BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 1 of 2016

BETWEEN:

LORRAINE ANTHONY **Appellant**
(Executrix of the Estate of
MARLENE YVONNE WORRELL-SMITH)

AND

PETER BEST **Respondent**
(Executor of the Estate of RALPH EDWARD SMITH)

Before: The Hon. Sir Marston C.D. Gibson K.A. Chief Justice, The Hon. Margaret A. Reifer and The Hon. William J. Chandler, Justices of Appeal (Acting)

2018: 7 February

2019: 15 May
26 June

2020: 24 June

Mr. Clement Lashley QC in association with Ms. Honor Chase for the Appellant
Mr. Emerson Graham QC for the Respondent

DECISION

REIFER JA (ACTING)

INTRODUCTION

[1] The subject matter of this appeal is property settlement pursuant to **sections 56** and **57** of the **Family Law Act Cap. 214 (the Act),** following a dissolution of marriage. The decision in the court below was delivered on 11 December 2015.

[2] The appeal focuses attention on contribution and the various factors that guide or should guide a court in the assessment of that contribution in determining what share, if any, a party to a marriage or a spouse in a union other than marriage should have in the matrimonial assets. In particular, it focuses attention on how a court should deal with assets brought into the marriage. One critical factor also arising herein, is the significance and treatment of a long marriage as opposed to a short marriage in the assessment of contribution and the determination of what constitutes a long marriage.

[3] It addresses the interesting and sometimes controversial issues that arise where one party to the marriage or union is the beneficiary of winnings or some type of financial windfall during the course of the marriage, specifically in this case, lottery winnings (Lotto Jackpot). In the case at bar, both a consideration of the applicable law and the relevant findings of fact by the trial judge are brought into focus.

[4] A collateral consideration is the proper practice to be followed by a trial court where issues of third party interests in "matrimonial property" arises.

[5] Lastly, it highlights the often ignored importance of pleadings in family law applications. Too often family law counsel in this jurisdiction pay scant regard to the accuracy of the factual matrix presented in applications for dissolution of marriage and to the preparation and content of financial disclosure among other pleadings. In simple matters, its significance and effect may never be felt, but in the matter at bar, its importance was brought into sharp focus.

BACKGROUND: FACTUAL AND PROCEDURAL

Factual Background

[6] The appellant/wife (the Wife) and respondent/husband (the Husband) were married on 4 September 1993 and decrees nisi and absolute of dissolution of marriage were granted on 4 October 2004, some 10/11 years later. At the time of the marriage the Husband was a 50 year old divorcé living in rented accommodation and the Wife was a 53 year old spinster who lived with her mother at Richmond Gap, St. Michael in a house owned by her mother.

[7] The parties lived with the Wife's mother before the Husband moved into the newly constructed matrimonial home at Headley's Land some 2/3 years after the marriage (circa 1995/96), followed by the Wife in 1997 after her mother

died. Both parties are of Barbadian parentage with Barbados being their permanent home.

[8] The application for dissolution of marriage, filed 4 May 2004 by the Husband, pleaded that the parties separated and the marriage ended in February 2000 but, as will be seen from the decision of the trial judge, this became a significant dispute of fact in the trial resulting in a finding of fact by the trial judge challenged by the appellant in this appeal.

[9] The parties had no children born to this marriage, but the Wife was the mother of two children from a previous relationship. It is however to be noted that one of the Wife's offspring was a mentally challenged daughter. The parties have deposed that on an application of the Wife for maintenance for herself and the 'child' of the marriage, being this said child, that the court made an interim order by consent filed 4 February 2013. This order was not made part of the record of appeal, nor did the parties make submissions or raise as an issue whether this 'child', in her forties at the time of the application, could in law be considered a 'child of the marriage'.

[10] It is largely undisputed that the parties brought the following assets to the marriage: the Wife brought the land on which the matrimonial home was constructed and a chattel house on this parcel of land which was renovated prior to the marriage. There was an amount in a savings account of

$10,000.00 and a small income from the rental of the chattel house which increased significantly after the said renovation. The Wife was employed at the time of the marriage but was subsequently terminated from her employment. Her level of income thereafter was in dispute. While counsel for the Wife argued that the Husband brought nothing to the marriage, there was only cursory reference to and little challenge to findings of fact that the Husband came to the marriage with monthly earnings of $1,600.00, that he received a settlement from his first marriage of $32,000.00 in 1993; that he received a personal injury settlement of $15,000.00 in 1994 and that he had savings of $20,000.00 with a credit union. What is material therefore in this appeal is how much, if any, of these financial resources went into the matrimonial pool. Certainly, the trial judge's findings of fact and declarations indicate that in her opinion they did.

[11] The parties were the beneficiaries of a financial windfall in 1993. A ticket purchased by the Wife won the Lotto Jackpot in the sum of $500,000.00. The cheque was made payable to the Wife alone. After the breakdown of the marriage and the Husband's application for the dissolution of the marriage, the issue of the entitlement of the Husband to an interest in this windfall became a highly contentious matter. At the time of the Lotto win the parties had been married two and a half years and had lived together for a short

unspecified time before the marriage. It is undisputed that proceeds from the Lotto win were used to complete the matrimonial home.

The Death of the Parties

[12] This matter took a slightly unusual turn when both parties died. This resulted in some initial delay in the continuation of this appeal which was first scheduled for hearing in April 2016.

[13] The first death was that of the Wife on 21 March 2017. It was not until 6 February 2018 that Lorraine Anthony, Personal Representative of the Estate of Marlene Yvonne Smith also known as Marlene Yvonne Worrell-Smith also known as Marlene Smith, applied to this Court for an order permitting her to continue proceedings on behalf of the now deceased Wife. The said Lorraine Anthony is the daughter of the Wife and was appointed as one of the executors of her mother's Will dated 20 May 2003. She applied for Letters Testamentary on 15 September 2017 and Letters were issued to her on 6 January 2018.

[14] This order was granted on 7 February 2018.

[15] The Husband died on 4 January 2018. By application filed 5 March 2019 Peter Best, the executor named in his Will dated 11 July 2016 applied to this Court to be added to the proceedings before the Court. He deposed in his affidavit

in support that he applied to the High Court for probate of the Will of the Husband and that on 18 January 2019 Letters Testamentary were granted.

[16] The order was granted on 15 May 2019.

Procedural Background

[17] The core application in this matter is that filed by the Husband on 28 September 2004 seeking orders with respect to the matrimonial home at Headley's Road, Deacon's Road in St. Michael, a joint account held at FirstCaribbean International Bank Warrens (First Caribbean) and the lottery money paid into the joint account at First Caribbean in 1996. However, the substantive application considered and ruled on by the trial judge was an Amended Application (significantly expanded) filed 30 January 2009 seeking relief in the following terms:

> "1. A declaration as to the existing title or rights to the matrimonial home at Headley's Road, Deacons Road in the parish of Saint Michael.
> 2. Such order altering the interest of the parties in the matrimonial home at Headley's Road, Deacons Road in the parish of Saint Michael so as to transfer to the applicant/husband a one-half or other share of the beneficial interest in the said property as the court may determine to be just and equitable.
> 3. That unless within 30 days of the date of the making of the order in respect of any alteration of the share of the beneficial interest in the matrimonial property written agreement is reached between the parties on the manner of dealing with their respective interest in the said property, either party be at liberty to purchase the one-half or other percentage share of the beneficial interest of the other party

and the party receiving the said sum to transfer all his or her rights, title and interest in the said property to the other party within 2 months.

In the event of failure to comply:

(i) An order that the matrimonial home be sold by private treaty within 3 months at not less than the mean of the appraised market values of the two valuers

(ii) Failing a signed agreement for sale of the property by private treaty within 3 months, the said property be sold by public auction at a reserve price agreed by the parties and failing agreement at a price not less than the fair market value thereof

(iii) The expenses in connection with the sale and the net proceeds of the sale to be divided in accordance with the aforesaid beneficial interest of the parties

(iv) In the event that either party shall fail to execute or endorse all necessary documents to effect this Order the Registrar of the Supreme Court be authorised and required to execute or endorse such documents in the name and on behalf of the defaulting party upon being satisfied by affidavit of the applicant/husband that such failure has occurred, the applicant/husband being at liberty to recover the costs of so doing from the respondent/wife.

4. An Order that the respondent/wife pays to the applicant/husband such lump sum as is just and equitable.
5. A declaration that the applicant/husband is entitled to a one-half share of the sum of $180,000.00 shown on joint account No. 001000223999 held at FirstCaribbean International Bank, Warrens in the parish of Saint Michael in the joint names of the applicant/husband and respondent/wife.
6. An order that the respondent/wife co-operates fully with the applicant/husband to have his one-half share of the sum of $180,000.00 as shown on the said account No. 001000223999 transferred to him within 7 days.
7. In the event the respondent/wife fails to comply with order No.6 that the applicant/husband be at liberty by virtue of this Order to withdraw the said one-half share from the sum of $180,000.00 as shown in account No. 001000223999 at

FirstCaribbean International Bank, Warrens in the parish of Saint Michael in the joint name of the parties.

8. That the respondent/wife pays to the applicant/husband one-half share of all interest paid to her from the amount stated in account No. 001000223999 held at FirstCaribbean International Bank, Warrens in the parish of Saint Michael.
9. A declaration that the purchase of the property at 70 Vauxhall Gardens, Christ Church was made to defeat the rights of the applicant/husband in the funds jointly owned by the parties.
10. A declaration that the applicant/husband is entitled to the sum of $62,500.00 being the value of the one-half share or interest of the sum of $125,000.00 used for the purchase of the property at 70 Vauxhall Gardens, Christ Church in the joint names of the respondent/wife and Lorraine Yvonne Broomes the daughter of the respondent/wife such sum being part of the proceeds of the monies won by the applicant/husband and the respondent/wife in a lottery in April, 1996.
11. An Order that the respondent/wife pays to the applicant/husband within 3 months the said sum of $62,500.00 being the value of one-half share or interest in the sum of $125,000.00 used for the purchase of the said property at 70 Vauxhall Gardens, Christ Church in the joint names of the respondent/wife and Lorraine Yvonne Broomes the daughter of the respondent/wife.
12. An Order setting aside the Conveyance dated the 7th day of August, 1996 which grants to the respondent/wife a one-half share of the property at 70 Vauxhall Gardens, Christ Church and the transfer of that one-half share to the applicant/husband.
13. An Order that the respondent/wife pays to the applicant/husband interest on the said sum of $62,500.00 calculated at 8 percent per annum for the period August 1996 until payment.
14. That the costs of the applicant/husband in prosecuting this action be borne by the respondent/wife in any event."

[18] The issue of the Vauxhall property took a new direction following a Take Notice filed by the Husband on 18 March 2009. This application sought the following relief:

> "1. A declaration that the purchase of the property at 70 Vauxhall Gardens, Christ Church was made to defeat the rights of the respondent/husband in the funds jointly owned by the parties;
> 2. A declaration that the respondent/husband is entitled to the sum of $62,500.00 being the value of the one-half share or interest of the sum of $125,000.00 used for the purchase of the said property in the joint names of the appellant/wife and her daughter, such sum being part of the proceeds of the monies won by the respondent/husband and the appellant/wife in a lottery in April 1996;
> 3. An Order that the appellant/wife pays to the respondent/husband, within 3 months, the said sum of $62,500.00, being the value of one-half share or interest in the sum of $125,000.00 used for the purchase of the said property in the joint names of the appellant/wife and her daughter;
> 4. An Order setting aside the Conveyance dated 7 August, 1996 which granted a one-half share in the said property to the appellant/wife, and a transfer of the one half share to the respondent/husband; and
> 5. An Order that the appellant/wife pays the respondent/husband interest on the sum of $62,500.00 calculated at 8 percent per annum for the period August 1996 until payment."

OTHER APPLICATIONS

[19] Other applications were filed which sought, inter alia, the following relief: Orders with respect to ownership of the chattel house and the rental income derived therefrom (14 February 2011 by the respondent/husband); Orders for

periodic maintenance pending disposal, post-settlement maintenance, including a maintenance component in the property settlement (3 February 2009 by the respondent/wife); applications for discovery (2 March, 12 April 2007; 18 April, 24 November 2008; 29 January 2009) and an application to strike out statements in the affidavits of the Husband (31 January 2011).

SUPPORTING AFFIDAVITS

[20] The parties filed numerous affidavits and statements of financial circumstances which, together with the oral evidence, provided the evidence from which the trial judge made her findings of fact. At least two affidavits (one for each side) were filed by third parties, namely, an Earl Broomes, the former son-in-law of the Wife who assisted with some of the work on the matrimonial home and mason Alan Layne for the Husband.

THE TRIAL JUDGE'S DECISION

[21] The trial judge in her approach to the determination of this matter firstly outlined, and then followed, 'the proper approach' as outlined by this Court in **Proverbs v Proverbs (2002) 61 WIR 91 (Proverbs v Proverbs)** namely:

1. To identify and value the net property of the parties;
2. To consider and evaluate the respective contributions of the parties within the context of **section 57(3)** of the **Act**; and
3. To consider the factors identified in **section 53(2)** of the **Act**, so far as relevant to the particular application.

[22] The judge recognised the Australian authorities as following a fourth step, consistent with the provisions of our law which is modelled on the Australian legislation, namely the "overriding discretion of the court to adjust or modify the operation of the orders so as to achieve an outcome that is just and equitable in terms of the demands of the legislation": Lindsay FM in **Kneen v Crockford [2011] FMCA (Fam) 372**.

[23] The trial judge identified the matrimonial assets as (i) a chattel house, (ii) the matrimonial home at Deacons Road and the furniture therein, (iii) a share in the remaining Lotto winnings held in fixed deposit (iv) a share in all the interest paid on that deposit (vi) a motor car purchased by the Wife with some of the Lotto winnings. Significantly, no mention is made here of the Vauxhall property which is later dealt with separately. There was other property of the parties referenced but not included in this identification of assets, namely, the Husband's inheritance from his father. No mention was made of whether the Wife inherited any part of her late mother's property which the evidence shows consisted of two houses, although there were unchallenged allegations by the Husband that $60,000 from the Lotto winnings was used to renovate one of these properties and a further sum was expended to cover her funeral expenses. In fact, the judge found at paragraph [127] that these amounts did "not constitute contributions to the property of the parties".

[24] It is clear from the judge's decision that there was a careful review of both the affidavit and oral evidence culminating in findings of fact concerning the direct and indirect financial contributions to the matrimonial assets.

[25] Special consideration was given to the issues surrounding the Lotto winnings as this source was a significant contributor to the matrimonial assets. In fact, the judge found at paragraph [126] that "just under fifty percent of the Lotto prize was plowed into the marriage". The trial judge looked at the applicable law and made a finding of primary facts after an evaluation of those facts, with the judge making the significant finding of fact that the purchase of Lotto tickets was a joint enterprise with family funds. In her words, "at the critical time there was a pooling of resources by the parties, and the Smith marriage was a joint enterprise".

[26] The finding and evaluation of facts involved an assessment by the judge of the credibility of the parties: her finding that the Wife's evidence "appeared to be tailored to the sabotage of any claim the Husband made against the Lotto money" (paragraph [118]); and her stated preference for "the evidence of the Husband about their joint approach to the playing of the Lotto game". (paragraph [119]).

[27] Among the several authorities examined by the judge on this subject was the text **"Family Law", (5th ed., 2007)** by **Anthony Dickey QC (Dickey)** where

the learned author examined the approach of the Australian Courts where the fortune of spouses is improved by an unexpected or chance event. As it relates to lottery winnings the judge recorded that **Dickey** stated at pages 575-576 of this text:

> "So far as a lottery win is concerned, where the increase in wealth might be substantial, the Full Court has made it clear that this should be treated as contribution by both parties equally if the winning ticket was effectively paid for from family funds, even though it was purchased by one spouse alone".

[28] Reliance was also placed by the trial judge on the guidance provided by the Full Court of the Family Court of Australia in the case of **Zyk v Zyk [1995] Fam CA 135 (Zyk)** where on the facts the court, in distinction to the above, found no factual matrix justifying a finding of joint enterprise, but nonetheless treated the lottery winnings therein as a joint contribution of the parties.

[29] The rationale was, that on a finding that the parties jointly shared their respective incomes, a lotto win should be treated as a joint contribution of the parties.

[30] The Full Court made the further ruling that lottery winnings should be treated as contributions and not as a windfall (although some of the cases used the terms 'contribution' and 'windfall' interchangeably) and that the court must determine by whom the contribution was made. The Full Court drew an analogy between this and how the courts in Australia treated gifts from family

as a contribution by or on behalf of that party. At paragraph [50] of **Zyk** the Full Court offered guidelines on how to determine who made the contribution.

[31] The trial judge, in the matter at bar, concluded that the parties contributed their income towards the joint partnership constituted by their marriage, in accordance with the **Zyk** guidelines. In short, that the purchase of the winning Lotto ticket should be regarded as a purchase from their joint funds, and the Lotto winnings, spent on the matrimonial property, the joint contribution by the parties to the matrimonial property. With respect to the Vauxhall property, she submitted that it followed that the Lotto money used to purchase this property was a matrimonial asset. In short, the trial judge appeared to make her findings on two bases: on fact, namely a joint enterprise in the purchase of the Lotto tickets; on mixed fact and the law, that on a finding that the parties jointly shared their respective incomes, that as a matter of law a Lotto win should be treated as a joint contribution of the parties **(the Zyk principle)**.

[32] At paragraphs [136] to [153] of her decision the trial judge evaluated the evidence and pronounced on the duration of the marriage, concluding at paragraph [147] that "The parties were together, through cohabitation and marriage, for approximately, ten years". In paragraphs [152] to [153] the trial judge determined that "By contemporary standards the Smith marriage was a long marriage."

THE GROUNDS OF APPEAL

[33] It is in the context outlined above that the appellant appealed the trial judge's decision, filing the following grounds of appeal:

(a) The trial judge erred in law in finding on the facts that the marriage between the parties was a long marriage see Paragraph 153 of her judgment rather than a short marriage.
(b) The trial judge erred in law in holding that there was a joint enterprise between the parties in playing the Lotto and consequently the parties were entitled to the lotto winnings in equal shares as shown at paragraph 206 (e) and (f) of her judgment.
(c) The trial judge erred in law in holding that the Husband contributed approximately thirty percent of the value of the total sum of $7,100.00 on the Chattel House consequently awarding the husband a 30% interest in the Chattel house at Headley's Land and a 30% interest in the rent collected for the chattel house for the period 1st May 2003 to 30th November 2015.
(d) The trial judge erred in law in holding that the Wife's maintenance application was "based on an erroneous understanding of the Husband's financial status and that his available cash after discounting the actual union was 16,100.00. The Husband was living in a substandard house needing ongoing repairs".
(e) The trial judge erred in law in failing to make provision for the maintenance of the Wife's disable daughter who resides with her at Headley's Land, St. Michael.
(f) The trial judge erred in law in holding that the Husband is entitled to a 50% share in the value of the matrimonial home at Headley's Land, Deacons Road, St. Michael.
(g) The trial judge erred in law in holding that the husband is entitled to a 50% interest in the property at Vauxhall Gardens, Christ Church.
(h) The trial judge erred in law in taking Judicial Notice of what the Court described as the "happy couple photographed" in the Nation newspaper on the 6th March 1996 receiving the lottery cheque.

(i) The trial judge erred by placing too much emphasis upon the needs of the Husband rather than taking into account the whole of the matters referred to in **56 (3)** and **53 (2)** of the **Family Law Act** in so far as relevant.

(j) The trial judge erred in failing to rule on the application to strike out, filed by the Appellant on the 31st January 2011 and replied to by the Respondent on the 14th February 2011 consequently thus resulting in prejudice to a fair trial. Such statements being also scandalous.

(k) The trial judge failed to apply the inherent jurisdiction of the Court to prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

(l) The trial judge failed to properly evaluate the evidence of the Appellant in regard to tips. She introduced her own opinion as to how tips were paid.

(m) The trial judge erred in law in failing to properly evaluate the evidence of Allan Layne in light of testimony of other witnesses and consequently too much emphasis was placed on Layne's evidence. The Judge therefore misdirected herself in determining the issues of fact.

(n) The trial judge erred in reopening the case and in holding at paragraph (194) of the judgment "that neither counsel expressed a desire to cross examine the parties on the content of their statements". The decision arrived at by the trial judge is against the weight of evidence. The Appellant reserves the right to add additional grounds.

ANALYSIS AND DISCUSSION

[34] The fourteen (14) Grounds of Appeal filed by counsel for the Wife cover several bases. They address issues of fact, issues of mixed law and fact and issues concerning the exercise by the trial judge of her discretion. Many of the grounds and attendant submissions touch all these bases and therefore defy a crisp classification.

[35] Wherever possible however, an attempt shall be made to categorise the grounds for the purpose of this analysis and discussion.

Ground (a)

The Trial Judge erred in law in finding on the facts that the marriage between the parties was a long marriage rather than a short marriage.

[36] The trial judge at paragraphs [152] and [153] stated in conclusion of her examination of the evidence under the heading "The Duration of the Marriage", that "the Smith marriage was not one of short duration." After reference to Australian and Barbadian courts' findings on what constitutes a long marriage, the trial judge made reference to the dicta of **Mohammed J** in the neighbouring jurisdiction of Trinidad and Tobago on what constitutes a long marriage before concluding that "By contemporary standards, the Smith marriage was a long marriage".

[37] This Ground is deserving of separate treatment because of the breadth of the submissions. It firstly challenges the judge's finding of fact that the marriage lasted 10 years. Secondly, it challenges what appears to be a finding of fact and law that a marriage of 10 years is a long marriage. Thirdly, it raises an issue of law that connects the finding of law to the finding in the disposal of the judgment that the Husband was entitled to 50% of the matrimonial home among other findings.

[38] Firstly, counsel objected strenuously to the finding that the marriage lasted 10 years. This touches on the issue raised at paragraph [5] above as to factual irregularities in pleadings, their effect on subsequent proceedings and how the court should deal with such. It is occasioned by the fact, inter alia, that in the application for dissolution of marriage filed in 2004 the Husband alleges that the parties separated in 2000, he gives no particulars of the circumstances of the separation in spite of the fact that the said application shows that the parties resided in the same house up to May 2004 and that up to early 2003 the Husband was contributing $400 per month to the Wife to assist with the purchase of food; that the Wife opened a bank account together with the Husband after 2000 (27 November 2002 to be precise), and that the parties travelled together to visit the Wife's father in England in 2003, among other evidence. On the other hand, the Wife alleges that the marriage ended as early as 1996.

[39] From paragraphs [136] to [153] the judge examined all the various threads of evidence on the subject and in an application of the law as it relates to the incidents of marriage made findings of fact that determined that the marriage was of 10 years duration: see paragraph [147].

[40] This was an exercise of the judge's fundamental function of fact finding. A review of the trial judge's examination of the evidence shows clearly that such

a decision was not against the weight of evidence and that the judge's evaluation of this evidence could not be faulted.

[41] This leads us to the second and third issues arising: the judge's finding of fact and law that a marriage of 10 years was a marriage of long duration and counsel's connection of this finding to the court's ruling that the Husband was entitled to 50% of the matrimonial home and other assets.

[42] There is, as far as we can see, no error of law in the trial judge making the pronouncement that the marriage was one of long duration. It was in our view a mere expression of opinion and not a pronouncement of a principle of law. It is how she used that finding in her analysis and disposal of this application that is relevant in the consideration of this Ground.

[43] The written judgement shows clearly that the trial judge followed the "proper approach" as outlined by this Court in **Proverbs v Proverbs** in her interpretation and application of **sections 56** and **57** of the **Act**.

[44] As already stated, at paragraph [23] of her judgement she identified and enumerated the three-step approach advocated by this Court, but went on to identify a possible fourth step to be found in **section 57(2)** of the **Act**, namely the court's overriding discretion to adjust or modify the operation of the orders so as to achieve an outcome that is just and equitable in terms of the demands of the legislation and its application to the facts at hand.

[45] The trial judge shows no direct nexus between the finding of a long marriage and the disposition of the application in accordance with **sections 56** and **57** of the **Act**. Counsel's submission wrongly asserts that by this finding the trial judge had applied the **"equity is equality"** principle.

[46] To the contrary, the judgment shows that the trial judge dutifully followed the three-step process advocated by **Proverbs v Proverbs** and showed an awareness of the statutory mandate of **section 57(2)**. From paragraph [28] and onwards the trial judge meticulously carried out her analysis of the evidence led before her, culminating in her findings on contribution at paragraph [166], where she stated as follows:

> "[166] The Court is of the view that despite its length, the marriage did not reach the threshold that would entitle the Husband to a share in the realty that the Wife brought into the marriage. He did not dedicate long years to raising children and being a homemaker. But, based on his contribution to the construction of the matrimonial home, the Court determines that the Husband is entitled to a fifty percent share in the value of the matrimonial home, that is, $123,105, or the market value ($375,000) minus the value of the land ($128,790), divided by two ($123,105)."

[47] In making reference to the dicta of **Worrell J** in **Brewster v Brewster (Suit No. 673 of 2003, B'dos. H. Ct., decision** dated **09 January 2014)** at paragraph [154] of her decision, the judge showed what weight she placed on the length of the marriage in the context of assessing contribution. She observed that **Worrell J** commented in that case as follows:

> "... in long marriages ... the initial contribution made by a party carries far less weight than in a short marriage as the value of such contribution erodes "not by the passage of time but by the offsetting contribution of the other spouse". **In the Marriage of Lee Steere [1985] FLC 91-626** at **80,078**".

Worrell J went on to find in that case that:

> "The initial contribution of the applicant to the matrimonial property although greater than that of the respondent, may well have been counterbalanced by the respondent's subsequent contribution to the improvement and conservation of the matrimonial home and as homemaker and parent, the evidence of which is considered below."

[48] The decision of the Australian Full Court of the Family Court in **Mallett v Mallett (1986) 156 CLR 605 (Mallett)**, adopted by this Court in **Proverbs v Proverbs**, overturned the **"equity is equality"** principle. This principle temporized that, provided each spouse fulfilled his or her role satisfactorily, financial and domestic contributions should balance out over time, resulting in equality of ownership of family assets after a reasonably long period of cohabitation.

[49] Thus, the effect was that prior to **Mallett** the court started from a presumption of equality where there were long periods of cohabitation or marriages of long duration. Therefore, pre-**Mallett** a finding of a marriage of long duration was a precursor to a finding of an equal division of the matrimonial assets. In short, the **"equity is equality"** principle. However, it was felt that this principle placed a fetter upon the exercise of judicial discretion to analyse and assess

the "contribution" of the parties. The decision in **Mallett** removed this presumption, thereby in effect restoring the wide discretionary power of section 79 (1) of the Australian Act (the equivalent of our **sections 56** and **57**).

[50] At no time does the record reflect that the trial judge started from or made a presumption of equality. It is clear that she considered the length of the marriage as a relevant consideration of the parties' respective contributions to the assets, but it was only one of several bits of evidence considered by the judge. While ultimately making a finding that the Husband was entitled to a fifty percent interest in some of the assets, she did so after considering and evaluating the respective contributions of the parties as required by **section 57(3)** and then considering the **section 53(2)** factors as required by the **Act**. After finding eleven of these factors relevant, she exercised her discretion in a determination of making an order that was in her opinion just and equitable. Thus she makes the following statements at paragraphs [201] and [202]:

> "[201] The Court is not persuaded, having considered the **section 53(2)** factors, that there should be any major adjustments to the declared interests of the parties in the matrimonial property. Eleven years after their divorce, it is the Husband who has greater needs, and the Wife who has a stronger asset base. The Husband will be allowed to retain the motor vehicle, and the Wife will keep the furniture in the matrimonial home.
> [202] The Wife's entitlement to half of the money on the joint account will also be adjusted to make a larger cash settlement available to the Husband. This would allow the Husband, if he so chooses, to invest in a home for himself that is mortgage free. After all, it was significantly through his industry and finances

> that the matrimonial home was built without a mortgage. The adjustment of the Wife's share and interest in the fixed deposit, in favour of the Husband, will correspondingly reduce his share and interest in the chattel house and its rental income."

[51] This was not an error in law or otherwise; this exemplified the trial judge's exercise of her discretion under the **"just and equitable"** principle introduced by **section 57(2)** and for this reason this ground of appeal fails.

Ground (b)

The Trial Judge erred in law in holding that there was a joint enterprise between the parties in playing the lotto and consequently the parties were entitled to the lotto winnings in equal shares as shown at paragraph 206 (e) and (f) of her judgment.

[52] Interestingly, the wording of this ground raises no objection to the principle of law applied by the trial judge in making this finding. The trial judge after examining the limited cases on this subject in these courts, accepted as the law in this jurisdiction the principle established by the Full Court of the *Family Court of Australia* in **Zyk** in which that court settled the approach to lottery winnings acquired during the course of the marriage.

[53] We find no fault with this. In short, we accept this as the correct legal test in this jurisdiction.

[54] The assumption therefore is, that the error of law referenced relates to the judge's finding of fact that there was a joint enterprise between the parties in playing the lotto.

[55] Under the rubric "Windfall or Contribution?" from paragraphs [114] to [135] the trial judge reviewed and evaluated the evidence, making critical pronouncements on the credibility of the parties and rationalizing her finding of a joint enterprise. She made the finding at paragraph [118] that the Wife's evidence "appeared to be tailored to the sabotage of any claim the Husband made against the Lotto money".

[56] Her findings at paragraph [119] and onwards are findings of fact from the evidence before her. The judge stated as follows:

> "[119] … They played together hoping for a big win. It mattered not who purchased the tickets, or with whose money. The relevant consideration for this Court is the nature of the relationship of the parties at the time the ticket was purchased by the Wife … The Court finds that at the critical time there was a pooling of resources by the parties, and the Smith marriage was a joint enterprise."

[57] And in an application of the **Zyk** principles, the trial judge states at paragraph [120]:

> "In accordance with the **Zyk** guidelines, the Court concluded that the parties contributed their income towards the joint partnership constituted by their marriage. Therefore, the purchase of the winning Lotto ticket is to be regarded as a purchase from their joint funds; and the Lotto winnings, that were spent on the

> matrimonial property, are to be treated as a joint contribution by the parties to the matrimonial property."

[58] An appellate court's approach to questions of law and questions of fact has been rehearsed by this Court in multiple judgments of this Court. For these purposes we chose to refresh ourselves from the case of **E. Phil and Sons A/S (Denmark and Brondum A/S (Denmark) Civil Appeal 24 of 2012** delivered **23 October 2013**, where we stated:

> "On an appeal on a question of law, there can be no doubt that an appellate court is free to review a trial judge's findings and to replace the opinion of the trial Judge with its own to correct errors of law. On such an appeal, the appellate court is unmistakably exercising its primary function which is to correct errors of law.
> Where the appeal is on questions of fact, the settled law in our jurisdiction is that a distinction is to be drawn between the perception of facts and the evaluation of fact, 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: …
> In respect of the latter, namely, the evaluation of the facts, it is clear from the judgment of **Byron CJ**, as he then was, in the Grenadian case of **Grenada Electricity Services Ltd v Isaac Peters, Grenada Civil Appeal No. 10 of 2002** that an appellate court will generally regard itself as being in as good a position to draw inferences from or to evaluate facts as the Trial Judge. That principle was applied by this Court's recent decision in **Walsh v Ward (Civil Appeal No. 20 of 2005)**.
> Questions of mixed fact and law involve applying a legal standard to a set of facts. This is to be contrasted with factual findings or inferences which require making a conclusion of fact based on a set of facts. But, both mixed fact and law and fact

> findings involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. It follows therefore that on an appeal on a question of mixed law and fact, an appellate court in our jurisdiction is free to draw legal or factual inferences and to interfere with the finding of the Trial Judge."

[59] On a review of the considerations raised by this ground of appeal, we take no issue with the judge's perception of the facts or her evaluation of the facts and for this reason, this Ground fails.

Grounds (c) (d) (f) (l) and (m)

[60] These Grounds have been dealt with together because they all exemplify findings of primary fact made by the trial judge, in all of which she assessed the credibility of the witnesses before making her findings.

[61] Thus, the trial judge held and made a finding of primary fact that

(i) The Husband contributed approximately thirty percent of the total sum of $7100 on the chattel house (Ground (c));
(ii) That the Wife's maintenance application "was based on an erroneous understanding of the Husband's financial status and that his available cash after discounting the Credit Union loan was $16,100 (Ground (d));
(iii) That the Husband was entitled to a 50% share in the value of the matrimonial home after assessing the evidence of the parties' contributions and making findings of primary fact (Ground (f));
(iv) The trial judge evaluated the evidence of the Wife on the issue of tips and made a primary finding of fact (Ground(l);
(v) She accepted the evidence of the witness Allan Layne (Ground (m)).

[62] In all these cases, the trial judge assessed the evidence before her, in some cases resolving conflicts in the evidence, and rationalized her findings of fact

after assessment of the credibility of the parties and, in some cases, an evaluation of the undisputed facts.

[63] This Court finds no merit in these Grounds and they are accordingly dismissed.

Ground (g)

That the Trial Judge erred in Law in holding that the Husband is entitled to a 50% interest in the property at Vauxhall Gardens, Christ Church.

[64] The factual matrix giving rise to this Ground of appeal surrounds the purchase by the Wife of a property at Vauxhall Gardens with moneys from the Lotto Winnings. The source of the purchase funds appears undisputed.

[65] The documents of title show that the property was purchased on 7 August 1996 for the sum of $125,000.00. This was less than six months after the Lotto win. It was purchased in the name of the Wife and her daughter Lorraine Yvonne Broomes as joint tenants. It is trite law that a joint tenancy creates absolute unity between the joint tenants with the right of survivorship (jus accrescendi). This legal title raises certain presumptions which can be rebutted by evidence to the contrary. The question arises as to whether the evidence on this issue in fact does so.

[66] The unchallenged evidence is that the daughter and her husband resided in the Vauxhall property presumably from sometime in 1996. The trial judge gave

judgment in 2015 when she purported to sever the joint tenancy and declare the Husband to be entitled to a 50% interest in this property. These parties' occupation gave rise to issues of further property rights (equitable and/ or proprietary): those of the daughter's husband, those of the daughter, those of the party paying land taxes, water rates, insurances and/or carrying out improvements/renovations etc., if any, between the period 1996 to 2015.

[67] The Husband's evidence on this purchase is largely inconsistent and contradictory. It is in our opinion significant that the Husband initially made no claim to this property, but five years after the initial property application he filed an Amended Application on 30 January 2009 in which he sought a declaration that this purchase was made to defeat his rights in the funds jointly owned by the parties. It is worth noting that his claim was not for a declared interest in the property but a declaration that he was entitled to one-half of the funds used to purchase the property, namely, $62,500 and that it be paid over to him with interest. In other words, he never asserted that the Vauxhall property was matrimonial property.

[68] It would not be unreasonable to infer that this claim was strategic, and the likely consequence of the Wife playing hardball on the issue of a share in the matrimonial home and the money in the bank on fixed deposit. It is significant, we think, that the Husband never brought into account as

matrimonial assets, the $60,000.00 spent by the Wife on repairing his mother-in-law's roof or the $12,000.00 spent on her funeral expenses, among other moneys spent.

[69] In his Affidavit of even date with this Amended Application he swore that "The property was purchased without my prior knowledge with funds which are jointly owned by the Respondent/Wife and me."

[70] In his oral testimony before the Court he gave two conflicting positions. In the record of his examination in chief to be found at page 3 of the Judge's Notes of Proceedings he admits prior knowledge of the intent to purchase. The record states as follows:

> "After Lotto Winnings she told me her daughter's husband was giving problems and she was going to give her a house. I dismissed it, didn't pay it any mind. Few weeks later she said to me she bought house at Vauxhall Gardens, Christ Church for her daughter".

[71] While being cross-examined on the purchase he changed from the above stated position. At page 12 of the record the judge recorded that he stated:

> "She did not tell me that she was going to give her daughter a house … I knew after house was bought. Not sure of the date."

[72] The Wife's affidavit evidence is strangely silent on the circumstances of the purchase. She merely alleged in her affidavit of 20 March 2009 that the Husband knew that she had purchased the property. It appears to this Court that there was a viable issue as to whether there was a gift to the daughter but

it was never directly addressed. A review of the judge's Notes of Proceedings does not reveal any meaningful examination or cross-examination on this point.

[73] This Court is of the view that the judge was wrong in her evaluation of the facts on this issue. There was no satisfactory evidence by any objective standard that the purchase of the property at 70 Vauxhall Gardens was made to defeat the rights of the Husband in the funds jointly owned by the parties. We do observe that the trial judge did not make that declaration or finding pursuant to **section 64(1)** of the **Family Law Act.** But if, as found by the trial judge at paragraph [132], "the Husband did not take his Wife seriously when she introduced the idea of purchasing a house for Lorraine", why did it take him from 1996 to 2009 to raise a challenge. We disagree with the trial judge's finding that this purchase was "by and large a secret acquisition". We are of the view that in evaluating this evidence the trial judge failed to resolve conflicts in the evidence that were central to her making a finding of fact.

[74] We are of the view that the purchase of Vauxhall Gardens was more likely than not a gift to the Wife's daughter approved by the husband, in the same vein as the $60,000.00 spent on the Wife's mother's roof and the $12,000.00 spent on funeral expenses. We take issue with the judge's finding that simply

because Lotto money was used to purchase the Vauxhall property that made this property a matrimonial asset.

[75] We therefore take issue with the judge's severance of the joint tenancy. There were legal rights and potentially equitable property rights/interests arising, given the period of occupation by the Wife's daughter and her husband (1996 to 2015). It was not just and equitable or legally justifiable that the joint tenancy was severed without these parties being notified and heard. Indeed, notice alone would have been insufficient to provide the court with jurisdiction to make an order affecting a third party(ies) in this matter, as discussed below.

[76] As a general principle of law, declarations of property interest under **section 56** do not bind third parties who are not parties to the proceedings. **Section 56(3)** provides:

> "(3) An order under this section is binding on the parties to the marriage or union but not on any other person."

[77] Under **section 71** a third party "may apply for leave to intervene in proceedings and the court may make an order entitling that person to intervene in the proceedings."

[78] **Subsection (3)** provides:

> "(3) Where a person intervenes in any proceedings by leave of the court he shall, unless the court otherwise orders, be deemed

> to be a party to proceedings with all the rights, duties and liabilities of a party."

[79] These provisions certainly raise the consideration of whether a judge of the Family Division of the Supreme Court can jurisdictionally sever and/or partition a joint tenancy, notwithstanding that he or she can order one or both parties to the marriage to issue a **section 43 (Property Act)** notice in writing to sever the tenancy.

[80] At paragraph [134] the trial judge states:

> "[134] The husband is asking the Court to grant him one-half of the purchase price, with interest at six percent from the date of purchase to the date of payment. Lorraine was served with a copy of the Take Notice in which the Husband asked for declarations in relation to the Vauxhall property. The Acknowledgment of Service was filed on 20 March 2009. There is nothing on the Court's file to indicate that Lorraine ever entered an appearance in this matter, or filed any documents objecting to the Husband's requests."
> [135] It is not disputed that the Wife used Lotto money to purchase the house. And in so far as the Court has determined that the Lotto money was held jointly by the parties, the Wife used matrimonial assets to purchase the house. The Husband knew of the purchase after the fact, and he did not consent to or acquiesce in the purchase. The Wife did not plead or allege either consent or acquiescence by the Husband. Therefore, he is entitled to half of the current value of the Vauxhall property."

[81] We do not agree. There is merit in this Ground of Appeal.

[82] For the reasons discussed above and in view of the provisions of **sections 56(3) and 71(3)** of the **Act**, it is our view that the severance of the joint tenancy by the trial judge is a nullity.

Grounds (e) and (i)

The Trial Judge erred in law in failing to make provision for the maintenance of the Appellant's disabled daughter who resides with her at Headley's Land, St. Michael. (Ground (e))

The Trial Judge erred by placing too much emphasis upon the needs of the Husband rather than taking into account the whole of the matters referred to in sections 56(3) and 53(2) of the Family Law Act in so far as relevant. (Ground (i))

[83] Ground (e) has proven to be an interesting one, in so far as the trial judge accepted from the evidence the need to maintain the Wife's daughter.

[84] The consideration of this issue could only have been addressed by the trial judge as a **section 53(2)** matter, specifically **section 53(2)(e),** being, the responsibilities of either party to support any other person. The evidence of the Husband is that at the time of his marriage to the Wife this daughter was a forty-something year old living in New York. There is no provision under the Act making a parent or party to a marriage responsible in law for the maintenance of an adult child in these circumstances, but as stated above **section 53(2)** does recognize that a party may assume this responsibility.

[85] The trial judge did in fact deal with this issue as a **section 53(2)** and addressed it as follows from paragraphs [183] to [186].

> "[183] The Husband has no offspring or other family members to support. The Wife assumed responsibility for an adult daughter who is mentally challenged. The daughter is not a child of the marriage, but lived with the parties before they separated.
> [184] The Wife swore in her affidavit filed on 03 February 2009 that:
>
> > "There is no other means of support for my daughter. My daughter is 49 years old and is diabetic has to be supplied with special foods including meat, vegetables and vitamins. This expenditure is no less than $1000 per month. I expect that I will have to maintain her for the rest of her life." (Para 4).
>
> [185] The medical evidence provided to the Court indicated that Patricia Worrell suffers from depression and a thyroid dysfunction. She is incapable of either living an independent life or maintaining employment. In his oral evidence, the Husband told the Court that he had no knowledge that Patricia was diabetic, or that she needed special foods. The medical evidence does not mention diabetes or the need for special foods. In addition, the special foods mentioned by the Wife, i.e., meat, vegetables and vitamins, may be considered to be part of a normal diet.
> [186] Patricia requires medication, but the Wife provided no information about the cost of medication. What she gave was a global figure of $1000 per month to maintain Patricia. The Court accepts that the Wife will incur additional expenditure, in order to care for her sick adult daughter. However, the Court has insufficient evidence before it to support the level of monthly expenditure claimed by the Wife."

[86] While it is clear from the aforementioned that the trial judge considered the Wife's adult daughter when analyzing the **section 53(2)** matters, there is some doubt as to what provision, if any, was made on her behalf given that the trial judge appeared to have accepted on the evidence before her that "the Wife

will incur additional expenditure, in order to care for her sick adult daughter", but deprecated the quality and sufficiency of that evidence.

[87] Certainly this Court must pay regard to the effect of the trial judge's statement at paragraph [201] that she is not persuaded "having considered the **Section 53(2)** factors, that there should be any major adjustments to the declared interests of the parties in the matrimonial property."

[88] As to Ground (i), it appears to this Court that the **section 53(2)** adjustment purported to be made by the trial judge appeared to have been an adjustment to address the needs of the Husband and not the Wife's adult child. The trial judge states further at paragraphs [201] and [202] that:

> "[201] Eleven years after their divorce, it is the Husband who has greater needs, and the Wife who has a stronger asset base. The Husband will be allowed to retain the motor vehicle, and the Wife will keep the furniture in the matrimonial home.
> [202] The Wife's entitlement to half of the money on the joint account will also be adjusted to make a larger cash settlement available to the Husband. This would allow the Husband, if he so chooses, to invest in a home for himself that is mortgage free. After all, it was significantly through his industry and finances that the matrimonial home was built without a mortgage. The adjustment of the Wife's share and interest in the fixed deposit, in favour of the Husband, will correspondingly reduce his share and interest in the chattel house and its rental income."

[89] This Court does conclude, in an examination of the final disposition of this matter, that, in spite of the trial judge's purported acceptance of the fact that "the Wife will incur additional expenditure, in order to care for her sick adult

daughter," no adjustment was made to take account of the needs of the Wife's adult daughter.

[90] There is some merit in this Ground of appeal although, like the trial judge we observe the paucity of evidence as to her needs and means.

Ground (h)

The Trial Judge erred in law in taking Judicial Notice of what the Court described as "the happy couple photographed" in the Nation Newspaper on the 6th of March 1996 receiving the lottery cheque.

[91] At paragraph [115] of her judgment, the trial judge made the following statement:

> "[115] The Court takes judicial notice of the happy couple photographed in the Nation Newspaper of 06 March 1996, receiving the Lotto cheque. Although the cheque was written in the Wife's name, they collected that cheque together. There was no attempt to hide the win from the Husband. As soon as the Wife realized her good luck she contacted the Husband to share the news with him."

[92] Counsel for the Wife in this Ground of Appeal submitted that the trial judge erred in law in taking judicial notice of what the Court described as the "happy couple photographed" in the Nation Newspaper on the 6 March 1996 receiving the lottery cheque.

[93] Statutorily, judicial notice covers matters of law or "matters of common knowledge etc". **Section 117** of the **Evidence Act Cap 121** speaks to matters

of law, while **section 118** speaks to "matters of common knowledge etc". This section, which is of relevance to the matter at hand provides as follows:

> "**118** (1) Proof shall not be required about knowledge that is not reasonably open to question and is
>
> (a) common knowledge; or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (2) The Judge may acquire knowledge of that kind in any manner that the Judge thinks fit.
>
> (3) The court, if there is a jury, including the jury, shall take knowledge of that kind into account.
>
> (4) The Judge shall give a party such opportunity to make submissions and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

[94] In his written submissions, counsel for the Wife gave further context to the circumstances surrounding the introduction of this evidence when he stated at paragraph [33] of the same:

> "During a recall of the parties by the Court date in 2014 and January 2015, while awaiting the decision, the Court produced a clipping from the Newspaper called the Nation Publishing Co. Ltd. showing the parties together with a headline "the happy couple"."

[95] This incident did not constitute a matter of law or common knowledge of which the judge could have taken judicial notice within the meaning of **sections 117** or **118** of the **Evidence Act.**

[96] Counsel submitted that it was an error of law for a court to infer from the newspaper article that the parties engaged in a joint enterprise in playing the Lotto Game and that consequently the Husband was entitled to a 50% share.

[97] While counsel's oral and written submissions on this point raised evidential and procedural issues of whether this evidence was properly before the High Court there being no evidence that the newspaper photo was put into evidence, and what weight, if any, should be given to this evidence, this Court observes that on a reading of the written judgment the trial judge gave a reasoned judgment analyzing all the evidence relative to the incidents of marriage in her determination of whether there was a marriage in 1996. On a review of the trial judge's analysis and on our own evaluation of the facts, it is abundantly clear, without any reference to the newspaper photo, that in 1996 the parties were undoubtedly married (and not separated) at the time of the Lotto win. This was not the only evidence informing the judge's findings of fact that the ticket purchase was a joint enterprise and the marriage a joint partnership.

[98] On the issue of the procedure adopted this Court also observes that family law matters are not as narrowly bound by the rules of evidence as other civil proceedings. For example, see **Anthony Dickey's** discussion in his text **"Family Law", (5th ed., 2007)** at **p. 304** on whether the best interests principle

can be used to override a rule of evidence or legislation. This approach is reflected in **Section 74(3)** of the **Act** which provides that "In proceedings under this Act, the Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted."

[99] **Rule 77(2)** provides

> "On hearing of such an application, the Court may, with the consent of the parties to the proceedings
>
> (a) Dispense with such procedures and formalities as it thinks fit; and
>
> (b) Inform itself on any matter as it thinks just notwithstanding any rules of evidence to the contrary."

[100] **Rule 80** empowers the Court to call any person before it as a witness of its own motion and can of its own motion under **Rule 82** direct the registrar to issue a summons on behalf of the Court to a person to attend to give evidence or to produce documents. While one may submit that this is a jurisdiction which should be used sparingly, in view of the fact that the trial judge exposes herself thereby to the criticism of entering the arena and of unfair prejudice, it is nonetheless within the jurisdiction of the trial judge to so do.

[101] We do observe however, that the procedure adopted by the trial judge in producing the newspaper article fell outside the provisions of the **Rules**.

Ground (j)

The Trial Judge erred in failing to rule on the application to strike out filed by the appellant on the 31st January 2011 and replied to by the Respondent on the 14th February 2011 consequently thus resulting in prejudice to a fair trial. Such statements being also scandalous.

[102] It is noted that counsel for the appellant/wife withdrew this Ground of Appeal at the hearing of this matter. His abandonment of this Ground can be found at page 225 of the transcript of the hearing.

Ground (k)

That the Trial Judge failed to apply the inherent jurisdiction of the Court to prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

[103] This Ground by reason of its vagueness and lack of particulars fails.

Ground (n)

That the Trial Judge erred in reopening the case and in holding at paragraph [194] of the judgment "that neither counsel expressed a desire to cross-examine the parties on the content of their statements"

[104] The trial of this matter was conducted principally in 2012. At that time, the trial record shows, there were Statements of Financial Circumstances for the parties dated 2004, 2007 and 2011. In October 2014 the trial judge summoned

the parties and requested the filing of updated Statements of Financial Circumstances given the passage of time. A copy of the Order made can be found in the trial judge's Notes of Proceedings. The parties duly filed updated Statements on 11 November and 26 November 2014 respectively.

[105] This was not a re-opening of the case but a prudent practice given the passage of time and the nature of the submissions made. It was reasonable in the circumstances to invite counsel to cross-examine the parties on the newly-filed Statements of Financial Circumstances.

[106] There is no merit in this Ground of Appeal.

CONCLUSION

[107] From the foregoing examination and discussion of the Grounds of Appeal two main findings are reached:

1. That the trial judge erred in law in holding that the Husband was entitled to a 50% interest in the property at Vauxhall Gardens and in severing the joint tenancy (Ground (g));
2. That the trial judge erred in not properly taking into the account the making of provision for the Wife's disabled daughter (Ground (e)).

[108] One finding affects the trial judge's declarations under **section 56** and the other her adjustment under **section 57** of the **Act**. Affected by the above would be **1(d)**, that is, a declaration that the husband is entitled to a fifty percent interest in the property at Vauxhall Gardens. Also in reviewing all the adjustments made by the trial judge, consideration needs to be given as to

how this Court should deal with the trial judge's **section 57** adjustment in favour of the Husband's future needs in view of the fact that these needs have been extinguished by his death. In any event, we can find no evidential basis on which this adjustment was made by the trial judge.

[109] This raises the question: what orders can the Court of Appeal now make in view of its conclusions above?

What Orders can the Court of Appeal Make?

[110] The length and breadth of the powers and jurisdiction of the Court of Appeal can be found in **section 61** of the **Supreme Court of Judicature Act Cap117A (Cap117A)** which specifically at **section 61(1)(e)** vests in this Court the power "to draw inferences of fact 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 orders as the case requires".

[111] Of relevance to the factual matrix of this matter, is the **Family Law (Amendment) Act, 2014** which came into force in December 2014, and which legislated the survival of an action in family proceedings when one of the parties' die before completion of the proceedings. The amendment inserts a new **Section 57(1A)** which provides:

> "Where before proceedings with respect to the property of the parties to a marriage or union are completed either party to the proceedings dies, the proceedings may be continued by, or,

> against, as the case may be, the personal representative of the deceased party."

Previous to this amendment it was considered a personal right which died with the litigant.

[112] In our opinion **section 57(1B)** preserves the "just and equitable" discretion of the court/judge found at **section 57(2)** in these circumstances. It provides as follows:

> "[1B] Where before proceedings with respect to the property of the parties to a marriage or union are completed either party to the proceedings dies and the court is of the opinion that it
>
> (a) would have made an order with respect to property if the deceased party had not died; and
>
> (b) is still appropriate to make an order with respect to property,
>
> the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or union, as the case may be."

[113] In this regard, this Court, in standing in the shoes of the trial judge pursuant to its jurisdiction under **section 61** of **Cap117A**, and in view of the findings and conclusions above, must ask itself what adjustments should be made in the disposal of this matter. In addition, we ask ourselves, and have answered in the affirmative, the question of whether the "just and equitable" mandate should be revisited in view of the fact that the parties have died and that the **section 53(2)** adjustment made by the trial judge was done to satisfy the "future needs" of the husband who is no longer alive. In other words, whether the order made is just and equitable given the changed circumstances.

DISPOSAL

[114] This appeal is allowed in part in the manner set out below.

[115] In the exercise of this Court's powers under **section 61** of **Cap. 117A** and **section 57** of the **Family Law Act** and **Family Law (Amendment) Act, 2014**, we now make the following Orders:

(i) Declarations 1(a), (c), (g) and (h) are affirmed. In other words, the declaration of the Husband's entitlement to a thirty percent interest in the chattel home at Headley's Land; a fifty percent interest in the value of the matrimonial home to the exclusion of the land value, computed by the trial judge at paragraph [166] in the sum of $123,105.00; and a fifty percent interest in the furniture at the matrimonial home and a fifty percent interest in the Toyota motor car remain unchanged. Declaration 1(b), that is, a thirty percent interest in the rent collected for the chattel house for the period 01 May 2003 to 30 November 2015 is set aside.

(ii) Declaration (d), declaring the husband's interest in the property at Vauxhall Gardens, and orders 9, 10 and 11 severing the joint tenancy and all consequential orders thereto are declared a nullity and set aside. The right of jus accrescendi accrues to the deceased (Wife's) daughter who shall be deemed the legal owner of the entirety.

(iii) Declaration (1)(e) entitling the Husband to a fifty percent interest in the fixed deposit and accumulated interest on the deposit at FirstCaribbean International Bank, Warrens is affirmed, but orders (3) (4) (5) and (6) are discharged. It is deemed just and equitable that the Husband's estate shall receive his fifty percent interest in the principal and interest, but no additional sum of money shall be vested in the Husband's estate. Declaration 1(f), that is, entitling the Husband to a fifty percent interest in the interest from the fixed deposit that was paid to the wife between 01 May 2003 and the date that the account was frozen is set aside.

(iv) The Bank is directed to forthwith pay the proceeds of the frozen accounts to the Estate of Marlene Yvonne Worrell-Smith and to the Estate of Ralph Edward Smith respectively in equal shares.

(v) Order 2 remains the same, that is, the interest of the parties in the Toyota motor car and the furniture in the matrimonial home are altered so as to vest a one hundred percent interest in the motor car in the Husband's Estate, and a one hundred percent interest in the furniture in the Wife's Estate.

(vi) The Wife's estate shall pay over to the Husband's estate his one half share in the matrimonial home in the sum of $123,105.00, and his thirty percent share in the chattel house within six months of the date of this

judgment, failing which interest shall accrue on the unpaid amount(s) at the rate of six percent per annum until payment.

(vii) The Wife's estate shall bear the cost of the valuation of the chattel home unless agreed by the parties without valuation.

COSTS

[116] In accordance with the provisions of **section 94(1)** of the **Family Law Act**, each party to the proceedings shall bear their own costs.

Chief Justice

Justice of Appeal (Ag.)

Justice of Appeal (Ag.)