

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV03634

BETWEEN CAROL STEWART CLAIMANT
AND LAURISTON STEWART DEFENDANT

J. Cooper-Batchelor instructed by Chambers Bunny & Steer for Claimant

L. Wright instructed by Vacciana & Whittingham for Defendant

Heard: April 27, May 17, 2010 and January 10, 2011

Lawrence-Beswick J

Division of Family Home -Property (Rights of Spouses) Act –
Time within which to Apply under the Act – Retrospective nature of Act
Limitation of Actions

1. Mr and Mrs Stewart are the registered proprietors of property located at 1 Spring Park Drive, St. Andrew (the house), holding the property as joint tenants. Although in 1997 Mrs. Stewart filed a petition for dissolution of their marriage, the petition was not pursued and the marriage still in law exists.
2. Mrs. Stewart by this claim seeks 50% interest in the house as she states that her husband and herself had a common intention to own the house equally, and that she contributed to its acquisition and maintenance.
3. Mr. Stewart's response is that the property was purchased with his money entirely and that his wife is entitled to none of it, or alternatively, to a smaller amount. Her name

was only added to the title for convenience because she was his wife, and in any event she abandoned any interest in it for over 12 years.

The Law

4. This application is brought under the Property (Right of Spouses) Act (the Act).

Section 13 (1) of the Act provides:

“A spouse shall be entitled to apply to the Court for a division of property –

- (a) on the grant of a decree of dissolution of a marriage or termination of a cohabitation; or*
- (b)*
- (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or*
- (d)*

5. Section 13 (2) of the Act limits the time within which the application to the Courts must be made.

It provides:

“An application under subsection (1) (a) ... or (c) shall be made within 12 months of ... termination of cohabitation ... or separation or such longer period as the court may allow after hearing the applicant.”

This Act came into effect in 2006. However, the Court of Appeal has determined that it is retrospective when in **Brown v Brown**¹, Morrison JA so opined. The provisions of the Act would therefore govern the division of the house although it is agreed that Mr. and Mrs. Stewart separated in 1994 and that Mrs. Stewart moved out of the matrimonial home in 1996, over a decade before the Act came into force.

¹ SCCA 12/2009 at para. 84

6. This suit was filed on July 21, 2008. This means that the Stewarts had terminated cohabitation for 12 years and they had separated for 14 years before this suit was filed. I have no difficulty in finding that after the passage of 14 years since separation, without reconciliation, there is no reasonable likelihood of reconciliation.

7. Mrs. Stewart in this application seeks an extension of time to file the action beyond the 12 month limit provided in section 13(2) of the Act. In her affidavit she does not seek to explain the reason for the delay but rather, refers to the reason for failing to pursue an earlier suit which she had filed in 2000.

8. In **Boswell v Boswell**², the court granted an extension of time within which the claimant could properly seek a remedy under the Act. Although in **Brown v Brown** (supra), the Court of Appeal disagreed with the learned Judge's decision in the substantive issue in **Boswell v Boswell**, her Order granting the extension of time was left undisturbed. In **Boswell v Boswell** (supra), the application had been approximately five weeks outside of the 12 month period allowed.

Here the delay is approximately twelve years. That period in my view is excessive. No acceptable reason for the delay has been proffered to merit an extension of time within which to file this action under section 13 of the Act and I therefore refuse the application for an extension of time within which to apply for such a hearing.

9. However, section 11 of the Act provides:

“Where, during the subsistence of a marriage ... any question arises between the spouses as to the title to or possession of property, either party... may apply ... to a Judge of the Supreme Court ...”

² 2006/HCV02453

10. I agree with the submission of Mrs. Cooper-Batchelor, Counsel for Mrs. Stewart, that this provision provides the Court with jurisdiction to hear an application for division of the house because this marriage still subsists. Although I have refused to hear the application under section 13 of the Act because of the 12 years that had elapsed since the parties' separation, in my view, on the granting of a decree dissolving their marriage, either party could within 12 months of the grant of the decree apply for the same Orders sought in this application.

11. This would be so because section 13 of the Act entitles the spouse to apply not only on the termination of cohabitation or on the separation with no reasonable likelihood of reconciliation, but also on the grant of a decree of dissolution of a marriage.

This apparent anomaly arising in section 13 of the Act prompted **Anderson J** to observe that, "the time within which the application may be brought, may be the subject of some manipulation depending upon the specific factor upon which its start is premised."³ I regard that observation as being most apt.

12. It is my view that section 11 of the Act provides the jurisdiction of the Court to hear this application, and I now proceed to consider it under that section.

13. Section 6 provides for equal sharing of a family home and states:

"(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home-

(a) on ... the termination of cohabitation;

(b) ...

³ . *Sterling v Sterling* HCV 69/2007 at p. 14

(c) *where a husband and wife have separated and there is no likelihood of reconciliation.*

14. Is this property a family home? Section 2 (1) of the Act provides:

“[F]amily home’ means the dwelling-house that is wholly owned by either or both of the spouses and used habitually ... by the spouses as the only ... family residence ...”

It is agreed that the Stewarts owned the house and lived as a family there until Mrs. Stewart left in 1996 and it is therefore a family home within the meaning of this Act.

15. Section 7 of the Act allows a spouse to apply to prevent the equal sharing of the family home by showing that such sharing would be unreasonable or unjust.

Section 7 provides:

“(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant”

16. Ms. Wright, Counsel for Mr. Stewart, argues that *prima facie* Mrs. Stewart is entitled to an equal share of the property but that an equal sharing of the property would be unreasonable and unjust because Mr. Stewart provided the down payment, mortgage and monthly payments of the property with no assistance from his wife and that he maintained the house and children with minimal assistance from her.

17. However, despite the Court’s order of June 4, 2009 for Mr. Stewart “to provide bank records in support of payment made in 1996 to discharge the mortgage and to

provide documentary proof of the purchase price of the property,” he has provided no such evidence. Mrs. Stewart’s evidence is that whilst living at the house, she paid for food, general household expenses, maintenance of the children and entertainment of Mr. Stewart’s relatives. Nonetheless, she does not appear to dispute that Mr. Stewart bore the larger financial burden.

18. Mr. Stewart portrays himself as the main breadwinner of his family, having earned a greater salary in a managerial position, than his wife did in her supervisory position. Indeed he gave her a boutique with stock and she drove a car fully maintained by him.

His evidence shows him to be a loving husband and caring father and for no apparent reason, his wife abandoned him and her children, leaving him with the sole responsibility to raise the children.

19. The letter allegedly penned by the couple’s son, now deceased, is unchallenged and puts the lie to the evidence of his father’s loving and caring approach to his mother Mrs. Stewart. It supports Mrs. Stewart’s evidence that she was justified in leaving the family home because of Mr. Stewart’s continued abuse and infidelity.

20. I accept on a balance of probabilities that Mr. Stewart’s behaviour caused Mrs. Stewart to leave the house which resulted in her having to bear additional expenses to maintain herself outside of the family home, thus reducing her ability to contribute to other expenses of the family home and of the children.

21. In the exhibited e-mail to their daughter, Mr. Stewart spoke of having to pay her mother for the sale of the house and his evidence is that he told his daughter that he was going to buy her mother’s property. Counsel for Mrs. Stewart urges me to accept that

that is an admission by Mr. Stewart that his wife is entitled to an equal share of the property. This, to my mind is an admission that Mr. Stewart accepted that his wife is entitled to a share of the property not necessarily an equal share.

22. Mrs. Stewart's Counsel argues that Mrs. Stewart contributed to her children's welfare after having left the family home because she regularly returned home to cook for her children during her lunch period. It was because she went to the home regularly that she knew that Mr. Stewart changed the locks on the house in 2000.

23. Counsel also urges the Court to view that as evidence that she had not abandoned her interest in the house because it was when she discovered that she could no longer enter the premises that she made an application for her share. Further, before leaving the family home, she had shared the household expenses, and cared for the children. In addition, the evidence points to their daughter being schooled overseas from the joint financial effort of Mr. and Mrs. Stewart.

24. Counsel for Mrs. Stewart argued in addition that the fact that Mr. Stewart may have made a greater contribution to the acquisition of the property and to the payment of the mortgage does not entitle him to a greater share than his wife in the family home, where Mrs. Stewart's non-financial contribution was also substantial.

She relied on **Graham v Graham**⁴ where the husband's greater financial contribution did not vary the equal share rule and Mrs. Graham's contribution of caring for their children was recognised.

25. Here Mr. Stewart's evidence in cross-examination was that the balance left to be paid on the mortgage was quite small when they had borrowed more money to add a new kitchen. He had paid off most of the mortgage even before his wife left.

⁴ 2006/HCV03158

Mr. Stewart's Contribution

26. It is undisputed that Mr. Stewart cared both children for approximately three years whilst Mrs. Stewart lived elsewhere having left the household, and he provided a live-in helper to tend to their domestic needs.

He it was also, who would manage the household and cause household duties to be performed.

27. Mr. Stewart's evidence is that since Mrs. Stewart left, he single-handedly paid off the mortgage, paid the property taxes, insurance and maintained the property and children. He maintains that in addition he had paid the deposit to purchase the property and provided food and utilities.

Mrs. Stewart's Contribution

28. For her part, Mrs. Stewart's evidence is that she contributed monies to purchase the property and to maintain it whilst she was living there. She claimed that she had contributed to their joint account from which the deposit was paid. However, in cross-examination she testified that it was not until months after the purchase that Mr. Stewart told her what the purchase price was. She was therefore contributing to an amount which she did not know.

29. In her affidavit, Mrs. Stewart also claims that she maintained the children and household but in cross-examination Mrs. Stewart revealed that her contribution to the household expenses was limited to expenses incurred when her husband entertained. Even that Mr. Stewart disputed stating that his employer paid for his entertainment.

30. Her evidence is also that she continued to communicate with her children after she had left, thus helping to raise them, and prepared their dinners daily during her

surreptitious visits to the family home, as the dinners provided by the helper were not to their suit.

31. There is no evidence of Mrs. Stewart exercising any acts based on her ownership of the property or of contributing to the household after she ceased preparing meals for her children. Their son Andre died in 1999 and their daughter went abroad in 2000.

32. If Mr. Stewart is to be believed, he held no joint account with his wife, and would not have held one because Mrs. Stewart, in his view, was unable to manage money. In any event, according to him, the deposit was paid from the equity he had taken from another property he owned before his marriage.

Limitation of Action

33. Section 3 of the Limitation of Action Act provides that a person who brings an action to recover land must do so within 12 years of the right to bring the action.

34. Counsel for Mr. Stewart submitted that this action is statute barred because it was filed in July 2008 which is over 12 years after the action accrued in March 1996 when Mrs Stewart left the home. She relied on **Wills v Wills**⁵ to support this. There **Mr. Wills** had married twice. He owned properties jointly with his first wife but they subsequently divorced and she did not live at the premises or show any interest in her ownership for over 12 years. However, when **Mr. Wills** died, she informed tenants that they should pay her the rental due. The second wife of **Mr. Wills** sought a declaration as to her late husband's entitlement to the property and the Judicial Committee of the Privy Council declared that she, as his personal representative, was solely and exclusively entitled to the properties because **Mr. Wills** had totally excluded his first wife from the properties for over 12 years.

⁵ PC 50 of 2002

35. In the instant case, however, I accept as true the evidence of Mrs. Stewart that she continued to access the home even after she had moved out of it. Mr. Stewart has acknowledged that she could have access to the home without his knowledge. She had keys to the house.

36. It is agreed that he changed the locks to the house in 2000 thereby excluding her entry. Had he wished to deny her access to the home earlier that was an obvious method by which to do so.

37. The evidence is that in August 2000, Mrs. Stewart filed suit against her husband under the Married Women's Property Act asking for the court to determine their respective interests in the property and to prevent Mr. Stewart from interfering with any interest she may have.

38. In my view, therefore, it was not until 2000 that Mr. Stewart made clear his intention to exclude Mrs. Stewart's entry onto the property and in that same year she challenged his right so to do.

She would therefore not be deprived of bringing an action to recover the property, nor would any interest she had in the property be extinguished, with the passage of the eight years until this suit was filed.

Alternative Claim

39. I now therefore consider the alternative claim by Mr. Stewart that he is entitled to 80% of the property based on his contribution to the property and the children.

40. The evidence is undisputed for the most part, that Mr. Stewart bore the most substantial portion of the financial burden of obtaining and maintaining the property and also of the general expenses of the household and the children.

41. I accept as true, on a balance of probabilities, the evidence of Mrs. Stewart's financial contribution to her household, but in my view it was small, compared to her husband's contribution, and stopped when she left the home, over 12 years before this suit was filed. Nonetheless, I am mindful of the undisputed evidence that she played an integral role in the upbringing of her children, and consider that important contribution as I determine the respective shares in the house.

42. I am of the view that it would be reasonable and just for Mr. Stewart to be entitled to the majority of the family home.

Order

43. The Order is therefore:

- a. The claimant, Mrs. Stewart, is entitled to 25% and the defendant, Mr. Stewart, to 75% of premises at 1 Spring Park Drive, St. Andrew, registered at volume 1050 Folio 364 of the Register Book of Titles.
- b. A valuation of the said premises is to be made by a valuator agreed upon by the parties and costs of the valuation are to be shared equally. If the parties fail to agree to a valuator within 30 days of the date of this Order, then the Registrar of the Supreme Court is empowered to select a valuator.
- c. The defendant, Mr. Stewart, has the first option to purchase the premises within 90 days of service of the valuation. Thereafter the property is to be placed for sale on the open market by private treaty and thereafter, if necessary, by public auction. The net proceeds of the sale are to be divided in accordance with paragraph (a) supra.

- d. The Registrar of the Supreme Court is empowered to sign any and all documents to make effective any and all Orders if either party is unable or unwilling so to do.
- e. No Order as to costs.