norm, have joint custody of TJ. This report acknowledged the animosity between the two parties as being a big part of this situation, as well as the fact that TJ was at times manipulating the situation to his advantage.

[12] The second report dated 1 October 2014 was a complete reversal of the first. In that report, the investigating officer recommended that both parents should continue to have joint custody of TJ, but that his care and control should be granted to the father SW with liberal access by JJ.

[13] This understandably begs the question as to what occurred between May and October 2014 to so fundamentally alter the officer's view and recommendation, to the extent that she recommended an alteration of the *status quo*. This however will be more relevant when this Court examines the judge's decision and her findings of fact later in this judgment.

[14] However, since the judge specifically requested this report to address TJ's parental, educational and other circumstances, it is reasonable to infer that the investigation of these matters was the direct cause of the officer's reversal of her May 2014 recommendation.

[15] It is noted that each report urged the parents to attend PAREDOS for counselling as there was a clearly observed deficit in that regard. The major concerns were two-fold: first, the dysfunctional relationship between SW and JJ which resulted in poor co-parenting; and second, JJ's inappropriate disciplinary methods in raising her teenage son.

[16] The trial commenced in July 2015. In September 2015, an interlocutory application arose from the cross-examination of the investigating officer by counsel for JJ. In a nutshell, counsel for JJ argued that he was entitled to see the notes to which the officer referred when she was being cross-examined.

[17] Counsel argued that these notes were needed to more effectively cross-examine the officer, it being counsel's case that based on his instructions, they were subject to challenge on the grounds of accuracy. Counsel's argument specifically related to allegations of inaccurate reporting of interactions between JJ and the officer and of interactions between the officer and TJ's teachers, past and present. Stated differently, these notes were critical to counsel's clear intentions to challenge the credibility of the Board's officer.

[18] Having heard this application, the judge in a written decision delivered 29 November 2016, ordered the production of the file notes of the Child Care Board officer.

[19] Counsel for JJ, in challenging the credibility of the Child Care Board officer, was particularly concerned about the Board's findings on the abuse allegations. While making it clear that the May 2014 report made no conclusive findings of abuse, counsel was nonetheless concerned that the October 2014 report was influenced by those allegations. He made particular reference in written submissions to the following extract from this report:

> "Since a number of concerns were raised regarding [JJ's] parenting style by staff from both schools, it is imperative that she seeks assistance in this area".

It appears that this was the reason for the challenge mounted by JJ against the quality of the officer's investigation and the judgment reached by the officer after considering the reports expressing concern from TJ's schools that apparently led to the recommendation that care and control of the minor child be vested in SW.

[20] These matters would eventually lead to significant arguments surrounding, *inter alia*, constitutional fair trial rights and the use of international standards and norms in the interpretation and application of domestic laws.

[21] As a consequence of the judge's ruling, the Child Care Board sought leave of this Court to be an Intervenor in this matter, as it took issue with the ruling of 29 November 2016. Its view was that its files and working

materials were protected by public interest immunity as their confidentiality is essential to the Board's role in child protection.

[22] The matter was heard and determined by this Court on 19 January 2017. The Court made an oral ruling that the judge was wrong to order production of the file notes of the Child Care Board officer.

[23] In an application for special leave heard and delivered by the **Caribbean Court of Justice (CCJ)**, their Honours overturned the ruling of this Court and re-instated that of the judge. The matter was further remitted to the trial court for the speedy completion of the trial.

THE HIGH COURT DECISION

[24] These proceedings, halted on 9 July 2015, continued in March and April 2017, and on 5 February 2018, the judge delivered her decision in this matter. In consonance with the views expressed by the Child Care Board officer, the judge's finding was that it was in the interest of the welfare of the minor TJ that his care and control be granted to SW.

[25] The judge outlined the applicable law, namely **section 8** of **Cap 215** which states that the "Court" must regard the minor's welfare as its "first and paramount consideration". This section reads as follows:

> "Where, in any proceeding before the Court, the custody or upbringing of a minor or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the

> Court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application, is superior to that of the mother or the claim of the mother is superior to that of the father".

The judge referred to **Smithen-Ward v Ward Suit No. 589 of 2001, HC B'dos**, where it was stated that welfare is not the only consideration, but is the primary consideration.

[26] The judge then proceeded with a summary outline of the evidence reviewed to determine or make an evaluation as to what is in the paramount or best interest of this minor child. She made reference to her review and consideration of all the oral and affidavit evidence which formed a significant part of the record and the reports and notes of the Child Care Board officer.

[27] Following from this, the judge made certain critical findings of fact, namely:

- That the officer's notes represented an honest and credible representation of what she was told by JJ and other persons.
- That the officer's integrity and the credibility of her analysis and recommendations were not weakened by her cross-examination.
- That JJ had not adequately answered the concerns raised in the second report which were enumerated at **para [11]** of the decision.

[28] At **para [11]** the judge stated as follows:

> "It is the opinion of this Court that the Defendant has not responded satisfactorily or convincingly to issues raised in the second report. These issues included the necessity for the maternal grandmother to bring breakfast and lunch for the minor child almost daily, while he was at primary school, the low visibility of the Defendant and other maternal relatives at the school compared to the paternal relatives; and the casualness of the Defendant's reaction to a principal's concerns about bruising to the minor's body. This led the principal to inform the Child Care Board".

[29] At **para [13]** and onwards, the court addressed its own concerns arising from the evidence, namely, the troubling cutlass incident and the evidence of the various parties as to what occurred; JJ's approach to TJ's need for lessons in the context of the minor's poor academic performance; the drug use of JJ's partner and his consequential and inferential inability to be a positive role model for either TJ or his younger half-sister; and JJ's use of corporal punishment and the wishes of the child as expressed to the Board's officer, corroborated by the report of a counselling psychologist.

[30] In consequence of the above, the judge made a final significant finding of fact, namely that SW's domestic arrangements were better suited to nurture the needs of the teenage minor.

THE APPEAL

[31] It is against the above background that JJ filed her notice of appeal against the judge's decision dated 6 February 2018, containing the following six grounds of appeal:

> "a. The finding of the Learned Trial Judge that she was compelled to treat the evidence of the Child Care Board as accurate testimony, which treatment therefore served to operate against the Defendant, was wrong as a matter of law because:
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> i. In the exercise of her discretion when balancing the issue of credibility, the Learned Trial Judge skewed the balance in favour of the Claimant because she preferred the version of events offered by the Child Care Board Officer rather than the Defendant who was an immediate participant in each of the events put in issue at the trial of the matter. Rather than treating fairly with the response offered by the Defendant in respect of the Defendant's partner's alleged use of drugs, the Learned Trial Judge instead preferred the version offered by the Child Care Board Officer when this version was in fact challenged during cross-examination.
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> ii. In the exercise of her discretion when expressing whose evidence she preferred, the Learned Trial Judge stated at the outset of her oral judgment that she accepted the credibility of the Child Care Officer while using pejorative terms to dismiss the evidence of the Defendant to the extent that she described the Defendant as casual and failing to take a serious approach to additional lessons for TTDJ. When in fact, the Defendant had provided extensive evidence regarding additional lessons throughout the course of these proceedings.

b. The finding of fact by the Learned Trial Judge that the Claimant's house was better placed to serve the interests and welfare of TTDJ was wrong as a matter of law because:
    i. the inferences drawn by the Learned Trial Judge from the proceedings were incorrect in that the Learned Trial Judge drew inferences based on second-hand reports provided by the Child Care Board and the Claimant in the course of his affidavit evidence. In particular, the report of the Child Care Board that the paternal grandmother provided breakfast to TTDJ at the school. This was wrong as a matter of law because at the very outset of the delivery of her oral judgment, the Learned Trial Judge stated that the Affidavits of the paternal grandmother could not be relied on. In fact, they were withdrawn by counsel for the Claimant depriving the Defendant the right to cross-examine her on its contents.
    ii. In the exercise of her discretion, she took into account facts and matters which were not facts and matters which ought properly to have been taken into account: for example, the alleged support that would be provided by the paternal aunt and paternal grandmother as a result of placing TTDJ in the Claimant's house. In fact, the Claimant's house was a mis-description by the Learned Trial Judge because the house belongs to the paternal grandmother. And, during the delivery of the oral judgment, the Learned Trial Judge failed to exalt the value that the Claimant would bring to TTDJ. In making this decision, the Learned Trial Judge failed and or deliberately omitted to take cognisance of the evidence produced during the trial of the matter as well as the value of, and, support and care provided by the Defendant and her home to TTDJ for the past sixteen years.
c. The decision of the Learned Trial Judge that she accepted the credibility of the Child Care Board Officer and the evidence of the Child Care Board as accurate was wrong as a matter of law because:
    i. In doing so, the Learned Trial Judge gave too much weight to the evidence of the Child Care Board when in fact the Learned Trial Judge was entitled to treat with this evidence as she would with any other evidence received

during the course of the proceedings and the trial of the issues. By giving so much weight to the evidence of the Child Care Board Officer serve to immediately prejudice the Defendant because equal weight was not given to the Defendant's evidence whom the trial Judge described pejoratively as casual.

ii. A further example of the disproportionate weight given by the Learned Trial Judge to the Child Care Board was the treatment of the Child Care Board's evidence in respect of the paternal grandmother, when in fact the Affidavits of the paternal grandmother were withdrawn depriving the Defendant of cross-examining the evidence of the paternal grandmother first hand.

d. The decision of the Learned Trial Judge that she gave weight to the report of the counselling psychologist Ms. Wendy Cave was wrong as a matter of law because the Learned Trial Judge accepted Wendy Cave as a counselling psychologist when in fact, when challenged, it was disclosed that Wendy Cave had studied a Master's qualification in psychology but her first degree was not in psychology. And moreover, her report provided to the Court was commissioned by the Claimant and the Claimant's family of which the Defendant was completely unaware and for which the Defendant's views and participation were not invited nor canvassed.

e. That the Learned Trial Judge erred as a matter of law because she failed to elicit the direct evidence of TTDJ, in accordance with and guided by **Section 43(1)(b) of the Family Law Act Cap 214 of the Laws of Barbados** when in fact counsel for the Defendant had made representations to this effect during the early part of proceedings.

f. That the Learned Trial Judge erred as a matter of law because during the delivery of her oral judgment and or leading up to the delivery of her oral judgment, the Learned Trial Judge failed to address or take into account the formative years TTDJ had spent at the Defendant's property and the impact that the separation of TTDJ from his sibling and his immediate family would have on him and his sibling. Which it is submitted are fundamental considerations when vesting or determining the care and control of a minor.

NOTICE OF APPLICATION

[32] Prior to the hearing of the substantive application this Court on the 15 February 2018 heard an application for a stay of execution of the judge's order of 5 February 2018. That application was refused. Thereafter, TJ was handed over to the care and control of SW on 18 February 2018, and has remained in his care and control since that date.

DISCUSSION

[33] Before addressing the grounds above, it is necessary to reiterate the guiding principles with respect to how an appellate court treats with findings of fact and the exercise of discretion by a lower court. In so doing we shall look at the appellate policy of judicial restraint. These principles, as set out in **section 61** of the **Supreme Court of Judicature Act Cap 117A (Cap 117A)**, are extensive. Particular reference is made to **section 61(e)** which empowers the Court:

> "(e) to draw any inference of facts that might have been drawn, or give any judgment or make any order that might have been given or made by the original court, and make such further or other order as the case requires."

[34] In the recent case of **Von Callender v Lorna Moore [unreported] Civil Appeal No. 2 of 2013** delivered on 31 July 2018, this Court has restated this approach and policy in this jurisdiction. A similar approach has been taken in the region: see Byron CJ (as he then was) in **Grenada Electricity**

Services Ltd v Isaac Peters, Grenada Civil Appeal No. 10 of 2002 and Berridge JA **in Edwards v Buxton (1982) 30 WIR 82**.

[35] The learned author of **Zuckerman on Civil Procedure 3rd edn** provides a useful insight into the policy of judicial restraint. Professor Zuckerman at 24.192 observes:

> "The English appellate jurisdiction is founded on a combination of extensive appellate powers and of a policy of restraint in their exercise."

[36] The appellate court's jurisdiction empowers it to re-hear or review. The policy of restraint favours the exercise of the review jurisdiction as opposed to a re-hearing and retrying of the issues, and registers a general reluctance to interfere with lower court decisions unless they were wrong or involved a serious irregularity. At chap. 24.6, **Zuckerman** summarises the general approach as follows:

> "As a general rule…appeals are normally confined to a review of the lower court's decision. Lower court decisions are accorded a large measure of respect; as long as the lower court has not committed an obvious mistake of fact, or an error of principle or followed a seriously defective procedure, the appeal court will not disturb its decision."

[37] In **Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33** Lord Neuberger at **para [53]** of his judgment, more expansively rationalises this approach in the following words:

> "This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. **This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."** (emphasis added)

THE APPELLATE APPROACH TO AN APPEAL ON FACTS

[38] The governing principle is that an appeal court will not interfere with the lower court's factual findings unless it finds that no reasonable court could have reached the judge's conclusion, or if the judge failed to take crucial facts into consideration.

[39] The *locus classicus* is the English case of **Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326**, where the House of Lords held that:

> "an appellate court on an appeal from a case tried before a judge alone, should not lightly differ from a finding of a trial judge on a question of fact, but a distinction in this respect, must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should

> form its own independent opinion, though it will give weight to the opinion of the trial judge."

[40] This Court in **Trimart Inc. v Glenda Knight Civil Appeal No. 9 of 2014**, in a decision delivered by **Burgess JA**, affirmed the above, stating therein that an appellate court will only interfere with a finding of fact where there was no evidence at all or only a scintilla of evidence to support the finding. At **para** [**21] Burgess JA** stated conclusively as follows:

> "… the settled law in our jurisdiction is that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of primary facts. An appellate court will only interfere with the former where there was no evidence at all or only a scintilla of evidence to support the finding."

[41] The reasoning of this Court in **Ward v Walsh** provides an example of those circumstances where this Court exercised its powers to interfere with the judge's evidentiary findings. The judge's findings were not based on a finding of the credibility of the witnesses, but rather the evaluation by the judge of the facts, which this Court found to be inadequate. As a consequence, this Court concluded that it could make any orders which ought to have been made by the court below and make its own findings of fact.

[42] The Court was at pains to point out that the appellate court should exercise cautious reluctance before it reviews findings of primary fact which are based on assessments of the credibility of witnesses, but that it is in as good a position as the trial judge when it comes to drawing inferences which involve evaluating the evidence. See also **Marshall v Barbados Telephone Co Ltd CA No. 18 of 2001; Edwards v Buxton (1982) 30 WIR 82.**

[43] The principles just enunciated are well captured in **Piglowska v Piglowski [1999] 1 WLR 1360,** a case cited by counsel for the respondent, where Lord Hoffmann, stated in terms worth repeating:

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in **Biogen Inc. v Medeva plc [1997] RPC, 45**:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. **His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance…of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."** (emphasis added)

THE APPELLATE APPROACH TO THE TRIAL JUDGE'S EXERCISE OF DISCRETION.

[44] The most quoted direction on the approach to be taken to decisions based on the exercise of judicial discretion is provided by the dictum of Lord Diplock in **Hadmor Productions v Hamilton [1983] 1 AC 191** as follows:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court …is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law, of the evidence before him or an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made the order that would have justified his acceding to an application to vary it."

[45] In our opinion, "wrong" within the context of review is best explained by Lord Fraser in **G v G (Minors Custody Appeal) [1985] 1 WLR 647 (G v G)** where he observes that an imperfect solution which is different from an alternative imperfect solution which a Court of Appeal might or would have adopted, will not be interfered with unless it "has exceeded the generous ambit within which a reasonable disagreement is possible".

[46] We now turn to the application to admit new evidence.

THE APPLICATION TO ADMIT NEW EVIDENCE

[47] By Notice of Motion filed 8 March 2018, counsel for JJ gave notice pursuant to **CPR 62.23** of his intention to seek the Court's leave to admit two pieces of 'new/fresh' evidence, when the appeal was heard.

[48] JJ's affidavit of the same date was filed in support and contained the two referenced pieces of 'new' evidence on which she intended to rely in the prosecution of her appeal.

[49] First, counsel sought to have admitted TJ's latest school report for the 2017-2018 Year/Term. Counsel submitted that this report showed a marked improvement in TJ's performance, and credited this improvement to JJ's efforts. At **para [6]** of this affidavit, JJ deposed as follows:

> "I created an environment where I ensured that almost every evening, TTDJ [TJ] relinquished his cellular phone and dedicated at least an hour and a half to reviewing his school work, doing his homework and preparing for exams. He reported back to me the subjects that he had revised so that I could keep a track that he paid equal attention to all his subjects. TTDJ also received additional lessons at the weekend. These lessons covered Mathematics. Whereas before TTDJ had been hovering around the 40 per cent mark, his performance had significantly improved. I was very happy that additional lessons had been arranged and I ensured he attended them punctually."

[50] The unchallenged evidence was that this report was received in the month of December 2017, and the last day of trial in the matter in the High Court was

25 April 2017. JJ submitted that this was new and relevant evidence of her commitment to improvement, as she now took serious issue with the judge's finding at **para [15]**, that she (the judge) was not convinced that JJ had adopted a serious approach to TJ's need for lessons at a critical period.

[51] At the hearing, with the consent of counsel for SW, counsel for JJ made an oral application for the admission of the Term 2 report, which showed a fall-off in said academic performance, now being attributed to the changed care and control arrangements.

[52] Second, counsel wanted to place before the Court TJ's current domestic arrangements in the household of his father, SW, namely, that TJ was sharing his father's bedroom. Counsel submitted that this evidence directly challenged the judge's finding that SW's domestic arrangements were better than JJ's.

The Applicable Rule

[53] An application to admit new evidence on the hearing of an appeal is governed by **CPR 62.23** which provides as follows:

> "(1)This rule applies to an application to the court to receive evidence in proceedings on an appeal additional to evidence in the court below, as in an appeal in which a new trial is sought on the ground of fresh evidence.
> (2)This rule applies unless the court otherwise directs.
> (3)The application shall be made by motion on the hearing of the appeal without filing or serving notice of the motion.
> (4)The grounds of the application shall be stated in an affidavit.

> (5) Any evidence necessary to establish the grounds of the application, and the evidence which the applicant wishes the court to receive shall be given by affidavit.
> (6) The applicant shall file any affidavit not later than 28 days before the hearing of the appeal.
> (7) The evidence of any other party to the appeal shall, unless the court or a judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.
> (8) A party to the appeal shall, not later than the time limited for him to file an affidavit under this rule
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> *(a)* lodge as many copies of the affidavit as the Registrar may direct; and
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> *(b)* serve three copies of the affidavit on each other party to the appeal."

[54] This Court in **Marjorie Ilma Knox v John Vere Deane et al Civil Appeal No. 6 of 2010**, outlined in detail the principles of law and case authority on the issue of fresh evidence. There, the Court recognised the **Ladd v Marshall** principles as part of our jurisprudence, both pre and post **CPR**. This jurisprudence encapsulates the three-pronged test outlined by Denning LJ in **Ladd v Marshall [1954] 1 WLR 1489.** At **p 1491** of that case Denning LJ stated as follows:

> "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[55] These principles vest in the trial judge a broad discretion **(rule 62.23(2))** to be exercised against the backdrop of the overriding objective of the **CPR**. At **para [31] Burgess JA** states incisively:

> "This discretion is to be exercised only when necessary to achieve the overriding principles of justice underlying CPR….The facts and circumstances of each case alone determine whether the overriding principles require the exercise of the **Rule 62.23 (2)** discretion."

See also **paras [27]** to **[32]** under the rubric "Application to adduce fresh evidence" in the case of **American Life Insurance Company v Ainesley Corbin, Civil Appeal No. 35 of 2014** and **Eugene Leacock v Lorna Griffith Magisterial Appeal No. 1 of 2014** at **paras [30]** to **[54].**

[56] The **Ladd v Marshall** principles are somewhat modified when considering the welfare of the child. In circumstances involving the welfare of the child, appellate courts may be more flexible in applying the test of admitting fresh evidence or allowing fresh argument: see **Re S (A Child) (Abduction: Custody Rights) [2002] EWCA Civ 908; Webster v Norfolk County Council [2009] EWCA Civ 59**.

DISCUSSION

[57] Despite this Court's acceptance of the flexibility discussed above, it is unable to accept into evidence the two additional schools reports for the reasons discussed below.

[58] It is ironic that the lessons attended by TJ were at the insistence of SW and paid for by him. There is no dispute about the judge's findings concerning SW and his family's attitude towards TJ's educational needs. It was JJ who received a negative grading on this issue and challenges the judge's finding of fact in this regard.

[59] This Court is of the view that the admission of this new evidence therefore, without more, does not establish which party should be credited with the improvement and/or deterioration; and on that basis, fails the second **Ladd v Marshall** principle**.**

[60] The issue of the current domestic arrangements in the household of SW is rejected as 'new evidence' as it spectacularly fails the first two **Ladd v Marshall** test principles. The record shows that this evidence was at all times before the Court, specifically to be found in the Child Care Board report 2014-05-23, the Notes of Proceedings at p.32, and the exchange of correspondence between counsel for the parties exhibited at Volume 2 & 3 of the Record. This then defeats counsel's argument that this was 'new evidence' that directly challenged the judge's findings that SW's domestic arrangements were better than JJ's.

[61] It bears repeating that this matter commenced with SW's application for care and control of TJ, and at no time was an objection raised before the judge, nor was this issue canvassed with the Child Care Board officer, or SW.

[62] The sharing of a room is not inherently objectionable. Each case must be determined on its own peculiar facts.

THE GROUNDS OF APPEAL

[63] As previously stated at **para [31]**, JJ filed six grounds of appeal.

Ground 1 (a (i) and (ii))

[64] This ground is, in summary, the complaint that the judge should have accepted JJ's evidence and not that of the Child Care Board officer. The matters to which this complaint related appear to be two-fold: (i) the issue of JJ's partner's use of drugs; and (ii) JJ's approach to additional lessons for TJ as compared to that of SW and his family.

[65] The issues here involve the judge's assessment of the witnesses and their credibility: her acceptance of the evidence of the Child Care Board officer and the authenticity of the officer's notes as being more credible; her assessment of the situation, having heard and seen the parties; and most importantly, observed them under cross-examination.

[66] The judge accepted the accuracy of the officer's notes following upon her acceptance of the officer's honesty. It is noteworthy that at **para [10]** the judge definitively observed:

> "In an effort to discern the truth of the matter, the Court relied heavily on the evidence and reports of the officer."

[67] The judge was at pains to point out that the officer was subjected to lengthy cross-examination by counsel for JJ, in spite of which she was "persuaded to the integrity of the officer's investigation and the credibility of her analysis and recommendations".

[68] There is, in our view, no error of law here, merely the judge's acceptance of one set of evidence over the other, having assessed the credibility of the parties.

[69] There is no merit in this ground of appeal.

Ground 2 (b (i) and (ii))

[70] This ground covers three issues: that in the face of the withdrawal of the paternal grandmother's affidavit, the judge's finding that the paternal grandmother provided breakfast to TJ was erroneous; that the judge took into account improper matters and facts when she took into account that the paternal aunt and paternal grandmother would provide support to SW; and that the judge failed to take into account the value of the care of TJ undertaken by JJ for the last 16 years.

[71] Items (i) and (ii) are pure and simple findings of fact evidently considered by the judge in making her final decision. With respect to (i) it is not known to this Court and not discernible from the record, why the affidavit of the paternal grandmother was withdrawn, but there is no apparent dispute over the fact that there is other evidence before the court which enabled the judge to make the determination at (i) and accord it such weight as she saw fit. There is no merit in (ii) and (iii). The living circumstances of all parties are a critically relevant part of the landscape of this matter and care proceedings generally, and there is no discernible error in the judge looking at the circumstances of SW to determine whether those circumstances were suited or best suited to the care of TJ. This is as relevant as the judge examining the living circumstances of JJ and finding them challenging, in respect of her partner and living arrangements generally.

[72] It is also evident, that the judge looked generally at the living circumstances, past and present, of all parties as far as relevant, in her determination as to which circumstances presently suited the best interests of TJ (item iii).

Ground 3 (c (i) and (ii))

[73] This ground covers two issues, one of which is a repetition of b (i) above. First, is the complaint that the judge gave too much weight to the evidence of the Child Care Board officer compared to that given to JJ’s evidence; and

second, that the judge gave too much weight to said officer's evidence about the paternal grandmother, when in fact her affidavit had been withdrawn.

[74] As noted above, this concerns findings of credibility by the judge which this Court is loath to disturb.

Ground 4 (d)

[75] This ground dealt entirely with complaints concerning the evidence of a Ms. Wendy Cave, tendered as Counselling Psychologist. Counsel's submissions addressed three concerns in this regard: first, that the judge was wrong to accept her as a Counselling Psychologist; second, that the judge gave too much weight to her evidence; and third, that the judge failed to take into account the effect of JJ having been unaware that Ms. Cave was counselling TJ. The position advanced by counsel, Mr. Khan, was that he considered the witness a counsellor and not a psychologist.

[76] Having satisfied herself as to the qualifications of this witness, the judge ruled her to be an expert in counselling psychology. It was not stated by the judge the point(s) on which the witness was giving expert testimony.

[77] Questions raised as to her qualifications by counsel Mr. Khan go to the weight of the evidence and not its admissibility: **see Robb (1991) 93 Cr. App. R 161.**

[78] In **Clark v Ryan [1960] CLR 486,** at **503** Menzies J. stated:

> "… the decision of the trial judge that a witness is qualified to give expert evidence is very much a question of fact and it is entitled to all, but no more than, the weight that a court of appeal gives to a finding of fact upon the hearing of an action. In **Bratt v Western Air Lines (1946) 166 A.L.R. 1061** and the annotation thereto at page 1067, what appears to me to be the correct rule is stated as follows: "The qualification and competency of one to give opinion evidence as an expert is primarily in the discretion of the trial court, and the admission or exclusion of such testimony on the ground that the witness was or was not qualified to testify as to his opinion as an expert, will not be reviewed or reversed by the appellant court except where such discretion has been abused, as where there is absolutely no evidence that the witness had the qualifications of an expert and his opinion testimony has been admitted as that of an expert, or where in deciding upon the question of his competency the trial court has proceeded upon erroneous legal standards."

[79] Nonetheless, it is evident that even though the judge accepted Ms. Cave as an expert, her judgment indicates that the weight given to this evidence was with respect to factual matters, namely, that in her interactions with TJ, he expressed to her a wish to reside with his father. Thus at **para [18]**, the judge states as follows:

> "[18] The Officer's investigations reveal that the minor child prefers to spend weekdays with his paternal relatives and weekends with the Defendant. This was confirmed by the counselling psychologist who noted that the minor was happier with his paternal relatives. The minor is 16 years of age and the Court may take his wishes into account."

[80] This was not expert opinion, merely factual evidence providing corroboration of the evidence of another witness on whose evidence the court had expressly relied and given significant weight.

[81] In **Mark Sargeant v R Criminal Appeal No. 2 of 2006 (Sargeant v R)**, **Williams** and **Connell JJA** in this Court at **para [42]** stated as follows:

> "The first requirement was for the judge to determine the subject matter upon which the opinion of an expert was necessary. In the South Australian Supreme Court case of **The Queen v Bonython (1984) 38 S. A. S. R. 46, King CJ** stated:
>
> > "The general rule is that a witness may give evidence only as to matters observed by him. His opinions are not admissible. One of the recognized exceptions to this rule is that which relates to the opinions of an expert. This exception is confined to subjects which are not, or are not wholly, within the knowledge and experience of ordinary persons: **Clarke v Ryan (1960) 103 C. L. R. 486**. On such subjects a witness may be allowed to express opinions if the witness is shown to possess sufficient knowledge or experience in relation to the subject on which the opinion is sought to render his opinion of assistance to the court."

[82] Since the judge never determined the subject matter with any specificity nor identified the issue, outside the knowledge and experience of ordinary persons, upon which the opinion of this witness was necessary, and in essence merely received factual evidence, it was not necessary for her to undertake the next step, which is, to determine whether Ms. Cave was competent to give expert evidence, although she did in fact make this ruling.

As identified above, the correct approach for a judge to adopt in deciding whether to allow a witness to give evidence as an expert has been laid down in **Sargeant v R**.

Ground 5 (e)

[83] This ground alleged that the judge committed an error of law in not taking evidence directly from TJ.

[84] This submission is based on an erroneous understanding of the law in this jurisdiction and elsewhere to the effect that the only way that a court can establish the wishes of a child is from the child giving evidence in the proceedings.

[85] Counsel for JJ, in his written submissions, invites this Court to take note of the persuasive authority of the case of **In the Marriage of Harrison and Woollard (1995) 18 Fam LR 788 (**Family Court of Australia). At p 818 of that judgment Baker J outlines the law in Australia:

> "There are various methods of ascertaining the wishes of a child, including:
>
> 1. By means of a s.62A Family Report, which is generally the best method of obtaining evidence as to the wishes of a child.
> 2. Evidence as to the child's wishes may be adduced from other witnesses, including the parties themselves. Section 100A allows admission into evidence of statements made by a child which would otherwise constitute hearsay.

3. The child's wishes may be communicated via a separate representative under s 65.
4. The child may give evidence in court, either orally or by affidavit, with leave of the court under O 23 r5 (5) or 5(6).
5. The Trial Judge may interview the child in chambers pursuant to O 23 r 5(1).
6. The Trial Judge may call for an expert assessment under s102 A."

[86] While this jurisdiction does not have the same statutory provisions as Australia, the above list reflects the accepted methods in this jurisdiction.

[87] Whether or not a child concerned in the proceedings should be heard by the court is a matter for the discretion of the judge, which discretion should be sparingly and cautiously exercised.

[88] **Section 43 (1) (b)** of the **Family Law Act Cap 214** referenced by counsel for JJ is not authority for the submission made that the judge erred in law by failing to take the direct evidence of TJ. This section provides:

> "In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union,
>
> (a) The Court shall regard the welfare of the children as the first and paramount consideration;
> (b) The Court shall not make an order under this part contrary to the wishes of a child who has attained the age of 16 years unless the court is satisfied that, having regard to special circumstances, it is necessary to do so;"

[89] There is no analogous provision in the **Minors Act**, under which this application has been brought, but this Court does note that pursuant to **Cap 117A**, matters filed under the **Minors Act** are heard by the Family Division of the High Court.

[90] This provision, had it been applicable to the case before us, does not require a trial judge as a matter of law to interview a 16 year old child, but rather, as a matter of discretion, to determine, having regard to the wishes of such minor, whether there were circumstances justifying the court making an order contrary to the expressed wishes of the minor. How the court informs itself as to the wishes of the child is an entirely different matter.

[91] The observations of Wooten J in the Australian case of **Sullivan v Read-Bloomfield [1983] 1 NSWLR 649** cited by counsel for the respondent, a case that examined the necessity for expert evidence on the needs of the child and the power of the court to inform itself, are indeed relevant to these circumstances and the approach in this jurisdiction. At p 652 to p 653 he stated as follows:

> "It is a feature of custody cases that judges rarely see the child involved, except in photographs. They see and hear the competing adults, who usually project their own wishes to support their belief by statements which the child has made to them. It is theoretically open to a judge to interview the child himself in chambers but this is rarely, if ever done. Judges realise that the situation would be quite artificial, and that they lack the skills and techniques to make a valid assessment about

> the child in a short interview. In such cases the judge's main hope of getting a real insight into the child's view of the world, the foundations of its security and psychological needs is through the evidence of an expert."

[92] We recognise that opinions differ, and that there continues to be on-going debate on whether a court should rely on the experts involved, usually Child Care Board or Family Services Division of the Welfare Department in this jurisdiction, as opposed to having the child express himself or herself in a court of law, to determine what is in the best interests of the child. However, this Court also recognises that the position outlined in the above extract reflects the majority view and approach. To date, there has been no foolproof counterfoil to the psychological and other dangers of requiring a young child to choose between parents. The judge was fully aware of the options available to her in the exercise of her discretion in not herself interviewing TJ.

[93] It is clear from the judgment that the judge did in fact take into account the expressed wishes of the minor, TJ, and the credibility of the persons communicating that information to the court, notwithstanding the fact that he would have reached age 16 after the trial, but before judgment.

Ground 6 (f)

[94] This ground alleges that the judge failed to take into account the years spent by TJ with JJ and the impact of his separation from his sister and family generally.

[95] The judge, an experienced and senior High Court Judge, showed herself to be well versed in the applicable law and its practical application to the circumstances in her findings of fact and in the exercise of her discretion, in determining what was in the best interests of this minor child. There is no doubt in our minds that in so doing, the judge in the exercise of her discretion, attributed such weight as she saw fit to JJ's past role in TJ's upbringing, the significance of his separation from his young sister and mother and in determining, in the final analysis, what is in his present best interests.

[96] This ground, like the several above, reveals that the judge determined, in a quintessential exercise of her discretion after having reviewed all the evidence, which evidence carried the most weight with her. Matters of weight are always at the discretion of the judge having seen and heard the parties give their evidence. The authorities outlined above and numerous others constantly reinforce the view that an appellate court is slow to

overturn a trial judge's exercise of discretion on grounds that involve a conflicting assessment of matters of weight.

[97] Stated in different terms, it is never enough, in the absence of clear error, for an appellate court to overturn a trial judge because it would have arrived at a different solution. And, in the apposite words of Lord Fraser of Tullybelton of the House of Lords in **G v G**:

> "…the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted …"

[98] It is not, in our view, trite to observe that, except in exceptional cases which constitute the minority, orders in care proceedings are always 'imperfect solutions' based on evaluation and judgment involving an assessment of credibility of parties and/or the evidence and a determination, *inter alia,* of the needs of the child.

[99] It also cannot be stressed sufficiently, that this process is neither to vindicate SW nor JJ. There is no winner as between SW and JJ; merely a determination of what is in the best interests of TJ here and now. The only winner should be TJ.

[100] There is no merit in this ground of appeal.

CONCLUSION

[101] It appears to this Court that in her handling of this matter, the judge followed the familiar directions of Lord MacDermott in **J v C [1969] 1 All ER 778**, in determining what is in the best interests of TJ. In that case, Lord MacDermott said this:

> "it seems to me that they must mean more than that child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process, whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood ... that is of first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed".

[102] It is evident that the judge paid close attention to, *inter alia*, the parenting styles of the parties, in particular, concerns about JJ's disciplinary methods, the living circumstances of the parties and their respective approaches and attitudes to TJ's educational needs.

[103] Special mention must be made of the 'cutlass incident' which evidently concerned the judge and also this Court. Looked at objectively, three possibilities arise from this scenario: (i) that it was a threat of harm to TJ; (ii) that it was a threat of harm to SW; or (iii) it was a threat of harm to them both.

[104] JJ's answering affidavit does not resolve the ambiguity nor does it put her in a positive light in this disturbing incident. Whether the judge believed JJ's account or that of the other deponents, it reflected poorly on JJ's parenting style. By itself, it could quite easily have justified the judge's finding that living with JJ was not suited to TJ's best interest when viewed in the round or in the full context in this matter.

[105] This case is less about a determination of which party was at fault in the break-up of SW and JJ, whether SW remains a threat to JJ, or whether JJ's partner uses marijuana, and more about what TJ's present emotional, psychological and educational needs are and how they can be met.

[106] On a review of this matter, this Court has concluded that the judge's decision was neither wrong in substance nor in process. The judge did not misdirect herself on the law. Her findings of fact did not "exceed the generous ambit within which reasonable disagreement is possible".

DISPOSAL

[107] In view of the foregoing, the decision of the judge is affirmed and the appeal dismissed.

[108] It is noted that in keeping with the objective of securing the best interest of TJ, the judge at **para [25]** of her judgment was at pains to invite the parties to address the issue of maintenance, access and counselling. At the time of

the hearing of the appeal this had not been done, with the consequence that TJ had been denied access to his mother and other maternal relatives. This state of affairs is unsatisfactory and should be remedied without delay if this has not already been done.

[109] The parties shall bear their own costs.

[110] This Court acknowledges the apology tendered by the trial judge at **para [21]** of her judgment.

Chief Justice

Justice of Appeal **Justice of Appeal (Acting)**