

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FAMILY DIVISION**

**CAUSE NO FAM 83 of 2013**

**BETWEEN**

**JUDITH MARIE GENDREAU EBANKS**

**Petitioner**

**AND**



**DANFORD EBANKS**

**Respondent**

**AND**

**DANA SMITH**

**Third Party**

**IN CHAMBERS**

**Appearances:** Ms. V Allard of Brooks and Brooks for the Petitioner  
Ms. S Thompson, Attorney-at-Law for the Respondent and Third Party

**Present:** Mrs. Judith Ebanks (Day 1 only), Mr. Danford Ebanks, Mrs. Dana Smith

**Before:** The Hon. Justice Ingrid Mangatal

**Heard:** 27 April 2016 and 1 July 2016

**Draft Judgment**

**Circulated:** 26 October 2016

**Judgment**

**Delivered:** 31 October 2016

***HEADNOTE***

*Family Law - Final Ancillaries - Whether Property Brought into the Marriage by one party, but used as matrimonial home for years constitutes matrimonial property - Sections 19 and 21 of the Matrimonial Causes Law (2005 Revision)*

## JUDGMENT

### THE PETITIONER'S APPLICATION

1. The Petitioner ("the Wife")'s application is for a Final Ancillaries Order against the Respondent ("the Husband") as follows:-

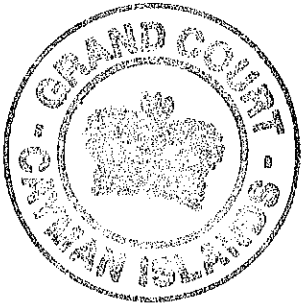
*"a. That the property registered at West Bay North West, Block 1D Parcel 273 (More commonly known as #55 Eureka Drive, West Bay) is a marital asset; and/or*

*b. That the Wife is entitled to a beneficial interest in the property registered at West Bay North West, Block 1D, Parcel 273.*

*c. That the property be placed for sale with a licensed real estate broker on the MLS, and once sold, that the Wife be paid 50% of the net proceeds of sale; or in the alternative,*

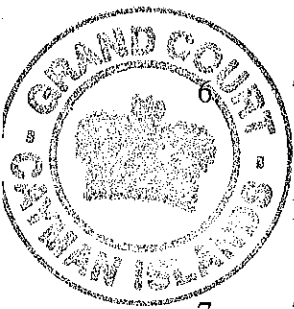
*d. That the Husband do pay to the Wife, within 30 days, 50% of the net equity in the property at #55 Eureka Drive, West Bay.*

*e. Costs"*



### BACKGROUND /THE UNDERLYING FACTS

2. The Parties were married on 28 September 2003. At the time of the marriage, both the Wife and the Husband were divorcees. This was the Husband's third marriage.
3. Following the celebration of their marriage, the parties lived and cohabited at property known as #55 Eureka Drive, West Bay, Grand Cayman registered as West Bay North West, Block 1D, in the name of the Husband ("the Property").
4. The Property was registered in the sole name of the Husband, at the time of their marriage, and had been so registered since 1981. The Property was therefore property which the Husband brought with him into the marriage.
5. The Wife and the Husband had been living and domiciled in the Cayman Islands for nearly ten years up to and including two years previous to the presentation of this Petition.



There are no children of the marriage however both the Wife and the Husband have adult children from other previous relationships. None of the children live with their respective parents.

7. The third party Dana Smith (“Ms. Smith”) is the daughter of the Husband.
8. The relationship between the parties deteriorated and the Petition for Dissolution of Marriage was filed by the Wife on 1 May 2013 on the grounds of unreasonable behaviour such that she cannot reasonably be expected to live with the Husband.
9. On 29 May 2013, an Answer and Cross-Petition, also on the grounds of unreasonable behaviour, was filed on behalf of the Husband.
10. Following advice from her attorneys, the Wife submitted an application for a caution notice to be recorded on the Property as she wished to claim an interest in relation to it.
11. Information subsequently came to the Wife’s attention that on 29 April 2013 the Husband had transferred the Property to his daughter Ms. Smith.
12. On 7 May 2013 the Wife was served with a letter from Ms. Smith as “sole owner” of the property, giving her 30 days’ notice to leave the matrimonial home and to take her possessions with her.
13. On the same 7 May 2013 the Wife was also served with a letter from the Husband in which he indicated, amongst other matters, that he was selling the jeep that he and the Wife had purchased together and in the letter the Husband stated that *“Once the vehicle is sold I will return your 50% contribution if equal to the amount contributed or 50% of the sale if less.”*
14. Prior to receiving the letter dated 7 May from Ms. Smith, and earlier that same day, the Husband had been served with the Divorce papers.

15. On 14 May 2013, a summons, (which was subsequently amended on 10 September 2013), was filed on behalf of the Wife. In the amended summons, in addition to claiming that the Property is matrimonial property and subject to a 50/50 division, an inhibition against further dealing with the Property was sought until the final determination of the matter. The Wife also applied for Ms. Smith be joined as a party to these proceedings.

16. On the 28 June 2013, on the Wife's application, Williams J granted an injunction that Ms. Smith be restrained, as follows:



*“whether by herself or from instructing another or encouraging or aiding the further transfer or disposition of the property registered at West Bay North West, Block 1 D, Parcel 273, until the conclusion of the ancillary proceedings herein.”*

17. On the 8 October 2013, an injunction essentially in the same terms was granted by Williams J, and it was ordered, amongst other orders, that Ms. Smith be added as a party and file affidavit evidence.


18. On the 13 January 2014 it was ordered by Williams J, by consent of the parties, that the Wife amend her Petition and the Husband withdraw his Answer and Cross-Petition.

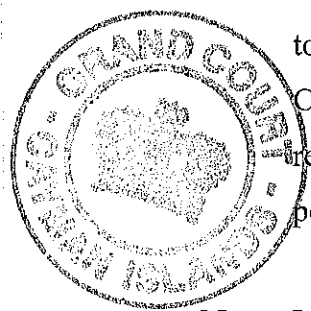
19. On 21 January 2014, an order was made by Williams J that the facts and matters stated in the Amended Petition were proved and the ancillary matters were adjourned into chambers.

20. On 2<sup>nd</sup> December 2014, on the Husband's short notice application, Smellie CJ made an order, allowing Ms. Smith to charge the Property to secure a loan from the Cayman Islands Government covering the Husband's then medical expenses in the sum of approximately \$10,000.00.

## THE PARTIES' EVIDENCE AND CONTENTIONS

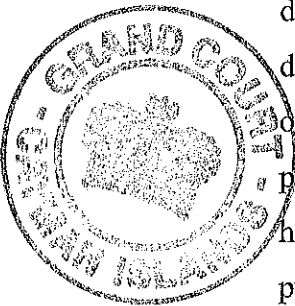
### The Wife

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21. It is the Wife's evidence in her affidavits that it is no coincidence that the Property was transferred by the Husband to Ms. Smith just two days before the Divorce papers were filed. It is her position that the Husband well knew that she was consulting an attorney-at-law in order to bring the marriage to an end, and that the transfer to Ms. Smith was done in a deliberate attempt to deprive her of, and defeat her reasonable claim, to an interest in the Property.
22. It is the Wife's assertion that she and the Husband acted, and treated the Property as being for their joint benefit for the years of their marriage. She indicates that she left her whole life in the United States to be with and reside with the Husband here in the Cayman Islands. She and the Respondent, prior to being in the Cayman Islands, had lived in Boston Massachusetts together for one year. She stated that she and the Husband behaved as if the Property, the house, was theirs, as man and wife. She bought items for the home, such as lawn mower, microwave, washer, dryer, fridge, grill, air-condition and other items. She made other efforts to ensure that she and the Husband lived comfortably at the Property together.
23. At the time of her earlier affidavit in September 2013, the Wife gave evidence that she was a member of the support staff at St. Ignatius Catholic School in the Cayman Islands. However, this matter appears to have taken a number of years to come on for trial, and at the current time, her evidence in her fourth affidavit filed 5 April 2016, is that in 2015 she was terminated from her previous position with St Ignatius School. Further, that because she is a US citizen, and had her Residency and Employment Rights Certificate through the Husband, in view of the ongoing divorce proceedings, she lost same, and had to leave the island.
24. Since her return to the United States, she has been living with her daughter Tara, and working only part-time, and that only on weekends, at a Waffle House, earning US \$87 per week. She gives her money to her daughter to help with bills, but her daughter has had



to be supporting her, along with her cat and dog that she brought back with her from Cayman. She has also had to rely upon financial assistance from her elderly father who recently sent her a cheque for US\$5,000 as a loan which she will have to pay back at some point.

25. In her third affidavit, the Wife stated that she does not own any home in the US and nor did she purchase any home with her children in the US. She denied that she had ever stated to the Husband that she would be going back to the US and she claimed that this was a complete fabrication on his part.
26. For the first time in oral evidence in chief, and then again in cross-examination, the Wife claimed that she had specific conversations with the Husband and that he always told her that the house belonged to both of them. That evidence is nowhere to be found in her affidavits.
27. The Wife stated that she was aware from the time they got married that the Husband was the sole owner of the Property. She did not have any conversations with him about placing her name on the Property and she says that she did not feel there was any need for her name to be put on because she never thought she was going to divorce him and go through all that she has. She does also give evidence though, that the marriage deteriorated within 4-5 years but they stayed together.
28. The Wife denied that the Husband had told her repeatedly or otherwise, that the Property was intended for Ms. Smith.
29. In cross-examination, the Wife said that the buying of items for the Property was not her only contribution. She also cooked, cleaned, maintained the place, bought food, paid bills, and contributed as any wife would.
30. The Wife was also cross-examined about her evidence that "*she did not own a home in the US*". The Wife's evidence in response was that there had been a property owned in her



name and that of her older daughter, but she had signed that property over to her older daughter, could be in 2002, before she met the Husband, but not long before. She said her daughter was living there, and filed for bankruptcy and thus the Bank took that property over. The Wife in cross-examination further stated that when she said she did not own any property in the United States, she was responding, not to the Husband's allegation that she had transferred property to her children, but rather to his allegation that she had been purchasing a property with her younger daughter from before the marriage broke up.

31. The Wife indicates that she did not leave the Property because of the eviction notice served on her by Ms. Smith. She claims that she left of her own accord because she feared for her safety, and did not know if the Husband was going to assault her again, as she claimed he had in the past.

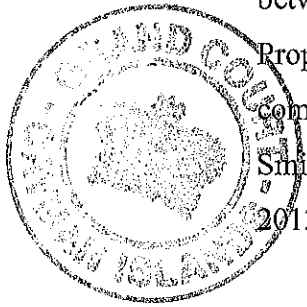
#### **The Husband**

32. In his second affidavit, filed 10 February 2014, the Husband indicates that he is seeking spousal maintenance of \$400 per month. Mr. Ebanks was born 9 June 1948 and is now 68 years of age. Mr. Ebanks however, accepting the Wife's evidence that she earns only a minimal amount, withdrew his application for maintenance during his evidence. During his Counsel Ms. Thompson's closing submissions this was ultimately confirmed, after some to-ing and fro-ing.
33. In his affidavit of February 2014 he stated that he is not in good health and said that he gets confused in large settings and sometimes has to stop to remember exactly where he is, and finds himself having to ask people to repeat themselves before he can understand them. He indicated that he has been seeing Dr. Christian at the HSA and the Doctor is testing to confirm whether he has dementia. No further or follow up medical evidence was presented in relation to this query condition. There was also before the Court on a number of occasions indication that the Husband has had to undergo treatment for cancer.
34. According to the Husband a significant part of the problem with himself and the Wife has been the interdependence both parties have with alcohol and that the vast majority of

disagreements which have occurred between them have been when one or both had been under the influence of alcohol.

The Husband states that he used to work as a seaman, then as a common labourer and mixing cement, but currently, his only income is from his seaman's pension which is \$550 per month, whereas his current monthly expenses are approximately \$951.

36. As regards the Property, the Husband states that he bought the Land for the Property in 1981. He built the house during his first marriage, with the final completion taking place during his second marriage.
37. The Husband claims that although he and the Wife lived together in the house for about nine years, the Wife never made any improvements during that time. They both paid towards utilities, food, cable and cleaning of the yard.
38. He concedes that the Wife bought some appliances, but indicates that when she moved out, she took those with her. He said that she said: "*These are mine. This is the only thing that I want from out of here.*"
39. The Husband's evidence is that, over the years, he told his daughter Ms. Smith that the Property was hers and she promised that she would take care of him when he was old. He stated that in a sense, this was the only security he had in his old age.
40. The Husband says that over the years, Ms. Smith has been a dependable daughter and has come to his aid upon numerous occasions. This includes ensuring that he gets to the Doctor when sick, and whenever there is a problem that he cannot deal with because of his level of education, or because of ill-health, Ms. Smith is the one who helps him out.
41. His first wife never made any claim on the Property because, according to the Husband, she knew that it was "*from his sweat alone*".



42. The Husband says that when he and his second wife Eileen divorced in 1999 it was agreed between them that she would not make a claim as the Husband had committed the Property to Ms. Smith. Eileen has filed an affidavit on behalf of the Husband which I shall come to in due course. As far as the Husband was concerned, the Property has been Ms. Smith's for many years and this was so, even though it was not transferred to her until 2013.

43. It was the Husband's stance in his affidavit evidence that both his sister Kinsley Wood and the Wife knew that the Property was for Ms. Smith. On a number of occasions before the Wife came to Cayman to live, they discussed the matter of the house and he told her that the house was Ms. Smith's. The wife never said that she had a problem with this.

44. The Husband states that the Wife had a home in the US when they met and she told him that she was handing it over to her children. The husband says that he never laid any claim as he agreed that this was fair as he really had no home to share with her. According to him, they were both on in middle age, with him being on his third marriage, and the Wife being on her second, and they probably would have to work and rent as long as they could.

45. It was also the Husband's evidence that he understood from the Wife from before they broke up in 2013 that she was buying another home in another State with her children and that she was contributing to that as she expected to retire and go back there too live. The Husband claims that he never got too interested because it had been clear to them both for at least 5-6 years that they were both unhappy in the marriage and that he expected that sooner or later the Wife would leave and go back to the US and to her children there.

46. Dr. Christian's Medical Report was exhibited in evidence. The doctor indicates that he saw the Husband on 5 February 2014. His Assessment was short-term memory loss, with a query for dementia, and given the history of heavy alcohol use, he was considering Korsakoff syndrome.

47. Indeed, prior to giving evidence, the Husband's recently retained Counsel Ms. Thompson, sought to rely upon this medical report to say that, in addition to her own assessment of the Husband as not being able to give straight instructions, the Court should rule the Husband unfit to be cross-examined. However she would rely on his affidavits as evidence in chief and the evidence of other witnesses in affidavits and Ms. Smith in cross-examination.

48. Ms. Allard, who appeared for the Wife, objected to this course, pointing out that the matter had come up many times before Williams J when the Husband had been otherwise represented and that the only aspect of the Husband's health that had been brought up was his unfortunate cancer conditions, and that there had been no mention of dementia, nor indeed, was there now before the Court any confirmed evidence of dementia.

49. I ruled that the Husband should be cross-examined. I gave oral reasons that, in essence, it would not be fair for the Husband not to be cross-examined, and yet to have his affidavits accepted as his evidence-in-chief, since there had been no previous indication, prior to the morning of the hearing, that the Husband was unfit to be cross-examined. Further, that in so far as credibility is an issue in this case, that is an issue which ought to be explored, in fairness to the Wife. There was no medical evidence before me to support or confirm specifically that the Husband was unfit to be cross-examined. In any event, if the Husband were found unfit to be cross-examined, that would have raised the question as to his fitness to give evidence in his affidavits, and their reliability in turn. In all of the circumstances, I considered it just that the Court allow cross-examination. I should say that while I found the Husband to give contradictory answers at times during his oral evidence, and he did not always seem to follow immediately what was being asked, there was no obvious difficulty or impairment in comprehension such as to cause the Court any concern or to have to re-think the ruling which was made.

50. In cross-examination, the Husband said that the Wife was not speaking the truth when in her oral evidence she now said that he had told her that the Property belonged to both of them. The Husband said a number of things about the Property. At one point, he said that



he never told the Wife about his intention of transferring the Property to Ms. Smith or that that the Property was for Ms. Smith because things were going well between them. This conflicted somewhat with his affidavit evidence. He said if he'd known that what has now happened between himself and the Wife was going to happen, he would have transferred the Property to Ms. Smith long ago. He said that he had told the Wife that the Property was built for him and his mother. He told the Wife in different ways, that if things were not going well, he would have to transfer the property to his daughter. He denied that he transferred the Property to Ms. Smith because of the Divorce.

51. The Husband's second wife Eileen, of Nashua, NH, USA gave evidence that she is the ex-wife of the Husband, having been married to him in 1991, and up until their divorce in 2002.
52. She states that she lived with the Husband at the Property, which had been in his name for some time, between 1988 until 1991 when she left Grand Cayman. The Property, when she first met the Husband and he became her fiancé around 1987-88, was furnished, had electric service, running water from a well, and appliances in kitchen, and bath.
53. When she moved onto the Property, the Husband and some of their friends plastered and painted the outside of the house and finished installing a window. She and the Husband painted some rooms over and prettied up the Property. Later, Eileen says that she bought floor tiles for the living room, hall, both bedrooms and the large front porch and these were installed by a friend.
54. The marriage ultimately failed, and upon divorce, Eileen states that she never made any claim on the Property. She regarded it as being the Husband's because he had it before they got together and also because he had told her that he intended it to be for his daughter Ms. Smith because she would take care of him in his old age. Counsel for the Wife did not seek to have Eileen attend Court for cross-examination.

55. An affidavit, as well as a response to a request from the Wife for Further and Better Particulars was filed on behalf of Ms. Smith, respectively on 14 March, and 27 August 2014.

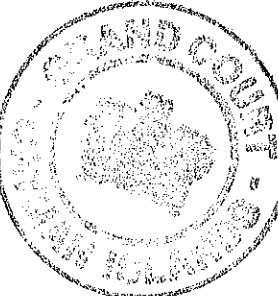
56. It was Ms. Smith's evidence that her father, the Husband, purchased the Property on 11 March 1981 for CI \$2,000 with funds received from a settlement for an injury while working on a ship overseas. The Husband built the house on the Property with funds from the settlement, with the assistance of family and friends. Due to the injury, the Husband could not return to ship-work, so he worked as a construction worker in Cayman, while building his house.

57. Ms. Smith stated that she recalled as a child spending afternoons after school with her grandmother Veena Bush and her aunt Eloise Hydes, both from her father's side of her family. Also with her father, who indicated that, despite the problems which the family had encountered, he wanted to provide for her and that the Property would be gifted to her. These statements were made upon numerous occasions, when the Husband would be telling her grandmother and aunt, (who are now both deceased), that what he owned would be given to Ms. Smith when she was older.

58. Ms. Smith states that sometime during the Easter Holidays in 2008, the Husband visited her mother's home at Hetties Lane, West Bay and in conversation with Ms. Smith and her mother, told Ms. Smith that he wanted to give Ms. Smith his property. Ms. Smith advised him that it was not necessary to do that because it was the only asset that he owned.


59. Ms. Smith states that in 2011 while overseas for medical treatment she received a call from the Husband advising her that he wanted to speak with her about the ownership of the house upon her return to Cayman. She indicates that, however, this did not materialize because her health did not improve, and she had to undergo major surgery.

60. It is Ms. Smith's evidence that on the 30 March 2013 the Husband called her and said he needed to speak to her about transferring the Property to her. She indicated that she told



him she would speak to him after the Easter Break. On 10 April 2013 she met the Husband at Mr. Benson Ebanks, Justice of the Peace's shop in West Bay. Ms. Smith told the Husband that she would only do the transfer of the Property to her when she had prepared a letter which stipulated the following; that the Husband would remain living at the Property until his demise or until he relocated on his own accord, that the Husband would continue to operate the Property as his personal dwelling house, and that the Husband advise her if any matters arise at the Property that required her action to evict any persons from the Property.

61. This letter was done and is dated 10 April 2013 and was witnessed by Mr. Benson Ebanks, Justice of the Peace.
62. Ms. Smith states that on 24 April 2013, the Husband collapsed and was hospitalized. On release from the hospital, he went to stay with his older sister Mrs. Kensey Wood in West Bay because his house was not in sanitary condition for him to return to.
63. Ms. Smith states that she had the House on the Property cleaned and she sorted out the guest room for him to return to when he improved. She says that she had to assist the Husband with getting maintenance done to the inside of the house because of the Husband's lack of finances and she claims to have effected repairs.
64. It was Ms. Smith's evidence that her father has always lived on the Property while he lived in Cayman and that when he lived overseas with his second wife Eileen, the Property was rented. She avers that the Husband has been the one who has worked on the Property and built and maintained the house. Although he had not been able to be financially successful in life, he had always been a loving father. If anything were to happen to him, she is the only one that the Husband has who would be able to take care of him.
65. In cross-examination, Ms. Smith said it was always her understanding that the Property would be during his lifetime for his benefit and that this was the Property that would be



used as collateral to secure funds for his considerable medical expenses. Ms. Smith says that even though all of her own medical issues had still not been sorted out in 2013, because she saw the bad state that her father's health was in, and after speaking to Mr. Benson, the Husband told her he wanted to transfer the Property to her because his health was failing, and she agreed to do so.

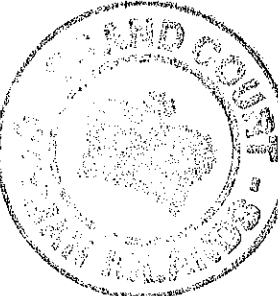
66. Ms. Smith knew that the Wife and Husband had lived together as man and wife for almost ten years. When she sent the eviction letter to the Wife she says that it was because she kept getting calls from the West Bay Police Station in relation to disturbances on the Property, and that the Husband was very sick, which she claims was also not helped by the stressful living situation between the Wife and the Husband. She admitted that the Husband was charged, but not convicted in relation to Domestic violence. She said she knew he was sent for counselling regarding alcohol use, she was unaware whether it was in relation to domestic violence.

#### **THE WIFE'S POSITION**

67. Ms. Allard, who appeared on behalf of the Wife, submitted that, on the basis of legal authorities, the Petitioner obtained, given the circumstances, a beneficial interest as spouse, during the marriage, in the property. Further, that the transfer does not affect her claim/entitlement to a share in the value of the property.

#### **Is it a Marital Asset and therefore subject to Division?**

68. It was submitted that the Court of Appeal's decisions in *McTaggart v McTaggart* [2011 (2) CILR 366], and *Gordon v Watler* (Unrep.) CICA (Civil) 13/2014, 9 September 2014, and the decision of the House of Lords in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, make it clear that the marital home, despite being brought into the marriage by only one of the parties does not prevent its characterization as a marital asset.
69. Following the dicta of Baroness Hale in *Miller*, the ultimate objective is to set each party out on the road to independent living. The road to independent living requires, Ms. Allard contends, that an award of an interest in the Former Matrimonial Home ("FMH") be made



to the Wife. As her information sets out in her affidavits, this is (a) the only real asset from the marriage, and (b) she has nothing else to depend on. She currently lives on US \$80 per week in wages, and has to depend heavily on her daughter and elderly father for assistance with her daily and living expenses. It was submitted that the requirements of fairness are in favour of awarding her a share in the FMH.

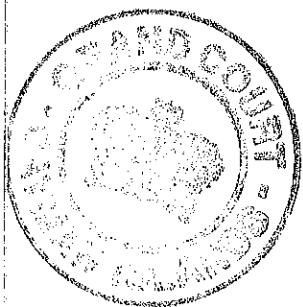
70. It is clear that the Husband maintains an interest in the home, Counsel argues, and or continues to benefit from it. In that regard, reference was made to the Order of December 2014 in respect of a charge over the Property being permitted for the Husband's medical fees.
71. It was argued that the concept of sharing also weighs in favour of the Wife being awarded a share of the value of the FMH.
72. The most recent valuation of the property, according to Ms. Allard, puts it at a valuation of CI\$95,000. Less the balance of the loan taken out on the property in order to benefit and pay for the medical fees of the Husband, there is still equity in the home, Counsel submitted.
73. The Petitioner is seeking, in accordance with the applicable authorities Ms. Allard contends, 50% of the equity of the house.

#### **SUBMISSIONS ON BEHALF OF THE HUSBAND AND MS. SMITH**

74. Ms. Thompson appeared for both the Husband and Ms. Smith. It was Ms. Thompson's submission, on behalf of the Husband and the Third Party, that the following "issues" arise:

##### **"Statement of Issues"**

- i. The burden is squarely on the petitioner to discharge the **Stack v Dowden** [2007] A.C. 432 inferences, that is, where the legal title is vested in a Third Party, the beneficial interest mirrors the extract of title unless there*



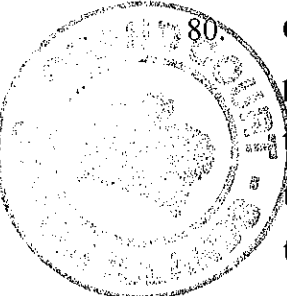
*is clear evidence to the contrary. If the burden cannot be discharged then the Wife's claim for an interest in the FMH must fail.*

- ii. *If the court considers that the Wife has discharged her burden then it must then put its mind to the exercise of determining her interest in accordance with the legal principles."*

**Submissions Re: Statement of Issues (i)**

75. Ms. Thompson suggested that the authorities provided by the Wife do not deal with a property owned by a third party being brought into the matrimonial melting pot. Case law provided deals with property already owned/controlled by either husband or wife. There are no authorities relied upon which address property which is legally and singularly owned by a third party, as here where the property is owned by Ms. Smith. The basis for making the claim must be identified and then justified. This is absent from the evidence, Ms. Thompson submitted.
76. The argument continued that if fraud is being alleged, then this must be set out with particularity, which is absent from the proceedings. Order 18 of the GCR and extensive case law deals with the requirements of fraud pleadings.
77. If it is being alleged that there was a trust in the Wife's favour, then the discharge of the burden to prove the beneficial interest rests with the Wife. There is no expressed agreement which the Wife has exhibited to support her case and neither has she asserted any evidence that it was agreed between herself and the Husband that she should share beneficial ownership of the Property.
78. The Wife's viva voce evidence is that the Husband said in passing on more than one occasion that this house was "*for me and him*". This evidence has not comprised any aspect of Affidavit evidence filed 23 June 2013, 1 May 2013, 6 September 2013 or 25 February 2014. Ms. Thompson submits that the evidence given orally has been contrived for effect.

79. Counsel submits that the viva voce evidence from the Husband is that the matter was simply not discussed. He neither told her the property was meant for her ( the Wife) nor did he tell her it was meant to belong to his daughter, Ms. Smith.



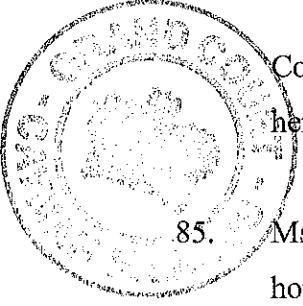
80. Counsel submits that *Stack v Dowden* is a leading case which provides authority for the presumption that “*equity follows the law*” and that in instances such as this where the legal title is vested in a Third Party, the beneficial interest mirrors the extract of title unless there is clear evidence to the contrary. The onus is on the person who seeks to show that the beneficial ownership differs from the legal ownership.

81. Another key principle emerging from *Stack v Dowden* Counsel contends, is that even if the presumption is rebutted by the Petitioner, the court will then search for what the parties must be taken to have intended in the light of their conduct. The court is not entitled to abandon that search in favour of what it considers fair.

82. Ms. Thompson points out that *Stack v Dowden* has been applied time and time again by the Grand Court of this jurisdiction.

83. On account of the facts in this case, Counsel submits that there is no evidence to suggest any presumption to share the FMH. There has been no detriment demonstrated by the Wife, the chattels she purchased for the home were either returned to her or otherwise made freely available for her collection. In the event that the Wife neglected to take her personal items, that neglect or failure cannot be imputed to the Husband as a basis for supporting the Wife’s claim.

84. The Wife’s evidence of expenditure in the home, Counsel submitted, is confined to chattels only and her evidence also includes that she was forbidden from executing more significant works to the home such as installation of a new toilet and tiling. The Wife therefore confirms that she did not act to her detriment in reliance on alleged notions that she has a beneficial interest in the property. The assertion in fact is not expressly made,



Counsel submits, and the Wife has therefore failed to discharge the burden on her to prove her case that the beneficial interest differs from the legal interest.

85. Ms. Thompson submits that the Wife in her evidence admits that she has signed over a home to one of her adult daughters some years ago. The arrangements that the Wife gives her house in US to her children and that the Husband would do likewise with his home in Cayman, supports the Husband's case that it was well understood and accepted that beneficial ownership of the house rested with Ms. Smith.

86. Ms. Thompson argued that the Wife has not discharged her burden and that the relief sought should be denied.

#### **Statement of Issue (ii)**

87. The Husband submits that, in any event, there should be a departure from the yardstick of equality because he brought the home into the marriage and the objectives of its acquisition had no connection with the Wife. Reference was made to *Miller v Miller* and *White v White*.

88. Another basis for departing from the equal division is the earning capacity and earning potential of the parties, it was submitted. While neither are big money earners, Ms Thompson submits that the Husband's distinct disadvantage is the state of his mental impairment. Further, the affidavit evidence asserts that Mr. Ebanks is a cancer patient.

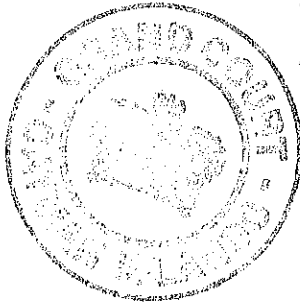
#### **THE LAW**

89. Section 21 of the *Matrimonial Causes Law* (2005 Revision) ("*the Law*"), makes provision for ancillary relief orders as follows:

##### *"Ancillary orders*

21. *At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for-*

(a) ...



- (b) *the disposition of matrimonial property, including the matrimonial home;*
- (c) *varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty [sic-entry?] of the said marriage;*
- (d) *varying any other settlement of matrimonial property;*
- (e) *making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
- (f) *providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and*
- (e) *[sic] costs."*

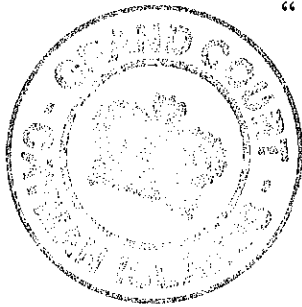
90. In the leading Court of Appeal decision in *McTaggart v McTaggart* [2012 (2) CILR 366], referred to by both Counsel, Chadwick P pointed (at page 388, para30) out that the provisions of section 21 must be considered in conjunction with the direction in section 19 of *The Law* that: –

*“in dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.”*

91. Also in *McTaggart* (page 376 para 3) it was pointed out that section 21 of *the Law* gives recognition to the concept of “matrimonial property”. Further, that although the concept is not defined in *the Law*, it is generally understood in the sense described by Lord Nicholls in *Miller v Miller*, that is to say, it comprises property acquired during the marriage otherwise than by inheritance or gift. Its distinguishing feature is that it is the financial product of the parties’ common endeavour.

92. I did not find the *Stack v Dowden* line of cases particularly helpful on the facts of this case.

93. However, in *McTaggart*, Chadwick P at paragraphs 36-37, 39-45 (inclusive) provides useful guidance as follows:



*“ 36. It is, of course, self-evident that an order under s. 21(b) of the Law can be made only in relation to property which exists-and which is in the ownership or under the control of one or other (or both) of the parties-at the date when the order is made. It is necessary, therefore, first to identify those assets (“the available assets”) which are in the ownership or under the control of the parties at the date of the hearing; and then to identify which of those available assets are matrimonial property and so capable of being the subject of an order under s. 21(b). There may be cases (of which, I shall explain, the present provides an example in relation to the husband’s potential retirement benefits where an asset which did exist at the date of final separation does not exist-or does not exist in the same form- at the date of the hearing. In such cases it will be necessary to consider whether the former asset can be traced into an after-acquired asset which can itself be treated (in whole or in part) as matrimonial property; and, if not, whether some other order (say, under s.21(e))should be made to reflect that the former asset has ceased to exist.”*

*37. The power conferred under s.21(b) of the Law is a power “to make an order for the disposition of matrimonial property”. There is no requirement under the Law that the disposition should give effect to an equal division of the matrimonial property as between the parties; and there is no invariable rule that the power should be exercised in a manner which achieves that effect. The requirement-imposed by s.19 of the Law is that, in exercising the power, the court shall have regard to “the responsibilities, needs, financial and other resources, actual or potential earning power and the deserts of the parties.” It is plainly open to the court if, having regard to those factors, it thinks it appropriate to do so-to make an order which effects an unequal division of the matrimonial*



*property as between the parties. The order made in **Wight v Wight** (11) and upheld in this court provides an example of such a case. In **Miller** (5) ([2006] 2 A.C. 618 at para. 16), Lord Nicholls observed that “the yardstick of equality is to be applied as an aid, not a rule.” But, as Lord Nicholls had pointed out in **White v White** (10) ([2001] A.C. 596 at 605), in a passage expressly adopted by Lord Cooke of Thorndon (ibid, at 615)*

*“as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.”*

*“ 39. As I have said, s. 19 of the Law requires that, in exercising the powers under s.21, the court is to have regard to “the responsibilities, needs, financial and other resources, actual or potential earning power and the deserts of the parties.” For convenience, I will refer to those matters as “the s.19 factors”. In this context, also, the underlying statutory provisions in this jurisdiction, although similar, are not the same as those in England and Wales. Section 25(1) and (2) of the Matrimonial Causes Act 1973, as amended by the Matrimonial and Family Proceedings Act 1984, requires the court, when exercising the powers under ss. 23 and 24 of that Act, to have regard to all the circumstances of the case; and in particular, to the following matters:*

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that earning capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) the age of each party to the marriage and the duration of the marriage;*



- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce....the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

*It has not been suggested that, despite the more extensive list of matters to which the English and Welsh statute requires the court to have regard when addressing questions of ancillary relief (in the financial sense), the approach which should be adopted in this jurisdiction in having regard to the s.19 factors differs materially from that which has been adopted by the courts in England and Wales. Indeed, there are observations in this court- in **Doak v Doak** ...and **Wight v Wight**...and **W v W**... which support the view that the approach should be the same.*

*40. We were referred by the parties, both in the skeleton arguments lodged on their behalf and in the oral submissions made in the course of the hearing, to a plethora of judicial decisions in England and Wales; and to a few decisions in this jurisdiction. Observations made by experienced judges are, of course, of assistance to an understanding of the application of the s.19 factors. But it must be kept in mind that most cases in this field are decided on their own facts; and there is a risk that extensive citation may confuse rather than illuminate. It is not, I think, necessary to look further than the decision of the House of Lords in *Miller (5)*-and, in particular, the speeches of Lord Nicholls and Baroness Hale-in order to identify the principles. Leaving aside, in this context, the best interests of the children (which, as I have said, are paramount) there are three strands: need, compensation, and sharing ([2006] 2 A.C. 618, at paras. 10-16 (per Lord Nicholls) and at paras. 138-143 (per Baroness Hale). The ultimate objective, as Baroness Hale explained (*ibid*, at para. 144) is to*

give each party an equal start on the road to independent living. She said this:



*“Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.”*

41. Two of these strands—need and sharing—require, little, if any, elaboration. But it is, I think, necessary to say something of the third: compensation. Lord Nicholls explained the concept in these terms (*ibid.*, at paras. 13-15):

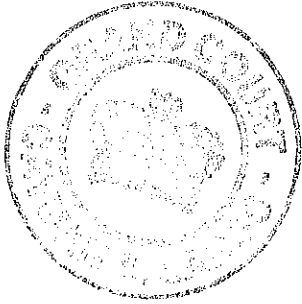
*“Another strand, recognized more explicitly now than formerly, is compensation. This is aimed at addressing any significant prospective economic disparity between the parties arising from the way they have conducted their marriage. For instance, the parties may have arranged their affairs in a way that has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own income earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband’s enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.”*

When this is so fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176, 182, is an example where this was recognized expressly.

Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are

*far from coterminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.*

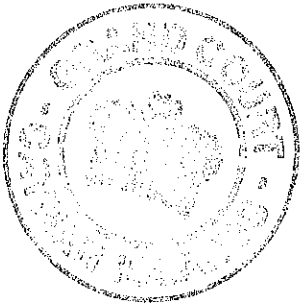
*Baroness Hale said this (ibid, at para. 140):*



*“ A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs. McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties’ needs, then a premium above needs can reflect that relationship-generated disadvantage. ”*

*42. In this jurisdiction a court will need to consider whether—having proper regard to the s.19 factors—an order under s.21(b) of the Law for the disposition of the matrimonial property will make appropriate provision for the relevant party within the three strands: need, compensation, and sharing. If not, then the court will need to go on to consider whether to make an additional order under s.21(e ): that is to say, an order making financial provision for that party out of the property of the other party.*

*43. It seems to me reasonably clear ( and I would so hold) that, if satisfied that an order under s.21(b) of the Law (or the combination of orders under s. 21(b) and (e ) would make appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing) the court should not (without good reason) make an order for periodic payments under s.21(f). To make an order for periodic payments- in circumstances where such an order is unnecessary because appropriate provision can be made by the disposition of matrimonial property (under s. 21(b) or by a capital adjustment from the separate property of the other party (under s. 21(e )) would be inconsistent with the principle of the “clean break” to which Lord Scarman referred in *Minton v Minton* (6) ([1979] A.C. at 608):*



*“There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other-of equal importance- is the principle of ‘the clean break.’ The law now encourages spouses to avoid bitterness-after family breakdown- and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not over-shadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order.....”*

44. The principle of the “clean break” was given statutory recognition in England and Wales when, some five years after the decision in *Minton*, s.25A was introduced into the *Matrimonial Causes Act 1973* by the *Matrimonial and Family Proceedings Act 1984*. Section 25A(1) of the 1973 Act provides that, where on or after the grant of a decree of divorce the court decides to exercise its powers under ss.23(1)(a),(b) or (c) or 24 of that Act in favour of a party to the marriage, the court must consider whether it would be appropriate “so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.” As Baroness Hale observed in *Miller (5)* ([2006] 2 A.C. 618, at para.133):

*“Section 25A is a powerful encouragement towards securing the court’s objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the principle of the lifelong obligation. Independent finances and self-sufficiency are the aims.”*



She emphasized (*ibid*, at para.134) that a clean break was not to be achieved at the expense of a fair result; but went on to say (*ibid*, at para.144) that the ultimate objective was to give each party an equal start on the road to independent living. She said this (*ibid*, at para 154):

*"If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision."*

45. There is no provision in the **Matrimonial Causes Law** in terms similar to those of s.25A (1) of the English and Welsh Act. But it must be kept in mind that the principle of the "clean break" in the law of England and Wales pre-dates the introduction of s25A. In **Miller** (*ibid*, at para 35), Lord Nicholls referred to the observations of Lord Scarman in **Minton** (6) as "the modern approach"; and to the "undesirability of ..... continuing ties" as being self-evident."

(My emphasis)

94. In **Miller v Miller, McFarlane v McFarlane**, at paragraphs [22]–[25] inclusive, Lord Nicholls discusses some of the relevant principles in this way:

*"[22] This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the matrimonial acquest but more usually the matrimonial property and (2) other property. The former is the product of the parties' common endeavor, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As*



*already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.*

*[23] The matter stands differently regarding property (non-matrimonial property) the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarized in *White v White* [2001] 1 All ER 1 at 14, ....*

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

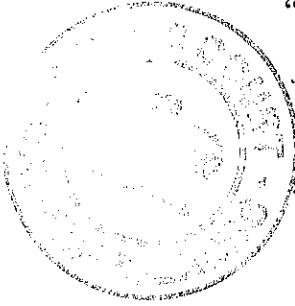
*[24] In the case of a short marriage, fairness may well require that the claimant should not be entitled to a share of the other’s non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that the parties will generally have less call upon each other on the breakdown of a short marriage.*

*[25] With longer marriages the position is not so straight forward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution, will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from *White’s* case. To this*

*non-exhaustive list should be added, as a relevant matter, the way the parties organized their financial affairs.”*

(My emphasis)

95. At paragraph [148] Baroness Hale of Richmond discussed “*The Source of the Assets and the Length of the marriage*” as follows:

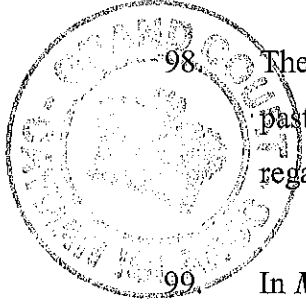


“[148] *The strength of these perceptions are such that it could be unwise for the law to ignore them completely. In White’s case, it was recognized that the source of the assets might be a reason for departing from the yardstick of equality ... There, the reason was that the property had been acquired from or with the help of the husband’s father during the marriage, but the same would apply to property acquired before the marriage. In White’s case, it was also recognized that the importance of the source of the assets will diminish over time.... As the family’s personal and financial interdependence grows, it becomes harder and harder to disentangle what came from where.....*”

(My emphasis)

96. In my judgment, the Court has to look at all of the circumstances of the case. The Property was Property brought into the marriage by the Husband. On the facts it is plain that the Wife made no significant improvement or alteration to the Property. However, as stated in *Miller v Miller* the parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. It was also noted that in principle, the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

97. However, as recognized in *White v White*, the source of the assets may be a reason for departing from equality. In this case, there is also the need to take into account that both parties had been married previously, and indeed, the Property was owned by the Husband prior even to his second marriage to Eileen.



98. The Court must recognize the 'clean break' principles, and encourage the parties to put the past behind them, and encourage them equally on the road to independent living. In that regard, the Court must have regard to the three strands of need, sharing and compensation.

99. In *McTaggart* Chadwick P pointed out that there may be instances where property which existed at the date of separation does not exist in the same form, or where the Court has to decide whether the former asset can be traced. In my judgment, where there has been a transfer to a third party, as in this case Ms. Smith, the law of Trusts, in particular the constructive trust, may be prayed in aid of the claim by the Wife to a disposition of matrimonial property.

100. It is in any event, plain that, although the Property has been transferred into the name of Ms. Smith, she has dealt with the Property, indeed, she expressly acknowledges that it is principally to be used as a source of collateral for securing the Husband's needs. The letter which she had prepared dated 10 April 2013 also acknowledged that. Ms. Smith has indicated that she cannot afford to pay for the Husband's medical expenses on her own, and that any such future expenses have to be met making use of the Property as collateral. Ms. Smith in essence therefore holds the property for herself, but impressed with a trust to take care of the needs and obligations of the Husband.

101. I found it interesting that neither the Husband nor Ms. Smith mentioned in their affidavit evidence, the giving of the eviction notice to the Wife. It seems plain that the timing of the Transfer of the Property to Ms. Smith from the Husband was with a view to avoiding a claim by the Wife.

102. I did not believe the Wife when she claimed for the first time in her oral evidence that the Husband had told her on a number of occasions that the Property belonged to both of them. However, it is plain, given the fact that the parties lived at the Property as their matrimonial home, that the Property is to be treated as matrimonial property.

103. There are in my judgment, a number of factors pointing away from using the yardstick of equality. In the first place, the Property was acquired by the Husband long before the marriage, indeed, even before his previous marriage to Eileen. Secondly, although the parties did not live in the Property formerly owned by the Wife in the United States as a matrimonial home, it is not in issue that the Wife felt free to transfer that property to one of her daughters, without taking the Husband or any interest of his into consideration. Further, this is a marriage entered into when the parties were middle-aged; it was not a first marriage for either of them. They each earned small incomes, and such sharing as there was involved principally living expenses, and such as to make their time spent as companions at this stage of their lives, comfortable.

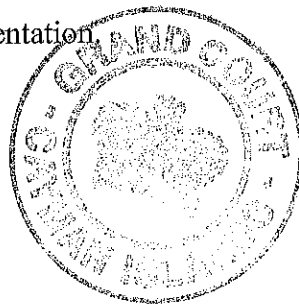
104. The needs of both parties are not greatly disparate. In the case of the Husband, he is quite physically unwell and requires continuing medical care. He receives as income only a modest pension as a seaman. In the case of the wife, she has needs based on the fact that she earns a very modest income in the United States. She does have a house to live in with one of her daughters.

105. The marriage was not a short marriage, but neither was it a long one, such as for example would be the case where a couple get married in their twenties and end up building their life together over decades, and have children together.

106. Now that the marriage is ended, fairness requires that the parties be placed as far as possible on an equal footing on the road to independent living. In my judgment, in all of the circumstances, there is clearly a sound basis for departing from the yardstick of equality.

107. In my judgment, the interests of fairness require that the Wife receive a small interest in the Property, which I declare and assess as being a 10 % interest. In my view, the justice of the case requires that the Wife's interest be subject to the loans already secured on the Property. Ms. Smith therefore holds the legal title to the Property subject to the Wife's 10% interest in the Property.

108. However, as the Property is the only place which the Husband has available to live in, it is not desirable that the Property be sold. It would be more just for a lump sum to be paid to the Wife. The Property should be valued within 30 days of the date hereof, by a competent Valuator to be agreed between the parties within 7 days of the date hereof, and a sum equivalent to 10 percent of the value of the Property is to be paid by the Husband to the Wife within six months of this judgment. If the Husband is unable or unwilling to comply with the terms of this Order, then the Property is to be sold on the open market and the Wife will be entitled to 10% of the proceeds of sale, with the remainder to the Husband.
109. Although the Wife has succeeded, it really has been only margin success. It was also very reasonable of the Husband to withdraw his claim for maintenance in light of the Wife's circumstances. In all of the circumstances of the case, in my judgment, exercising the undoubted discretion which I have as to costs, the Husband should pay 25 percent of the Wife's Costs on the standard basis, to be taxed if not agreed.
110. The parties have liberty to apply in order to work out the terms of this Order or to seek further directions for its implementation.



A handwritten signature in black ink, appearing to read "Ingrid Mangatal", is written over a horizontal line.

**HON. JUSTICE INGRID MANGATAL  
JUDGE OF THE GRAND COURT**