[2012] JMSC Civ. 130

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV06106

IN THE MATTER of ALL THAT parcel of land part of **MONA AND PAPINE ESTATES** now know as **NUMBER ONE OTTAWA AVENUE** in the parish of Saint Andrew being the Lot numbered **ONE B** on the plan of Number One Ottawa Avenue aforesaid and being the lands registered at Volume 1089 Folio 810 of the Registered Book of Titles.

AND

IN THE MATTER of the Property (Rights of Spouses) Act, 2004

BETWEEN	**ROBERT DUDLEY BLAKE**	**CLAIMANT**
A N D	**DOREEN BEVERLY BLAKE**	**DEFENFANT**

Ms. Jacqueline Asher, instructed Asher & Asher for the Claimant.

Ms. Gillian Mullings, instructed by Mullings & Co. for the Defendant.

Heard: 24th and 31st May 2012, 21st June 2012 and 28th September 2012

Property Right of Spouses Act S. 13 – Application for an Unequal Share of Family Home – Family Law Reform – Equal Share Rule – Whether Equal Share Unreasonable and Unjust – Relevance of Contributions – Statutory Entitlement S. 6

Campbell, Q.C, J.

[1] The Claimant is a Safety Supervisor, and the Defendant, a Family Centred Specialist. The parties, who I shall refer to as husband and wife, were married on the 30th day of July 1983. The husband was 27 years old, and the wife, 23 years old. They have two children, both now adults. They resided firstly, at the home of the husband's parents until October 1984, when 30B Wellington Drive, the subject of this claim, was transferred into their joint names. On 26th April, 2010, an order of decree absolute was granted dissolving their marriage.

[2] On the 10th December 2010, the husband filed a claim, seeking, orders pursuant to the Property (Rights of Spouses) Act including, that he has all the interest in 30B Wellington Drive. The wife contends that the property was bought jointly through mortgages secured by both the wife and husband and that she is entitled to a one-half share in the property.

The husband's case

[3] That after he was married, he decided to purchase 30B Wellington Drive, and his wife's name was placed on the duplicate certificate of title, only because at the time we were husband and wife. He alleged that his wife worked sporadically. That the cost of the house was $125,000.00, that his mother gave him $13,000.00, of the 15% per cent deposit that was required. That, in October 1984, he secured a mortgage loan of $100,000.00 from Life of Jamaica (LOJ). The mortgage payments were made, over a period of seven years from his account at the Bank of Nova Scotia, Liguanea. In May 1991, he benefitted from a low interest mortgage scheme instituted by his employer, Petrojam. The monthly mortgage loan repayments of $7,000.00 were taken from his salary. He maintained that all expenses for the upkeep of the house, his wife and children, inclusive of their educational, medical, dental bills w*ere* borne solely by himself. In 2007, as a result of Hurricane Dean, the property sustained an estimated damage of $1,100,000.00. To effect repairs, he borrowed $400,000.00 from his

employers, and the remainder of $749,069.69, was paid pursuant to the terms of the mortgage insurance from Victoria Mutual Building Society (VMBS).

[4] He testified that his wife travelled frequently to the United States, sometimes spending three months at a time. That the wife left in 2002 and did not return to reside in Jamaica, this in the absence of an agreement between the parties. The wife's departure caused him to become the sole caregiver for the children. The wife has not sent monies since she migrated.

The wife's case

[5] The wife states that the move to 30B Wellington was effected in August 1985. She was at the time employed full–time in public relations, and her husband was a lab technician. Their two children, Ryan and Randi, were born in November 1983 and March 1988, respectively. She said she sought a home after marriage; she met with Life of Jamaica (LOJ), and was offered and approved for a mortgage. That both parties had insurance policies with LOJ, and a mortgage was granted to them by that entity. She provided $12,500.00, one half of the deposit that was required to purchase the home. That sum was made up from a loan of $5,000.00 from her employer and $7,500.00 from her savings account at Jamaica National Building Society (JNBS).

[6] That her husband and herself purchased the property and had their names entered on the mortgage documents as joint co-purchasers. That the monthly payments to service the mortgage were deducted from a joint account, in the name of the parties, held at Bank of Nova Scotia, Liguanea. Both their salaries were deposited in the Nova Scotia account. The mortgage was refinanced in 1993, and consequent on the arrangements made with his employer, the husband paid the monthly payments. That throughout the marriage they both supported the household. In 1998, she negotiated a home improvement loan from National Housing Trust (NHT) and the proceeds were given to her husband to effect the repairs. That in 2002, she went to the United States and sent monies to the husband's mother, then residing with the family to provide financial support

for the family. A sum of $197,000.00 was given by the wife to the husband to purchase a car for her son, monies were left in various accounts to defray the cost of maintaining the household. In 2007, the wife co-signed a mortgage loan from VMBS, in the amount of $1,100,000.00.

[7] Both parties have refuted some of the assertions made for contributions, by the other side. In these matters this is to be expected and has been the source of judicial comments in the past. The Defendant was prepared to quarrel whether it was he who became aware of the property or the wife. Items of concern included, where were discussions for the purchase price held, and the frequency of the wife's trip abroad, whether the wife had deposited her salary in their joint account or not.

[8] The court has been provided documentary evidence which is relevant to vital issues in this matter. There has been no challenge to these documents. (a) The acceptance by LOJ in their letter dated the 30th April 1984, of the parties joint application for a mortgage in the sum of $100,000.00 for the purchase of the property; (b) mortgage documents dated 18th September 1984 in the joint names of the husband and wife; (c) the mortgage documents dated 2nd May 1991 in the sum of $185,000.00, borrowers being the husband and wife; (d) mortgage dated 29th August 1984 in the names of the husband and wife, in the sum of $12,500.00; (e) a mortgage dated the 11th December 1998 in the sum of $210,000.00 in the joint names of the husband and wife; (f) a mortgage dated 15th November 1991, the sum of $25,000.00; (g) the certificate of title for Vol. 1089 Folio 810, transfer no. 43102 registered the 3rd October 1984 to the husband and wife; (g) the NHT letter dated 9th June 2010 to the wife, advising her mortgage account # 8352, in respect of 30B Wellington is closed; (f) letters from former employers, PRO Communications Limited, Deeks Design Limited, Shell, advising the period of employment of the wife at the respective organizations.

[9] The documentary evidence shows that the property was transferred into the joint names of the wife and husband, and that wife was employed in full-time

occupation for a substantial part of the marriage, that she had a joint account with her husband.

Property (Right of Spouses) Act (PROSA)

[10] Section 4 of PROSA underscores the scope of the new regulatory framework, by expressly substituting the provisions of PROSA in place of the rules and presumptions of the common law and equity that hitherto governed the division of matrimonial property. Section 4 provides;

> "**The provisions of this Act shall have effect in place of rules and presumptions of the common law and equity to the extent that they apply to transactions between spouses in respect of property and in cases for which provisions are made by this Act, between spouses and each of them, and third parties."**

[11] In **Brown v Brown** (2010) JMCA Civil 5, Cooke JA, after examining several sections of the Act and concluding that its benefits were of retrospective effect said, at paragraph 13;

> "I have set out these sections in extensio to emphasise the dramatic break with the past as demanded by section 4 of the Act, which directs that it is the provisions of the Act that should guide the Court and not as before, presumptions of the common law and of equity."

Morrison, JA at para 34;

> "It introduces for the first time the concept of the family home in respect of which the general rule is that, upon the breakup of the marriage, each spouse is entitled to an equal share (Section 6)."

[12] PROSA, Section 6 mandates an entitlement in a spouse to a one-half share in the family home, whether the legal estate is vested in the other spouse or not, this is a threshold entitlement, provided for by law without any evidentiary exertions by either party, upon the occurrence of events signalling the termination of the marriage or cohabitation. The statutory entitlement in the family home where the relationship is terminated by death and the spouses had owned

as joint-tenants, the surviving spouse is entitled to a one-half share in the dwelling-house which is wholly owned by either or both spouses, and used either habitually or from time to time as the only or principal family residence.

[13] Morrison, JA., noted that the law prior to the coming into effect of PROSA, did not recognize "family assets" and settled disputes between husband and wife for the beneficial ownership of property vested in one or the other by reliance on the law of trusts. In tracing the vital reform in the law, Morrison JA. recognized the establishment in 1975, of the Family Law Committee, and the Family Court. The mischief that PROSA came to correct, Morrison JA noted, was identified in the opening statement of the Family Law Report Committee;

> "The present law relating to ownership of matrimonial property is unsatisfactory, creates injustice between the parties and is out of touch with the social realities. It recognizes only money contribution to the acquisition and ignores the contribution made by a wife in the performance of her role as a mother and a homemaker."

My only comment on that statement would be that the legislation is gender neutral, and would recognise the role of a husband in the performance of his role as father and a homemaker. This is relevant in a society where all our tertiary institutions have a majority of female students with the potential of being the substantial contributor to the household.

[14] Morrison, JA. noted that the Family Law Committee singled out the "family home" for special consideration, for it was in many cases the principal asset. The Committee had recommended that legislation should provide for equal ownership subject to provisions for exceptional circumstances. The committee referred to legislation in Canada, New Zealand, Australia, and Barbados among others.

[15] In respect of Wellington Drive, the husband's application is that he is entitled to sole ownership of the property. The wife claim is for the statutory entitlement of fifty per cent share. The husband had claimed that he alone found the home, started and completed the purchase transaction for the family home. The evidence before the court is that both parties signed the mortgage agreements. Both parties worked, although the husband case was that her employment was

sporadic and she spent many months travelling to the United States. On the other hand, the wife denied those allegations and provided documentary support, for her contention that she worked for substantial periods throughout the marriage.

[16] On an application for a division of the family home pursuant to Section 13 of PROSA, the court has to satisfy itself of the following:

(a) That the property, the subject of the application is the family home, for purposes of, Section 2, and Section 6 of The Act.

(b) That the condition triggering the statutory entitlement in accordance with Section 6 (1) (a), (b) and (c), has occurred.

(c) That it would be unreasonable or unjust for the statutory entitlement to remain, then;

(d) A reasonable order is made in substitution of the statutory entitlement, considering the relevant factors in Section 7 (1) (a) (b) (c) among others.

Family Home

[17] Section 2 of the Act, defines "family home" to mean, the dwelling–house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, building or improvements appurtenant to such dwelling house used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit.

[18] There is no suggestion that the property is not wholly-owned by the parties or by one of them. There is also agreement that it was the principal family residence. The family having lived there from the date of its acquisition in 1984 until the wife went to reside abroad in 2008. The husband resides there as does the parties adult son.

[19] There is no suggestion that the property constitutes a gift to either spouse and was meant for the benefit of that spouse alone. The husband did give evidence

that his mother provided a part of the deposit on the property when the home was being acquired. It seems that to amount to a gift that would disqualify a dwelling-house from being a "family home" for purposes of Section 2, the entire structure, would have to be given to one spouse for that spouse sole benefit. Neither party has made an issue of Wellington Drive, being inconsistent with the definition of family home.

Triggering Mechanism Pursuant to S. 6(1)

[20] There is also no issue made that marriage has been terminated, and the triggering mechanism, required by S6 (1) (a), (b) or (c) is satisfied. The decree absolute was granted dissolving their marriage, on the 26th April, 2010. On the 10th December 2010, the husbands claim, was filed pursuant to PROSA, which satisfies the time requirement of twelve months, within which an application under Section 13 (1) (a), can be made. Section 13 (2), provides;

> An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the application.

[21] Would it be unreasonable or unjust, for the statutory entitlement to remain?

On an application for division of matrimonial property, that is the family home, the court may make an order in accordance to Section 6 or 7. Section 6, enshrines the one–half entitlement of each spouse, on the dissolution of the marriage or termination of cohabitation or on the death of a spouse the surviving spouse is entitled to one-half share in the family home. Pursuant to Section 7, this one-half entitlement in the family home will be displaced if the Court is of the opinion that **it would be unreasonable or unjust for** each spouse to be entitled to a one half of the family home. It's the husband who is claiming that the one-half share which the law entitles the wife is unreasonable and unjust and therefore carries the burden of proof. The written submissions for the husband stated that;

> "Claimant's contribution to the care and upkeep of the family, the subject premises, and the general well being of the household was extensive. The factors set out in Section 7(2) are not extensive. Claimant asks this Court, in its determination, to consider as well the Section 14(2) factors to the extent that they are relevant in considering what a determination is for the purposes of Section 7."

[22] The issue therefore is whether, in the circumstances found by the court, it would be unreasonable or unjust, in light of the husband's application, for the statutory entitlement of one-half share in the family home to each spouse to remain. The effect of the wife's contention is that it is not unreasonable or unjust to maintain the statutory entitlement. It is only where the court forms an opinion that it would be unreasonable or unjust for the half share rule to remain that, it may replace the statutory entitlement by making such an order as "it thinks reasonable".

[23] In determining what is meant by unreasonable and unjust, in context of Section 7(1), the development in the law and the mischief that it seeks to correct is of importance. Morrison JA, in **Brown v Brown,** applied the principle in **R v Industrial Disputes Tribunal**, **ex parte Seprod Group of Companies** (1981) 18 JLR 465, as he expressed it at paragraph 18, "that in construing an enactment, it was not only permissible to consider the state of the law at the time of the enactment, but also to review the history of the legislation on the subject in order to detect what mischief Parliament wish to correct." The judgment in ***Brown v Brown***, notes at paragraph 32, that the Memorandum of Objects and Reason appended to the Bill, read in part;

> **The present law does not provide for the equitable division of property between the spouses upon the breakdown of marriage as the basic principle governing the property rights is "you own what you buy'. Where there is a dispute as to the ownership of property, proof of purchase or contribution to the purchase of the property in question is required. The emphasis on financial contribution places a wife who has never worked outside the home at an obvious disadvantage. There have been practical difficulties regarding proof of contribution since records of expenditure are not usually kept and contribution is often indirect.**

[24] The present application hinges on the Claimant's contribution to the care and upkeep of the family, the subject premises, and the general well being of the household, which he claims was extensive. The application would require a detailed examination of contributions from the parties, and lead the Court back to the area of mischief, from which the PROSA sought to extricate these proceedings.

[25] Morrison JA, in paragraph 32 of **Brown v Brown**, on an examination of the Memorandum and Objects appended to the Bill, one of its main objects was (c) to make provision for the family-home to be equally divided except where such division would not be equitable. At paragraph 38, says of Section 7, "it provides for the exceptional situations in respect of which the court is given power to vary the equal share rule."

[26] These exceptional situations named in Section 7 (1) (a) (b) (c) are matters, which the court may think are relevant in the determination of a reasonable entitlement. It seems those matters are equally relevant in first determining whether the entitlement provided by law is unreasonable or unjust. None of the situations in Section 7 (1)(b) (c), was urged on this court, the evidence would not support any such submission. The family home was not an inheritance of either spouse. Neither was the home owned by either party at the commencement of the marriage. The marriage was not of shortage duration, it lasted from 30th July 1983 until the divorce in 2010.

[27] Among the evidence in support of the application, was the wife's numerous visits to the United States, for vacation purposes. In the written submissions on behalf of the husband it was stated she would usually buy the tickets with her money and the Claimant would contribute by buying one of the children's ticket. He says that the wife finally settled in the USA around January 2002. The visits of the wife accompanied by her children, one of whom would be paid for by the husband, cannot assist the husband to demonstrate conduct that would cause a court to think that to maintain the one-half share would be unjust or

unreasonable. It demonstrates, to my mind a normal functioning middle-class Jamaican family.

[28] The Claimant complains that the Defendant's evidence is varied as to her contribution to the household. 'It ranges from Defendant depositing her salary into a joint account she had with Claimant to Defendant using her salary to pay household expenses. That after a time the wife's money was redirected to an account bearing her name only. These variations are to be expected in a marriage that subsisted for years. What are referred to as variations could have occurred at different stages throughout a long marriage, without causing any inconsistency in her evidence. This complaint serves to identify, a part of the mischief that the Act came to correct, the inability of the parties to produce proper records.

[29] There are also complaints that, contributions were made to the family-home by the mother of the Claimant as also she made a substantial contribution to the deposit. The contributions from third party sources, that would be a relevant factor for consideration at the stage when the court is considering the reasonableness of the statutory entitlement, is contained in Section 7 (1) (a). The Claimant, in his written submissions, did accept that 30B Wellington Drive is a family-home for the purposes of Section 2 (1) of the Act. That definition does not include "a dwelling house which is a gift to one spouse by donor who intended that spouse alone to benefit". However, a dwelling-house that is owned by either party, which is a gift, but intended to benefit both spouses, and is used habitually, conforms to the definition in Section 2(1).

[30] There is no evidence that the contributions of the husband's mother, even if they were relevant factors for consideration, were a gift to her son for his sole benefit. Provisions of PROSA shall have effect in place of rules and presumptions of the common law and equity to the extent that they apply to transactions between spouses. The mother, on the evidence, enjoyed cordial relations with her daughter-in-law. She did not give evidence before us. The presumption of advancement of a gift solely to her son, as it applies to the deposits and other

contributions by the mother, has been replaced by the Provisions of PROSA (see S. 4). Finally, the definition of family home includes any improvement to the house.

[31] The Claimant does not demonstrate any injustice that would be visited on him by an application of the one-half share. In **M.T. *v.* J.Y.T., [2008] S.C.R.78, 2008 SCC 50**; from the Canadian Supreme Court, the respondent sought an unequal partition and to exclude the benefits under his pension plan from the partition. He contended a significant age difference between himself and his wife, and the consequential postponement of his retirement plans, in order to rebuild his retirement income if she was entitled to one-half. He argued that all the property had been accumulated through his sole effort. It was submitted, that equal partition would result in an injustice, and his pension benefits should be excluded pursuant to art. 422, which provided that the court may make an exception to the equality rule where it result in an injustice in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them.

[32] Fournier, J., at first instance, rejected the request for unequal partition. Although he opined, an injustice cannot result solely from the operation of the law itself. The Court of Appeal, however, concluded that equal partition would result in an injustice and ordered that the pension plan be excluded from the partition of the family patrimony. **The Supreme Court was of the view that there has to be demonstrated the injustice wreaked by the application of the equality rule, before the court is enabled to consider art 422, which bears similarity to Section 7 (1) (a) (b) (c) of PROSA**. The Supreme Court found that the emphasis placed by the Court of Appeal on the disparity in the contributions of the parties was unwarranted. First of all, there is no evidence of economic fault or injustice on the appellant's part. As the parties had agreed, she studied and worked, often part-time or in unstable or temporary jobs.

[33] The Supreme Court underlined the need to respect the legislation

cautioning that a liberal interpretation would jeopardize the principle of equality that is central to the law, Judges should be as shy to depart from the general rule of 'equal partition'. It would mean, in effect, a return to the ad-hockery of the compensatory allowance which the legislature has so explicitly steered courts away from doing [p. 583]

[34] The documentary evidence before the Court supports the wife's claim to having worked substantially throughout the duration of the marriage. The family-home was in the name of both parties, the husband's admits that the mortgage payments were deducted from an account in the joint names of the parties. The Defendant received a mortgage from NHT, in 1998. That whilst abroad the wife made regular monetary remittances for the purpose of mortgage payments to NHT, the court accepts that the proceeds of that mortgage was given to the husband, to purchase groceries and as a contribution to the son's college fees. I find that there is nothing unreasonable or unjust about both husband and wife, being entitled to a one-half share. The husband's application is therefore dismissed. The statutory entitlement of the parties will remain, each being entitled to a one-half share in the family home.

[35] Counsel for the Claimant has asked the court to consider Section 14(2) factors to the extent they are relevant in considering what a determination is for the purposes of Section 7.

[36] Prior to the coming into effect of PROSA, all property that fell to be divided could have been apportioned based on the respective contributions of the spouses. S. 14 (1) (b) by providing that contributions, along with the other factors, in S. 14 (2), may be considered in an application for family property other than "the family home," is deemed to have excluded such contributions from being considered relevant pursuant to S. 7 (1) of PROSA. In my judgment, the principle *expressio unius exclusio alterius* as a canon of construction can be applied. It evinces a clear intention that the matters mentioned in S. 14 (2), but not in S. 7 (2), were deliberately omitted, and ought not to be applied in an application for a share inconsistent with an equal share entitlement in the family home.

It is hereby ordered as follows:

1. That the Claimant is entitled to 50% interest and the Defendant is entitled to 50/% interest in the property herein.

2. That Claimant be permitted to purchase the Defendant's interest in the said property within six (6) months of the Order or, in the alternative, that the premises be sold on the open market and the proceeds be apportioned between the parties.

3. That the premises be valued by a reputable valuator to be agreed on between the parties and the cost of the valuation be apportioned between the parties equally. In the event, should the parties fail to agree, that a valuator be selected by the Registrar of the Supreme Court.

4. That in the event that the Claimant opts to purchase Defendant's interest in the subject property, that Defendant's Attorney-at-Law has Carriage of Sale.

5. That should the property be placed on the open market that Claimant's Attorney-at-Law be given Carriage of Sale and that a Realtor, agreed on by both parties, be engaged to conduct the sale of the said property and that all offers to purchase be presented to Defendant's Attorney-at-Law.

6. That the cost of discharging the mortgage on the said property be borne equally by the parties.

7. Costs to the Defendant to be agreed or taxed.

8. Liberty to apply.