

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

FHP0004/2016

BETWEEN

RENISON EUGENE Mc PHERSON

Appellant

AND

MARY HELEN Mc PHERSON

(Substituted by Christina Rosemary Sunday)

Respondent

Panel:

Prakash Moosai JA

Maria Wilson JA

Ronnie Boodoosingh JA

Appearances:

Mr Kenneth Thompson for the Appellant

Mr Ronald Dowlath for the Respondent

Date of delivery: 16 December 2024

I have read the judgment of Boodoosingh JA and I agree with it.

Prakash Moosai

Justice of Appeal

I too have read the judgment of Boodoosingh JA and I agree with it.

Maria Wilson

Justice of Appeal

JUDGMENT

Delivered by Boodoosingh JA:

1. This appeal arises out of divorce and property settlement proceedings between the parties. The appeal challenges the property settlement order made by Tam J. The respondent, Ms Mary Mc Pherson, had filed an application for property settlement in which both parties provided affidavit evidence. With the respondent being in declining health, the judge expedited the trial at which the appellant, Mr Mc Pherson, was cross-examined. The respondent, who was living in Canada at the time, was terminally ill at the trial, could not travel to Trinidad and could not be cross-examined. The judge, however, had regard to her affidavit evidence.

She died on 19 May 2015, a few days after the trial, but before the judge gave judgment. Her daughter, Christina Rosemary Sunday, was later substituted to represent her estate on 6 September 2021 after the appeal was filed.

Background

2. The parties were married in February 2005. They were of mature age at that time, the appellant being 55 and the respondent being 60 years of age respectively. The respondent had been married previously, but divorced before and had two adult children from that marriage. She had lived in Canada and the appellant in Trinidad. Before their wedding, they signed a prenuptial agreement on 31 December 2004, specifying that unless explicitly shared, each party maintained ownership of their own properties. The respondent's assets included a condominium in Canada and one in Barbados. The appellant had a share in at least two properties in Trinidad.

3. In 2005, the respondent purchased a home at The Crossings in Arima, Trinidad, to serve as their marital residence (the Arima home, the property or the marital home). While the property was put in both their names, the entire cost of \$835,000.00 was covered by the respondent, as well as the associated fees and expenses. The appellant did not contribute financially to the acquisition of the property, although the respondent claimed it was his intention to do so.

4. The appellant retired as a teacher in October 2008 and received his gratuity the following month, which he deposited into a joint account. Shortly after, he transferred \$154,489.40 to the respondent's Canadian bank account in November 2008. Initially, he stated in his affidavit that this sum was intended as his contribution to the purchase of the marital home. However, during cross-examination, he accepted that he had not contributed to the home's acquisition and instead advanced the money to

pay off his wife's credit card debt, which she had used to purchase furnishings for the home.

5. Although no order was issued pursuant to **section 53** of the **Matrimonial Proceedings and Property Chap. 45:51** (the **MPPA**) regarding the occupation of the marital home, the appellant continued to reside there while the respondent lived in Canada following their separation.

The Judgment

6. Key facts found by the judge included:
 - i. The marriage lasted about 7 years.
 - ii. The respondent owned a condominium in Canada and one in Barbados. The appellant bought a house in Mallick, Trinidad. He sold this and kept the proceeds. The Arima home was in both their names. The cost of the home and the legal expenses were paid by the respondent.
 - iii. They were both pensioners at the end of the marriage. Both parties could meet their own normal living expenses.
 - iv. The appellant's payment in the sum of \$154,489.00 to the respondent's credit card was his contribution to reimburse for "purchase [of] furniture, household effects, shutters, the kitchen sink, mixers and beds which she shipped to Trinidad...".
 - v. The appellant lived in the Arima home. The respondent lived there at times but she went back and forth to Canada and she moved back to Canada when the marriage broke down and for health care.
7. The judge in his judgment dismissed the appellant's argument that the respondent's properties in Canada and Barbados should be considered as appropriate for division. The judge reasoned that such consideration

would be unjust given the appellant's lack of contribution to the acquisition of these properties and that the appellant had no role in their ownership and management. The only property deemed appropriate for division was the Arima marital home.

8. Additionally, the judge examined other assets such as the household contents and a motor vehicle owned by the appellant, which would ordinarily be considered matrimonial assets. The judge calculated the wife's contribution to the acquisition of the home at \$873,575.00, encompassing the purchase price, legal fees, and other expenses. The appellant's contribution was calculated at \$177,489.00, including monetary contributions, reimbursements for items purchased for the home, and \$23,000 for property maintenance fees. Consequently, the respondent's contribution constituted 83 percent, while the appellant's contribution amounted to 17 percent.
9. The judge acknowledged that the appellant resided in the matrimonial home and made full use of his motor vehicle, although the vehicle was not considered as being subject to distribution. Given the relatively short duration of the marriage (approximately 7 years before separation) and the fact that the appellant did not contribute to the home's purchase, the judge decided that the wife's estate was entitled to 83 percent of the home's value.
10. Further, the judge determined that a section 54 order under the **MPPA** was feasible and represented the fairest outcome. This provision allowed the court to order the sale of the property, recognising that neither party could buy out the other. Considering the appellant's circumstances, the judge concluded that if the appellant was unable to purchase the wife's share, his portion of the proceeds from any sale would still be more than satisfactory for him.

The Evidence

11. Both parties filed affidavits. The appellant was cross-examined. As noted before, the respondent was not cross-examined because by the time of the trial she was terminally ill and was unable to travel to Trinidad. She died a few days later. Much of the evidence was uncontested. The appellant made certain admissions in cross-examination including that he had not intended to contribute to the acquisition of the Arima home; that they had followed the ante-nuptial agreement during the marriage; that the respondent had paid the full purchase price for the Arima home; and that he paid the property maintenance for the Arima home. The judge determined that the affidavit evidence of the respondent was “of great evidential value” even though she could not have been cross-examined. This was because the appellant had either admitted many of the relevant facts or had not disputed them. The judge also accepted the appellant’s version of the facts where there was a divergence.

Appellant’s submissions

12. The respondent had made a will leaving her Canadian and Barbados condominiums to her two children as well as the Arima property. The appellant submitted that according to section 26(1)(c) of the **MPPA**, the court had the authority in the present case to modify the mentioned will of the respondent. This modification would involve reallocating a larger portion of her interest in the Arima property to the appellant. This section reads:

26. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the Court may, subject to the provisions of

sections 30 and 34(1), make any one or more of the following orders:

...

c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any antenuptial or postnuptial settlement (including such a settlement made by Will or codicil) made on the parties to the marriage; ...

13. It was further argued that according to section 26(1)(c), the judge could have properly exercised a discretion to completely disregard the antenuptial agreement or assign it minimal significance, considering all the circumstances of the case. Specifically, factors such as the appellant's lack of other assets, the duration of the marriage, and his contributions to the family's welfare should have been taken into account. Regarding the last factor, although the appellant did not directly contribute financially to acquiring the property, he did pay the respondent \$154,489.40 and made other contributions to the family's welfare, including purchasing gifts and providing accommodation at his own property in Barataria.

14. The appellant submitted that ante-nuptial agreements are not legally binding in Trinidad and Tobago, and upon the dissolution of a marriage, the assets of the parties are subject to distribution under the **MPPA**. Furthermore, the principles of resulting and constructive trusts are not recognised by the letter and spirit of the **MPPA** as the basis for dividing family assets following a divorce decree. It was argued that trust principles established in cases like **Stack v Dowden [2007] UKHL 17** do not extend to the distribution of real estate interests under the **MPPA**. In cases such as **Stack v Dowden** and **Goodman v Gallant [1986] 2 WLR 236**, the court allocated shares in the property to the parties based on their respective contributions to the purchase.

15. The relevant considerations for dividing family assets differ significantly. The division is not solely based on the parties' contributions, but rather on

the factors outlined in section 27. Therefore, the judge erred and disadvantaged the appellant by applying trust principles and the terms of the ante-nuptial agreement instead of the relevant provisions of the **MPPA**. This mistake led to an incorrect judgment. If the judge had properly applied the section 27 factors to the crucial issue of dividing family assets, he would have recognised that the respondent's properties in Barbados and Canada should be considered family assets, and a portion should have been allocated to the appellant. **Section 27** section reads:

“27. (1) In deciding whether to exercise its powers under section 24 or 26 in relation to a party to the marriage and, if so, in what manner, the Court shall have regard to all the circumstances of the case including 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;
- (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) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) any order made under section 53;

(h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring,

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.”

16. The appellant argued that in cases where real estate is conveyed to both husband and wife without specifying whether they should hold as tenants in common or joint tenants, there is a presumption of joint tenancy. Therefore, the property in question belonged solely to the appellant on 19 May 2015, when the respondent died, and consequently, the learned judge lacked the authority under the **MPPA** or any other legislation to classify it as family assets. The appellant cited the Jamaican case of **R Mayers Cooper [1922] 2 Stephens R 2203-04** as precedent, where an instrument lacking words of severance was deemed to establish a joint tenancy.

17. Between the date of the respondent's death and the delivery of the judgment on 24 March 2016, no substitution for the respondent occurred. Consequently, as of that date, there was no designated applicant. Despite this, the learned judge proceeded to deliver his judgment, declaring, among other things, that the respondent's estate held an 83% share in the property. The appellant submitted that the judge erred by delivering the judgment before a substitution for the respondent, took place. Essentially, he issued a ruling in favour of a non-existent party. This, it was argued, is entirely impermissible. Since the respondent had not been substituted at the time of the judgment's delivery, the judgment itself was considered null and void. No authority was submitted for this proposition.

Respondent's submissions

18. The respondent submitted that in addition to the judge stating that ante-nuptial agreements are not enforceable in this jurisdiction, the judge saw it as his responsibility to consider that there had been such an agreement while considering the factors in section 27 of the **MPPA**, which he was required to apply.

19. The respondent submitted that the Court of Appeal, in the case of **Persad v Persad, CA 130 of 2008**, had considered the principles outlined in **Edgar v Edgar [1980] 3 All E R 887**, as well as subsequent decisions of the Privy Council in **Macleod v Macleod [2008] UKPC 64** and the UK Supreme Court in **Radmacher v Granatino 1201 2010 UKSC 42**.

20. In all three cases, the English courts had examined the implications of written separation agreements, primarily focusing on ante-nuptial and post-nuptial agreements. In **Persad**, while deliberating on the impact of a written post-nuptial separation agreement in an ancillary relief application, the court endorsed Ormrod LJ's statement from **Edgar**:

“To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in the connection to think in formal legal terms, such as misrepresentation or estoppels; all the circumstances as they affect each of two human beings must be considered in a complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless... there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement. There may well be other considerations which affect the justice of the case; the above list is not intended to be an exclusive catalogue.” [per Ormrod LJ at page 893]

21. The respondent submitted that the judge considered the agreement as conduct and made the appropriate assessment, weighing the circumstances surrounding the formation of the agreement and its subsequent effects.

22. Therefore, the respondent argued that it was open to the judge to determine that the ante-nuptial agreement held relevance in the present case, especially as the appellant admitted during cross-examination that they had conducted their affairs in accordance with the terms of the agreement after marriage. From this perspective, the judge appropriately assessed their conduct and treated the agreement as a post-nuptial arrangement.

23. The judge heavily relied on the parties' conduct following the marriage, which aligned with their adherence to the terms of the agreement, particularly paragraph 1.
24. Through their actions, the appellant never asserted any claim to the respondent's properties in Canada and Barbados. Similarly, the respondent made no claims regarding the appellant's properties.
25. It was uncontested that before their marriage in 2005, the respondent already possessed a condominium in Canada and another in Barbados. The appellant did not provide any financial support, and the acquisitions of these properties were solely undertaken by the respondent, predating the marriage.
26. Furthermore, since there are no children from the marriage, the appellant did not make any financial contributions or significant non-financial contributions that would warrant consideration. Therefore, there were no grounds to justify awarding any share in properties in which he had no involvement in acquiring. The appellant himself acknowledged his lack of contribution to the acquisition of any of the respondent's properties, both before and after the marriage. Moreover, in a particular instance where he could have potentially obtained an interest in a property, he did not fulfil his commitment to contribute financially upon retirement and receipt of his teaching service gratuity.
27. The respondent submitted that the judge could not disregard the appellant's behaviour; his contribution amounted to zero, and thus, it could not be asserted that the parties contributed equally.
28. The judge's reasons were careful and well reasoned. Accordingly, the respondent submitted there is no basis to disturb his findings and to conclude that he was plainly wrong in his assessment.

29. While the Arima house was acquired in both their names, it is clear that it was purchased and contemplated to be the marital home. No presumption of a joint tenancy arose in respect of it. It properly formed part of the property acquired during the marriage. Moreover, on the breakdown of the marriage, the judge was entitled to consider it as forming part of the marital assets to be distributed.

30. There was nothing unreasonable about the manner in which the judge determined the respective interests. In fact, the appellant can be considered to be lucky that he shared in the Arima home and he was also allowed to keep the furnishings which he had put money towards. In effect, his 17 % interest was found even though he had made no direct contribution to the acquisition of the home.

The position in law of the ante-nuptial agreement

31. Arguments were advanced by Mr Thompson on behalf of the appellant on whether the judge had appropriately treated the ante-nuptial agreement which the parties had made.

32. In **Manickram Persad v Wendy Persad, Civil Appeal No. 130 of 2008, delivered 31 October 2011** (Mendonca JA, Jamadar JA, Bereaux JA), the Court of Appeal gave consideration to the implications of the judgments of the Privy Council in **MacLeod v MacLeod [2008] UKPC 64** and the UK Supreme Court in **Radmacher (Respondent) v Granatino (Appellant) [2010] UKSC 42**, concerning ante-nuptial and post-nuptial agreements. Comments were made in relation to both judgments. Ultimately, the Court of Appeal at paragraphs 60 and 62 reiterated that the court's obligation in Trinidad and Tobago is to give effect to section 27 of the **MPPA** when the assessment of property settlement takes place. Jamadar JA stated:

“60. In Trinidad and Tobago the starting point for an assessment of the financial consequences of divorce is a consideration of all the section 27 criteria with the objective of satisfying the aim of the tailpiece. It must never be forgotten that the court’s power to make financial provision on divorce is derived from statute, and that in Trinidad and Tobago means the MPPA. Thus, any legitimate judicial development and reform of the law must remain wedded to the enabling statute and not divorced from it.

...

62. Further, the starting point for the court’s evaluative exercise in Trinidad and Tobago is section 27 of the MPPA, which applies to all applications for financial provision and transfer and settlement of property, and which is mandatory in terms and effect. And, the aim and objective of the exercise of the court’s discretion is to “so exercise those powers as to place the parties so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.” This and this alone is the guiding principle for the exercise of the court’s discretion under sections 24 and 26 of the MPPA. It is to be applied in light of the actual and reasonably foreseeable circumstances at the time when the court makes its orders. Necessarily these circumstances would include any maintenance agreement made between the parties to the marriage and the appropriate weight to be attributed to it.”

33. This remains the law in this jurisdiction. Additionally, the case of **Scatliffe v Scatliffe [2016] UKPC 36** (see para 25 and 26) offered guidance regarding properties owned by the respective parties. Having regard to the approach taken by the judge in this case, which will be considered below, it is unnecessary to further interrogate the supposed differences in

approaches between **MacLeod** and **Radmacher** for the purposes of this case.

New submissions on the appeal

34. Mr Thompson at the appeal hearing advanced new arguments that had not been made before the judge. They were also not contained in his notice of appeal. His grounds of appeal focused on the judge being wrong to hold that the Canada and Barbados properties were not considered by the judge as subject to division; the 17 % share allocated to the appellant in the Arima property was too small; and he sought an order increasing the appellant's share in the matrimonial home.

35. The first new submission was that the judge was wrong to give judgment in the matter after the respondent died and before any substitution was made for her.

36. The second new ground advanced in submissions was that regarding the Arima home, it having been acquired in their both names, on the death of the respondent, a joint tenancy was presumed. The property, therefore, became his entirely, and was not subject to forming part of the matrimonial assets to be divided and for which the respondent's estate could benefit. I will now go on to consider these two matters in turn.

Whether the judge could give judgment after the respondent died and without substitution being ordered

37. In **Halsbury's Laws of England Wills and Intestacy (Volume 102 (2021))** at **para. 1286**, the learned authors state:

“Where a party to a claim dies but the cause of action survives, the claim does not abate by reason of the death. The court has power to make judgments or orders made in the claim binding upon non-parties as if they had been parties to the claim, and, whether the cause of action survives or not, **where a party dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the death.** The personal representatives of a deceased party may obtain an order without notice that they be made parties and the proceedings are then carried on as if they had been substituted for the deceased party, but they become personally liable for all the costs of the claim ab initio. Where a sole claimant or defendant dies, but no order substituting a new party is made, the other party may, in the case of a cause of action which survives, apply for an order that unless the claim is proceeded with within a specified time the claim is to be struck out as against the party who has died. The court has also power to appoint an interim receiver for the preservation of property, notwithstanding the death of a sole defendant.

Where a defendant against whom a claim could have been brought has died, and a grant of probate or administration has not been made, the claim must be brought against the estate of the deceased and the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim. Where a person who had an interest in a claim has died and that person has no personal representative, the court may order a claim to proceed in the absence of a person representing the estate, or for a person to be appointed to represent the estate of the deceased.”

38. No contrary authority was submitted to suggest that the court could not go on to give judgment where the party had died after the trial. While

Halsbury's refers to a civil claim, there is no discernible reason in principle why this position should not apply equally to matrimonial proceedings.

39. Based on the extract from Halsbury's, the judge in this case had the power to deliver judgment when the respondent died. The evidence had been taken and judgment was reserved. The issues remained alive for determination and, in any event, no prejudice was occasioned to the appellant. He continued to live in the marital home and no steps were taken to remove him. Eventually, the substitution of the deceased's daughter as the respondent party to the appeal was granted, which allowed the appeal to be proceeded with.

Did the Arima marital property pass to the appellant husband immediately on the death of the respondent wife or could the judge continue to give judgment in accordance with the application for property settlement?

40. Joint tenants hold property equally. When a joint tenant dies, by the doctrine of survivorship, the deceased's interest in the property is transferred to the other tenant or tenants. Given the formula of words used in the deed of lease of the Arima property, it can be presumed that a joint tenancy was created by the lease.

41. The issue here is whether by the respondent bringing the application for property settlement and in the context where the trial took place and submissions were made, it can be concluded that the tenancy had been severed at the time of the death, to displace the ordinary rules of survivorship.

42. **Halsbury's Law of England Volume 87 (5th Edition), paragraph 202** states that:

"The death of one joint tenant creates no vacancy in the seisin or possession. His interest is extinguished. If there were only two joint tenants, the survivor is now seised and possessed of the whole. If there were more than two, the survivors continue to hold as joint tenants. The incident which is called the 'jus accrescendi', is the most important feature of joint tenancy."

43. The decree absolute in the respondent's divorce petition was made on 7 July 2014. The application for property settlement by her was made on 28 January 2015.

44. In England, a notice in writing which shows an intention to sever a joint tenancy serves as a basis to sever the tenancy under section 36 of the Law of Property Act, 1925. In the matter of **Re Draper's Conveyance; Nihan v Porter and Another [1967] 3 All ER 853**, in October 1951, a house was transferred to a husband and wife in fee simple as joint tenants, constituting their matrimonial home. In November 1965, the wife obtained a decree nisi of divorce, finalised in March 1966. In February 1966, on an affidavit, she requested the sale of the house and equal distribution of proceeds. Despite a possession and sale order, the husband stayed until forcibly removed on January 2, 1967. He passed away four days later.

45. The issue in **Draper** was whether his estate had a rightful claim to fifty percent of the net sale proceeds of the dwelling-house due to the purported severance of the joint tenancy during his lifetime. Plowman J reasoned at page 856:

"Now, dealing with the matter up to this point, and ignoring for the moment certain matters which were submitted by counsel for the plaintiff, it seems to me that counsel for the defendants' submissions are right, whether they are based on s 36(2) of the Law of Property Act, 1925, **or on the old law which applied to**

severing a joint tenancy in the case of a personal estate. The summons, coupled with the affidavit in support of it, clearly evinced an intention on the part of the plaintiff that she wished the property to be sold and the proceeds distributed, a half to her and a half to the deceased. It seems to me that that is wholly inconsistent with the notion that a beneficial joint tenancy in that property is to continue, and therefore, apart from these objections to which I will refer in a moment, I feel little doubt that in one way or the other this joint tenancy was severed in equity before the end of February, 1966, as a result of the summons which was served on the plaintiff's then husband and as a result of what the plaintiff stated in her affidavit in support of the summons of 11 February 1966."

(Emphasis supplied)

46. In the case of **Harris and another v Goddard and Others [1983] 3 All ER 242**, a different finding was made based on section 36 of the Law of Property Act, 1925. In this case a husband and his second wife jointly owned a property, utilising it as both a residence and as shop premises. In 1979, the wife filed for divorce, requesting, among other relief, the transfer, settlement, or variation of the property's ownership concerning the former matrimonial home, as well as any other just measures. Before the scheduled hearing, the husband suffered severe injuries in a car accident, passing away shortly afterward. The plaintiffs, the husband's executors and children from his first marriage, sought a declaration that the joint tenancy had been severed under section 36(2)(a) of the **Law of Property Act, 1925** due to the prayer in the divorce petition, claiming entitlement to fifty percent of the property's sale proceeds. The wife countered, asserting her right to the entire proceeds through survivorship upon her husband's demise. The judge ruled that the divorce petition's third paragraph did not serve as a valid severance notice, thereby dismissing the plaintiffs' claim and granting the wife's counterclaim.

47. The plaintiffs in that matter then appealed and the Court of Appeal held that a written notice expressing the intention to sever a joint tenancy under section 36(2) of the 1925 Act will immediately bring about a severance of the joint tenancy. This notice needed to clearly demonstrate the intention to trigger the consequences outlined in section 36(2), which pertained to the handling of the net proceeds of the statutory trust for sale in line with the intended beneficial interests post-severance. Paragraph 3 of the prayer in the petition merely suggested that the court might, at a later time, consider whether to utilise its jurisdiction under section 24 of the 1973 Act and, if so, in one of three alternative ways. Consequently, paragraph 3 did not function as a written notice to sever the joint tenancy, entitling the wife to the entire sale proceeds of the property. As a result, the appeal was dismissed.

48. Trinidad and Tobago does not have in force an equivalent to section 36 (2) of the 1925 Act in England. If there was to be a severance, therefore, it had to be based on an agreement or the conduct of the parties, echoing Plowman J's suggestion that under the common law, the result would have been the same. In contrasting these cases, in **Draper**, the affidavit evidence was enough to show the intention of severance whereas in **Harris**, paragraph 3 of the relief was an action which the court considered was not a form of severance.

49. In the textbook, **Commonwealth Caribbean Property Law by Gilbert Kodilinye (third edition) at page 96** the learned author stated:

“Section 36(2) of the Law of Property Act 1925 (UK) provided a new method of severance of a beneficial joint tenancy, viz, by a joint tenant giving notice in writing to the other joint tenants of his desire to sever. This method has been introduced in Barbados and Belize. This statutory method of severance is convenient, in that it may be unilateral, no consent being required from the other joint tenant, nor is it necessary that the

notice should have been actually received by the other tenant; it is sufficient that there is evidence that it was duly posted to him. The notice need not be signed, and it is established that it may take the form of a writ or originating summons commencing litigation for the purpose of determining the rights of the parties inter se. In *Re Draper's Conveyance*, a wife applied by summons under s 17 of the Married Women's Property Act 1882 (UK) for an order that the jointly owned matrimonial home be sold and the proceeds of sale distributed in accordance with the parties' respective interests. Shortly after the court had made the order requested, the husband died intestate. Plowman J held that the wife's summons, coupled with her affidavit in support, showed an intention inconsistent with a continued joint tenancy, and operated to sever her beneficial joint tenancy during her husband's lifetime, both at common law and under s 36(2)."

50. In **Williams v Hensman (1861) 70 ER 862, 867**, Page Wood VC identified three circumstances which can effect a severance:

"A joint tenancy may be severed in three ways: in the **first place**, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund- losing, of course, at the same time, the right of survivorship. **Secondly**, a joint tenancy may be severed by mutual agreement. And, in the **third place**, there may be a severance by any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy in common."

51. A document in writing or agreement must indicate a definitive intention to sever. In the Trinidad and Tobago case of **Gangoo v Gangoo et al CA No. 131 of 1999** the effect of an “incomplete” agreement to sever the joint tenancy was not regarded as sufficient to effect a severance. In that case, Justice of Appeal Nelson reasoned:

“Quite apart from there being no completely constituted agreement to partition the subject lands, the submission that the alleged agreement to partition or the alleged common intention to partition effected a severance of the joint tenancy is fundamentally flawed. The fact that co-owners, whether joint tenants or tenants in common, wish to partition lands owned by them does not by itself effect a severance, but constitutes a desire to put an end to co-ownership. Severance of a joint tenancy continues co-ownership, albeit as tenants in common. Accordingly a proposal for partitioning or an agreement to partition cannot be evidence of the continuation of co-ownership as tenants in common.”

52. With respect to whether actions constitute a severance, in **Commonwealth Caribbean Property Law (3rd edition) at page 95** under the rubric “course of dealing”, Kodilinye stated:

“Severance under this head does not require any express act of severance, nor any agreement or declaration of trust. All that is required is ‘a consensus between the joint tenants, arising in the course of dealing with the co-owned property, which effectively excludes the future operation of a right of survivorship’. Thus, for example, where spouses who are joint tenants of property negotiate with one another for some arrangement of their interests on divorce, it may be possible to infer from the circumstances a common intention to treat each other as tenants in common, even where the negotiations break down.”

53. In the local case of **Angela Edwards v Yola Elizabeth Constantine, CV 2019-02412**, Seepersad J, at first instance, expressed the view at para 31:

“31. The Court should take a practical approach to the issue as to whether or not severance has been effected as the implications associated with the right of survivorship can often lead to unjust or impractical consequences. The intention of the parties whether expressed, implied or inferred as a result of their course of dealing is imperative. In the discharge of its fact finding mandate to ascertain the parties’ intent, the Court should view the facts from a practical and common sense perspective. Where for example, the operative circumstances establish that individual rights were asserted over a specific and identifiable portion of land though owned jointly, such a circumstance should be viewed as an act of severance as it materially impacts upon the unity of possession.”

54. In **Debra Jones Williams V Janice Charles Williams and Others, CV2017-02216**, Seepersad J also expressed the view that:

“72. There is authority for the proposition that the formal commencement of litigation concerning a joint tenancy may be viewed as ‘an act operating on the share’ of the joint tenant.

73. In CV2017-01825 Tenille Hepburn and another v Eleanor Lourenco So’Brien this Court had to determine whether the joint tenancy which existed between a husband and wife (defendant) was severed, either by the lease which the husband effected or due to the course of conduct engaged by the parties and the positions which they adopted and declared during their divorce proceedings.

76. The Court having considered the aforementioned case, holds the view that the 2016 applications which were filed by the deceased, whereby he unequivocally sought to vary the terms of the consent order, had the conjoined effect of severing the joint tenancy. The institution of the said applications amounted to a clear, certain and definitive expression of the deceased's intention to sever the joint tenancy."

55. The discussion in Kodilinye's textbook is persuasive, as it highlights the impact of **Re Draper's** case in other Caribbean jurisdictions which have adopted the UK's position. In **Williams and Hensman**, the third form of severing a joint tenancy by way of mutual conduct illustrated that actions can indicate a desire to sever. **Gangoo** suggested that severing can be done in writing (by mutual agreement) but that there must be shown a definitive intention to sever. In **Angela Edwards and Debra Jones**, Seepersad J considered the court can look to the actions of the parties to discern whether there was a severing a joint tenancy.

56. By itself, the filing of the application for property settlement could not constitute an act of severance. What the parties expressed, and what the parties did, had to be considered in determining whether their conduct evinced a clear intention to sever. The appellant's position in the property settlement application was that he should have the whole benefit of the property or a share in it.

57. The trial proceeded on that basis. Between the end of the trial and the judgment, the respondent died. At no time after that did the appellant submit before the judge that his position had changed on account of the respondent's death. No objection was taken before judgment was given to suggest to the judge that the issue of division of the matrimonial home no longer arose for consideration because of the death of the joint tenant. The conduct of the parties, and most importantly, the appellant, showed a clear intention that the judge should continue to conduct an assessment

in relation to the property under section 27 of the **MPPA**. In this case, there was not only the application that was made, but the position taken by the parties at the trial and by the appellant after the respondent's death which all together showed the conduct of the parties.

58. The judge in those circumstances cannot be faulted for going ahead to make the order on property settlement that he did. The conduct of the parties throughout the proceedings showed the intention not to advance that the property should be viewed as a joint tenancy one, but one which was subject to being dealt with as a matrimonial asset. If they had recognised it was subject to the rule that on the death of one the property would pass to the other, there would have been no need to ask the court to rule on their respective share. They could simply have allowed the law to operate. The appellant did not at the trial, when he knew the respondent was terminally ill, assert that the issue of the division of the matrimonial home would be made otiose by her death. And most importantly, this conduct was not altered by the appellant after the death of the respondent. The conduct suggested an intention to sever by both parties and for the court to undertake the exercise under section 27 of the MPPA. Additionally, his notice of appeal did not address that matter. This was only made an issue at the stage of legal submissions at the appeal. It was opportunistic.

59. There are other facts relevant to conduct which can be summarised as follows. The parties were married in 2005. By December 2009, the respondent alleged they slept in different rooms. According to the petition, the relationship broke down from 2009 and the relationship became acrimonious from September 2009. This was disputed to some extent by the appellant. It was undisputed however that the respondent returned to Canada to live for medical treatment for cancer. There was little or no communication in the years preceding the filing of the petition. The respondent acknowledged the house was owned jointly.

60. In her application for property settlement, the respondent sought property settlement or a lump sum payment regarding the matrimonial home. She noted they had entered an ante-nuptial agreement on 31 December 2004; the funds to purchase the Arima home was all hers; the appellant did not contribute to the property although he had promised to do so; the appellant obtained a 1/7 interest in a 20 acre Tobago property during the marriage and she obtained no share in this nor did she seek any. The order sought in the property settlement application was that the “premises be sold and the proceeds therefrom be divided in accordance with the contributions” made by the appellant and herself. As far as the respondent was asserting, the appellant had made no contribution to the property. In the appellant’s affidavit, he accepted he used part of his gratuity to purchase a motor vehicle for himself. He asked the court to “take into consideration all items of real and personal property owned” by the respondent and him in determining the property settlement application. In the respondent’s reply affidavit, she stated that it was always their intention to split the cost of the purchase of the matrimonial home, but he did not live up to his promise. This may have been a likely reason why it was acquired in a manner presuming a joint tenancy. The respondent could not have known then that the appellant would not uphold his agreement to contribute to the purchase of the house. By the time of the court proceedings, the parties knew their respective actual contributions, and, at the trial, the appellant accepted he only paid off for some of the furnishings.

61. Additionally, to further the property settlement application, the judge on 4 March 2015, ordered a valuation of the home and both parties were to contribute to it. The property was later valued at \$1.3 million. The respondent also made a Will on 10 March 2015 containing terms that the property be sold and that the sum of \$155,000.00 should be paid to the appellant with the remainder to her estate. This was an acknowledgment by her that he had actually contributed the sum of \$154,498.40 towards the furnishings. He was in effect being paid off for this to allow for a clean break regarding the house.

62. Based on the above, it is clear that the parties approached the court with a view to including the matrimonial home in the property settlement. The marriage had broken down and the respondent had moved out of the home and returned to Canada to live. The both parties acted to further the court dealing with the Arima home as part of the property settlement. The appellant was required to contribute to the valuation of the property. At the trial, the appellant's approach was not altered by knowledge of the respondent's grave illness. Even after the respondent's death and before judgment, the appellant made no attempt to change his position before the judge to suggest that the judge should not treat the property as a matrimonial asset any further, having regard to her death. This could have been done through a further submission being made. As noted, even his notice of appeal did not raise the issue.

63. By the position taken by the both parties and their conduct during the property settlement phase of the court proceedings, the clear intention of the parties was to sever the joint tenancy and for the court to settle the issue of their respective share in the Arima property. The ante-nuptial agreement had also signalled an intention that each party would treat their properties separately and they did so during the marriage. All of this points firmly in the direction of severance by a course of conduct by the parties. In the circumstances, the judge was entitled to and right to treat the Arima home within the property settlement even after the death of the respondent.

The ante-nuptial (prenuptial) agreement

64. On this issue the judge stated:

“19. Such agreements are currently unenforceable in this country. Nonetheless, the court has a duty to consider the terms of the agreement against the background of section 27 of the Act. The section requires that, in addition to the factors

specified, the court must also consider all other relevant circumstances. The prenuptial agreement is relevant. In the instant case, the husband agreed in cross-examination that, after they got married, they conducted their affairs in accordance with the agreement. He attempted to say that the agreement exhibited by her was not the one he had signed, but I find as a fact that it was. My finding is based on his acceptance that he did not dispute it in his opposing affidavit, that he conducted his affairs in accordance with its terms, and that he could produce no documentation or other evidence to refute that it was the document he had signed. In particular, he accepted that they had conducted their affairs in accordance with the terms of paragraph 1 of the agreement. Thus, he had never made any claim to her property in Canada and, in relation to the Malick property, she had never made any claim on it, or on the proceeds from its sale. And the evidence shows that he had utilized the net proceeds of the sale to purchase a car in his sole name and for his use. It seems therefore that, although the agreement *per se* might be unenforceable, nonetheless there are elements of it, if not all of it, that the parties accepted after the marriage and, from that perspective, it can be treated as a post-nuptial arrangement to be considered in the mix as part of the court's general consideration of the section 27 factors."

65. In saying that he was treating the agreement as a "post-nuptial" agreement, the judge was not saying that a post-nuptial agreement had been made separately. What he, in effect, was saying was that the parties conducted themselves in the manner of keeping the benefit of their properties separate. In considering section 27 therefore, the judge was entitled to consider all of the circumstances and this conduct was one of the circumstances which he was entitled to take into account. The judge was careful to say he was not giving effect to the agreement as an end in itself. And he had not done so. If he had, the appellant would not have received a share of the Arima property. The appellant's submission that the judge gave too much weight or gave effect to the ante-nuptial

agreement was therefore misplaced. The judge considered it in the mix in his section 27 assessment. He cannot be said to have been wrong in law to do so.

The judge's approach to the evidence

66. The judge was entitled to give weight to the evidence of the respondent for the reasons he stated in his judgment. Many of the facts in this case were not disputed and he accepted the appellant's evidence where there was any significant divergence, which were not many. Having regard to the terminal illness of the respondent at the time of the trial, the judge adopted a sensible approach to the evidence and cannot be faulted in his treatment of the evidence. He simply could not ignore the respondent's evidence even though she could not be cross-examined because of her illness. He considered the evidence in the context that many facts were not disputed and that the appellant accepted material aspects of the respondent's case when he was cross-examined.

The section 27 of the MPPA analysis

67. The judge's judgment reflected that he conducted the section 27 analysis from paragraphs 10 to 22. Some of his significant observations regarding the section 27 factors can be summarised as follows:

- i. Standard of living: The parties enjoyed a fairly high standard of living. Both had health issues.
- ii. Income, earning capacity and financial resources: The respondent's monthly income was equivalent to approximately \$17,200. She owned a condominium in Canada worth an estimated \$1.6 million, a Barbados condominium valued approximately at \$1.05 million. There was also her share in the Arima matrimonial home. The husband's pension and NIS

- amounted to approximately \$9,102.00. He had a one-seventh share in a 20 acre parcel of land in Tobago which the appellant valued at \$35,000. He owned a motor vehicle valued \$60,000 and funds in accounts amounting to approximately \$57,000. The parties could meet their own living expenses. The respondent owed \$1.4 million on her Canada property.
- iii. Contributions to the welfare of the family: When they lived together they both contributed to the groceries and living expenses. The appellant paid most of the maintenance fees for the Arima property. He contributed \$154,489 to her credit card debt when she bought furniture and household effects for the Arima property. She paid for the Arima property entirely including the legal fees, and other charges in its acquisition.
 - iv. Section 53: There was no order for occupation but the appellant lived in the home while she returned to Canada.
 - v. Lost benefits: There was no evidence that either party lost any benefit from the end of the marriage.
 - vi. Other relevant factors: The parties conducted their affairs in accordance with the terms of the ante-nuptial agreement. He never made any claim to her property in Canada and she did not make any claim to his Malick property. He used the sale proceeds of that property to buy a car.
 - vii. The Canada property: The appellant made no contribution to it and he should have no share in it.
 - viii. The Barbados property: This was purchased by the respondent with her funds obtained from re-financing of her Canada property and the appellant made no contribution.
 - ix. The Arima property: This was the only property for distribution. The appellant was entitled to keep all the contents of the property. The appellant should be entitled to buy out the respondent's share in the property. If he could not, then the property should be sold and he would receive 17% of the value.

68. The judge correctly identified that these were persons who were mature in age and in their careers at the time they came to the marriage. They

were entitled to agree terms before. What is also significant is that they kept to the terms of the agreement after marriage. When the appellant sold his property, he kept the proceeds. When he sold his car, he kept the proceeds also. The respondent willed her property to both her children. This was quite consistent with their agreement, but also with a fair and just settlement of their property under section 27.

69. The judge considered section 27 and the various factors outlined therein and placed those considerations in the mix. He was entitled to consider all the circumstances, including the agreement that was made. The fact that the judge considered that the ante-nuptial agreement was not directly enforceable in this jurisdiction led him to the section 27 analysis. In any event, it could not oust the court's duty to conduct a property settlement in accordance with the Act. There was no prohibition in law from a court considering its terms as part of the conduct of the parties in an appropriate case. This was one such appropriate case where the parties agreed to it before the marriage and kept to the terms after.

70. In any event, the judge engaged in a careful section 27 analysis, including of the "all of the circumstances" requirement. He found the only property which should be the subject of division was the Arima matrimonial home. He did have regard to both the Canada and Barbados properties but determined these should not be shared. He did not exclude them from consideration. He considered that they should not be subject to an order for division. While he did not mention the case of **Scatcliffe v Scatcliffe [2016] UKPC 36**, his analysis was consistent with the position articulated at paragraph 25 of Lord Wilson's judgment regarding non-matrimonial property. The judge considered the needs of the appellant and whether there was a need for compensation in the context that the Canada and Barbados properties were acquired by the respondent on her own. His conclusion was there was not such a need and accordingly that the non-matrimonial property should not be shared. He was not plainly wrong to come to that conclusion.

71. While a home had been acquired by the respondent for them to live in, the judge considered that, in light of the contributions and their conduct, that their shares should be allocated 83% to the respondent and 17 % to the appellant. The judge considered that the appellant may now have to find a place to rent. This is what he had done for most of his adult life and he did not consider that in these circumstances the Arima property should be left entirely to him. The judge took the appellant's payment of the respondent's credit card bill as a contribution to the home although those expenses were for furnishings for the home. Nonetheless, he received credit for this. In addition, the appellant was entitled to keep the furniture so he received a 17% share in the property and the furniture of the property. The judge considered the age of the parties when they got married; the seven year duration of the marriage; the agreement made before to keep their assets separate except for what they made joint; the fact that they could both maintain themselves even though the respondent's income was higher; their conduct afterwards in keeping their financial affairs separate; and their respective contributions. There was also evidence that the parties were already maintaining separate sleeping arrangements from 2009, a mere four years after the marriage, but the judge considered in any event that the marriage was one of seven years before separation. The judge was not wrong to consider the marriage to be of relatively short duration in the circumstances.

72. It cannot be said that in considering these various factors the judge in any way departed from a careful section 27 analysis consistent with the Court of Appeal's suggested approach in **Persad v Persad** and in **GBH v RH, FHP0006 of 2019**. This resulted in a 17 % share in the matrimonial home to the appellant and he could also keep the furniture. The Canada and Barbados properties were rightly not considered as being appropriate to make an order for division. The judge was not shown to be wrong in law or incorrect in his analysis of the evidence.

73. There is nothing unreasonable about any of the findings which the judge made. It has not been demonstrated that he misconstrued the evidence or that he failed to give consideration to any material aspect of the

evidence or that his assessment of the evidence was unreasonable or led to conclusions which no reasonable judge would have come to. These are the usual bases on which an appellate court can interfere with the fact-finding of the trial judge as established by the many authorities. There was also no discernible error of law made in applying the principles on matrimonial property sharing. In the circumstances, the appeal of the appellant is dismissed in its entirety. We will hear the parties on the costs of the appeal.

Ronnie Boodoosingh

Justice of Appeal