[2018] JMSC Civ 99

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV06791

BETWEEN	**MARLENE DAVIS**	**CLAIMANT**
AND	**HUGH ASHLEY DAVIS**	**DEFENDANT**

IN CHAMBERS

Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the Claimant

Vivienne Washington for the Defendant.

Heard October 29 & 30, 2012, February 18 & 22, 2013 and June 29, 2018

DATE OF SEPARATION-DIVISION OF FAMILY HOME-EQUAL SHARE RULE-PARTNERSHIP OF EQUALS-VARIATION OF EQUAL SHARE RULE-UNJUST-UNREASONABLE-FACTORS TO BE CONSIDERED-WHAT IS FAIR AND JUST IN THE CIRCUMSTANCES-CONTRIBUTION-OTHER FACTOR-OWNERSHIP OF OTHER PROPERTY-BURDEN OF PROOF-DIVISION OF PROPERTY OTHER THAN FAMILY HOME-OCCUPATION RENT-MENSE PROFIT-DEFINITION OF PROPERTY-INHERENT JURISDICTION

D. FRASER J

BACKGROUND

[1] The claimant Marlene Davis and the defendant Hugh Ashley Davis were married for over two (2) decades at the time this claim was filed. Their union produced two (2) children. The defendant, who purchased the family home before marrying the claimant, has contended that the claimant has no beneficial interest in this property. The claimant however asserted that she is entitled to a fifty percent (50%) share in the family home, and has claimed an interest in other property owned by

the defendant. The defendant in turn counterclaimed for an interest in a property acquired by the claimant after their separation as well as other reliefs.

THE CLAIM, COUNTERCLAIM AND AFFIDAVITS FILED

[2] The claimant filed a fixed date claim form and supporting affidavit on December 24, 2009, seeking the following orders:

(i) that the claimant and defendant are each entitled to fifty percent (50%) interest in property at Lot 190 Bauxite Crescent in the parish of Clarendon, registered at Volume 1170 Folio 681 of the Register Book of Titles (the family home);

(ii) the said property is valued by a valuator to be agreed between the parties. If there is no agreement within fourteen (14) days of this order, then the said property shall be valued by D.C. Tavares and Finson Realty Company Ltd;

(iii) the claimant and the defendant are each entitled to a fifty percent (50%) interest in 1997 Toyota Caldina license no. 0148 DN;

(iv) the property be put on the open market and sold with the net proceeds being divided equally between the parties; and

(v) the Registrar of the Supreme Court be empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unable or unwilling to do so.

Exhibited to this affidavit were: a copy of the Duplicate Marriage Register; a copy of the Duplicate Certificate of Title for the family home; copy receipts from the National Housing Trust (NHT); copy statement of bank account; a copy of an option for discharge of mortgage from the NHT; copy receipts for the purchase of household furniture; and a copy invoice for materials to do electrical installation work.

[3] The defendant filed an affidavit in response on April 1, 2010, denying that the claimant had any interest in the family home or the 1997 Toyota Caldina. He counterclaimed for the following:

(i) fifty percent (50%) of the property located at Lot 3 Andersleigh Close in the parish of Clarendon, registered at Volume 1132 Folio 186 of the Register Book of Titles which was acquired during the course of the marriage ("the Andersleigh property");

(ii) Mense profit/occupation rent from September 1, 2009 to March 31, 2010 and continuing;

(iii)	Repairs to 1997 motor vehicle	$98,000.00;
(iv)	Replacement of damaged 600 Gallon Rhino water tank	$28,000.00;
(v)	Unpaid telephone bill total	$20,862.46;
(vi)	100 lb Gas cylinder	$2,500.00
(vii)	Replacement of Microscope	$80,000.00
(viii)	Portraits of the Prime Ministers & Governors General	$9,000.00
(ix)	Replacement of Passport	$9,000.00
(x)	Original Will of Edwin Davis with five (5) Certificates of Title attached and in the alternative, the cost to replace the same	
(xi)	Portion of the income earned from the flat which is being used by the	

claimant as classroom to teach

extra lessons

Exhibited to this affidavit were: a copy of the Duplicate Certificate of Title for the Andersleigh property; copy of receipt for report made to the May Pen Police Station dated October 19, 2009; and a copy estimate of repairs to 1997 Toyota Caldina motor car, dated November 27, 2009.

[4] On June 11, 2010, the claimant filed a second affidavit in reply, with several exhibits. These were copies of bank statements; copy of statement from the Jamaica Teachers' Association Credit Union ("JTACU"); copies of receipts for work done on the house; copy statements indicating withdrawals from the JTACU; and a copy of a Cable & Wireless telephone bill. An affidavit of Evroy Whyte was also filed by the claimant on the same date. The defendant, in response, filed his second affidavit on December 3, 2010.

[5] On February, 17, 2011, the claimant filed her third affidavit, exhibiting a letter from the NHT setting out the details of a mortgage which the defendant acquired. The defendant filed a third affidavit on February 25, 2011. The claimant filed a fourth affidavit on July 5, 2011 with a copy of a purported birth certificate of Nickoy Davis and a copy of pages of a book entitled 'Everything for Early Learning'.

[6] The defendant filed a fourth affidavit on February 2, 2012, responding to the claimant's fourth affidavit. Exhibited to this affidavit were: a copy letter from the Chief Executive Officer of the Registrar General's Department (RGD), dated July 22, 2011; three copies of criminal informations laid against the claimant; and a copy of an article from the Star Newspaper dated January, 4, 2012, entitled 'Wife Created Fake Baby'. The claimant filed her fifth affidavit in response on October, 22, 2012.

ISSUES

[7] The issues which arise for determination are as follows:

(i) Preliminary Considerations:

(a) The effect if any of the criminal charges against the claimant

(b) What is the effective date of separation?

(ii) Is the claimant entitled to an interest in the family home?

(iii) If the claimant is entitled to an interest, would an application of the equal share rule in the circumstances of this case be unreasonable or unjust, warranting its variation?

(iv) Whether the defendant is entitled to a fifty percent (50%) or any interest in the Andersleigh property acquired and owned by the claimant?

(v) Whether the claimant is entitled to a fifty percent (50%) interest in the 1997 Toyota Caldina Motorcar?

(vi) Whether the defendant is entitled to mense profits and/ or occupation rent from the claimant?

(vii) Whether the defendant is entitled to a portion of the income earned from the flat which is being used by the claimant as a classroom to teach extra lessons at the family home?

(viii) Whether the court has jurisdiction in these proceedings to order the claimant to:

(a) account for and return to the defendant forthwith all documents and/or items, belonging to the defendant and listed in the counterclaim which it was alleged she has in her possession;

(b) compensate the defendant for the destruction of his microscope, water tank, repairs to his motor vehicle and purchase of gas cylinder; and

(c) pay the outstanding amount on the telephone bill.

ISSUE 1: Preliminary Considerations

The Effect of the Criminal Charges

[8] At the time of the hearing, the defendant provided evidence in the form of copy criminal informations, that the claimant had been charged before the Kingston and Saint Andrew Parish Court, with Forgery, Uttering Forged Documents and Conspiracy to Defraud. The defendant also exhibited a copy of the Star Newspaper dated January 4, 2012, containing further details of the allegations.

[9] The claimant admitted that she was before the criminal court charged for having a false birth certificate. She accepted that the birth certificate is false and admitted that she has not applied for the authentic birth certificate. Her counsel submitted that the claimant's arrest for uttering forged documents was after the parties separated, the claimant had not been found guilty and that in any event the charges ought not to impact on her right to share in property of the marriage.

[10] The court takes judicial notice of the fact that public records of the Kingston & Saint Andrew Parish Court disclose that since the evidence and submissions were concluded in this matter, on March 27, 2018 the claimant was acquitted of the charges of Uttering a False Birth Certificate and Making False Statements on Oath when a no case submission was upheld. On April 18, 2018 the claimant was acquitted of the charges of Conspiracy to Defraud and Forgery when the crown offered no evidence.

[11] Even if the charges had not been determined in the claimant's favour, I agree with counsel for the claimant that the criminal case had no bearing on the property

rights of the claimant. In any event, the issue is now beyond question as the criminal charges have been determined in the claimant's favour.

The Date of Separation

[12] At the time of the filing of the claim and when the claim and counterclaim were heard, the parties were separated but not divorced. Section 13(1) (c) of **PROSA** entitles a spouse to apply to the court for a division of property "where a husband and wife have separated and there is no reasonable likelihood of reconciliation" Subsection (2) imposes a time limit. The application shall be made within twelve months of the separation or such longer period as the court may allow after hearing the applicant.

[13] The date of separation, therefore has implications for the grounding of the claim. That date is strongly in dispute, with both parties having offered conflicting evidence on the point. The evidence of the defendant if accepted would establish that the application was filed within time, while some aspects of the evidence of the claimant, and the submissions of her counsel is that the application was filed shortly after the limitation period. There having been no application filed by the claimant seeking the court's leave to bring the claim out of time, pursuant to s. 13(2), the claimant therefore relies on section 11 (1) (2) and (5) of **PROSA**, which her counsel submitted gives the court jurisdiction to hear the matter during the subsistence of the marriage.

[14] S. 11 (1), (2) and (5) provide that:

> (1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides.

> (2) The Judge of the Supreme court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.
>
> (3) …
>
> (4) …
>
> (5) Where a court makes an order under subsection (2) or (4), it may make an order as to costs and may make such consequential orders including orders as to a sale or partition and interim or permanent orders as to possession

[15] What is the evidence in detail? The claimant in her evidence in chief first stated that they separated in October 2008. Later she said the reason for the separation was her discovery, sometime in 2009, that the defendant had been unfaithful. She left for the USA in May 2009 and returned in August 2009.

[16] When cross-examined, she stated that it was over a period she found out about the unfaithfulness and that she found '*little things*' before 2008. However sometime in December 2008 they separated. When confronted with her inconsistent statements as to the date of separation, she said October 2008 was correct. She explained that they were separated in 2008, but she was trying to make the marriage work but, "*in 2009 we called it a day when I found out about the baby*." There was however further inconsistency as she went on to say that in 2008 she made the discovery about the baby and in 2009 they separated. The court makes no finding whether or not there was a baby but is considering on the statements of the claimant when separation occurred.

[17] She further stated that: 1) she grilled off a bedroom at the matrimonial home; 2) her dad and her had been in occupation of that house without Mr. Davis since August 2009; and 3) after she changed the padlocks to the house in October 2009 the defendant went away with the lock.

[18] Also of significance is that 2009 was the year when the claimant said she removed the defendant's name from her bankbook and commenced negotiations for the

purchase of the Andersleigh property in her own name, without the defendant's knowledge.

[19] The defendant refuted the claimant's timeline. He testified that while the claimant stopped cooking his meals and laundering his clothes in late 2008, when the '*craziness'* started, he maintained that they were sleeping together in the same bed, as man and wife, up to late February 2009 — a claim she denied. He stated that she left the island sometime in March 2009, the relationship having broken down shortly before that. She left the key with Gary, (Evroy Whyte, the claimant's witness), and the girls never had a key to go to the house at their own free will. He explained that although he lived and worked in St. Mary, he would return home every weekend.

[20] He denied that when she came back in August 2009, they were in separate bedrooms. He asserted that the first night, they were in the same bedroom. However, after that, *"all hell broke loose"* and from then until September 12, when he went back to St. Mary, they were in separate rooms. It was also the defendant's evidence that it was sometime in 2009 that he stopped putting money in the drawer for general household use, something he said he had always done for years. It was however denied by the claimant that this was something the defendant used to do. He put the date of separation as October 2009.

Analysis

[21] It seems clear from the evidence of both the claimant and the defendant that the marriage of the parties entered turbulent waters in late 2008. The defendant maintains that they were in the same bedroom up to February 2009 and on the first night after her return in August 2009. The claimant denies this. However, despite the inconsistent statements made by the claimant, her final testimony on the point was that they separated in 2009. From the evidence, it is unlikely that the date of separation was as late as October 2009 when the defendant took away the lock(s) as posited by the claimant. It is more likely to have been March 2009 when,

on the admission of the defendant, at that time the relationship had broken down and the claimant left the island. The claimant having been away from the island between March and August 2009, that would explain the claimant's assertion, which the court accepts, that from August 2009 she had been in occupation of the house with her father without the defendant.

[22] It is also significant that it was in 2009 that each party took particular significant steps to act independently of the other. On the claimant's side, she removed the defendant's name from her bankbook and commenced the acquisition of property in her sole name. The defendant on his evidence, stopped providing funds for the home, though both the fact and the manner of provision have been disputed by the claimant. While it is difficult to pinpoint with certainty the time in 2009 when the parties separated, though I have found it is likely to have been March 2009, it is clear from the weight of evidence that it was sometime in 2009. The application is therefore grounded pursuant to section 13 (1) & (2) of **PROSA** and there is no need to have recourse to section 11.

ISSUES II & III: Is the claimant entitled to an interest in the family home? & If the claimant is entitled to an interest, would an application of the equal share rule in the circumstances of this case be unreasonable or unjust, warranting its variation?

The Submissions

[23] Counsel for the claimant submitted that the property is clearly the family home and the claimant should be entitled to a 50% interest based on the equal share rule under section 6 of the **PROSA**. It was acknowledged that the house was purchased by the defendant before the parties were married, and that under section 7 of the **PROSA** this was a factor which the court could consider as a basis for variation of the equal share rule. However, counsel maintained that the court should look at all the circumstances and give greater weight to other factors such as the twenty year length of the marriage, the claimant's contribution to paying the mortgage and the expansion of the house while the parties were happily married.

[24] Counsel maintained that the burden was on the defendant to show that it would be unreasonable and unjust to award the claimant a fifty percent (50%) share in the family home to justify a variation of the equal share rule under section 7 of **PROSA**. Otherwise, the equal share rule should remain undisturbed.

[25] Counsel relied on the authorities of ***Annette Brown v Orphiel Brown*** [2010] JMCA Civ. 12; ***Graham v Graham*** 2006HCV03158 jud. del. April 8, 2008; ***Donna Diedrick v Audley Diedrick*** 2007HCV3069 jud. del. December 18, 2007 and on appeal ***Audley Hughan Diedrick v Donna Annmarie Diedrick*** SCCA 4/2008 jud. del. July 15, 2008.

[26] Counsel for the defendant in opposing the claimant's contention placed great reliance on section 7(1) (b) of the **PROSA** as it was undisputed that the family home was acquired before marriage and cohabitation. It was submitted that the factors outlined in section 7 of the **PROSA** as circumstances that could justify a variation of the equal share rule were not the only considerations that could warrant a displacement of the rule. Counsel maintained that it would also be unjust and unreasonable for the claimant to rely on the equal share rule for the following reasons:

a) the claimant acquired the Andersleigh property during the course of the marriage, with the defendant's direct and indirect assistance;

b) the defendant had greater earning power and contributed more to the general household;

c) the claimant's contributions of cleaning, cooking and buying clothes were irrelevant in supporting her claim as they were normal activities that did not yield a share in the family home; upon separation they should just be viewed as gifts;

d) her account as to payment of mortgage left much to be desired; and

e) there was no evidence of any common intention to give a share of the property to the claimant.

[27] Further counsel maintained that though the claimant was seeking equity she was not doing so with clean hands. Counsel argued that her application for an equal share of the family home property should be refused and in the event any contribution to the family home was proved by her she should be compensated for it.

[28] Counsel relied on the authorities of ***Monica Bernard v Michael Bernard*** 2006HCV01865 jud. del. April 2, 2008 and ***Maxine Yolanda Coley v Leslie Carol Coley*** 2006HCV00160 jud. del. May 16, 2008.

The Law

PROSA and the Presumptions of Common Law and Equity

[29] It is perhaps best to start with the submission by counsel for the defendant that the equal share rule should be displaced, on the basis that, amongst other things, there was no evidence of any common intention to give a share of the property to the claimant.

[30] In ***Monica Bernard v Michael Bernard***, Straw J concluded that the claimant was not entitled to rely on the principles governing the division of property under the **PROSA**, as the claim was filed outside the twelve (12) month limitation period and she had not sought the leave of the court to bring the application outside that period. As the **PROSA** did not apply, the court had to apply principles of common law and equity to divide the untitled property in dispute. On the evidence the court found a common intention between the parties established by contributions by the claimant and awarded the claimant a 35% interest in the house.

[31] While in ***Monica Bernard v Michael Bernard*** an attempt, though unsuccessful, was made to bring the application for entitlement to property under **PROSA**, no such attempt was made in ***Maxine Coley v Leslie Coley.*** Among the relevant

facts Beswick J found were that the marriage lasted only two – four months before separation and the claimant's name was not on the title, nor had she contributed to the purchase, mortgage payments or improvements to the house. In those circumstances, the learned judge found there was no common intention upon which the claimant could be awarded any beneficial interest in the house.

[32] These two cases relied on by the defendant are therefore unhelpful as both were decided using the principles of common law and equity, whereas the instant case was filed under and is governed by the **PROSA,** given that it has been settled that the claim was filed within the twelve month limitation period.

[33] S. 4 of the **PROSA** provides that:

> The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of 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.

[34] In ***Annette Brown v Orphiel Brown*** Cooke J.A. stated at the beginning of paragraph 10 that:

> By section 4 of the Act, the legislature directed that there was to be an entirely new and different approach in deciding issues of property rights as between spouses. Section 4 is a directive to the courts as to what the approach should be.

[35] In respect of ss. 6 & 7 of the **PROSA**, he stated further at the conclusion of paragraph 13 that:

> I have set out these sections in extenso to emphasize 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 equity".

[36] The more extensive framework created by the **PROSA,** will therefore guide the court's determination of the respective property entitlements of the parties to this claim and counterclaim.

The Family Home

[37] S. 6 (1) of the **PROSA**, lays down the equal share rule. It provides that:

> 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 grant of a decree of dissolution of a marriage or the termination of cohabitation;
>
> (b) on the grant of a decree of nullity of marriage;
>
> (c) where a husband and wife have separated and there is no likelihood of reconciliation.

[38] In ***Carol Stewart v Lauriston Stewart*** [2013] JMCA Civ. 47 Brooks JA in interpreting the **PROSA**, stated at paragraph 15 that:

> [I]t may first be stated that the Act utilizes what Morrison J.A., in **Brown v Brown** [2010] JMCA Civ 12 (para. 34) termed a "composite approach" to matrimonial property. In this approach, the family home is treated differently from other property owned by either or both of the spouses…Unlike its treatment of other matrimonial property, the Act creates a statutory rule of equal entitlement to the beneficial interest in the family home.

[39] Further at paragraph 19 he referred with approval to the judgment of McDonald-Bishop J (Ag.) (as she then was), in ***Graham v Graham*** claim no. 2006 HCV 03158 (delivered April 8, 2008) where at paragraphs 15-16 she said that:

> [15] By virtue of the statutory rule, the claimant [applying under s. 13 of the Act] would, without more, be entitled to a 50% share in the family home….and this is regardless of the fact that the defendant is the sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals. See **R v R** [1992] 1 AC 599, 617, per Lord Keith of Kinkel. **So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets, unless there is good reason to the contrary;** fairness requires no less: per Lord Nicholls of Birkenhead in **Miller v Miller**; **McFarlane v McFarlane**, [2006] 2 AC 618,633.

> *[16] The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation...." (Emphasis* supplied)*.*

[40] It is safe to say it is now settled law, that in determining interests in the family home, the starting point and general rule is equal entitlement thereto of both spouses. Both the claimant and the defendant in this matter accept that the property at Bauxite Crescent, the legal title to which is solely in the name of the defendant, is the family home. The parties used it habitually for at least two (2) decades, as the only family residence.

[41] S. 7 outlines the power of the court to vary the equal share rule. It provides that:

> (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 including the following:-
>
> (a) that the family home was inherited by one spouse;
>
> (b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
>
> *(c)* that the marriage is of short duration.
>
> (2) In subsection (1) “interested party” means:-
>
> (a) a spouse;
>
> (b) a relevant child; or
>
> (c) any other person within whom the Court is satisfied has sufficient interest in the matter.

[42] It becomes apparent from the use of the word ‘including’ in s. 7, that the triggering events which could cause the court to find that it would be unreasonable or unjust for each spouse to be entitled to one-half of the family home are not exhaustive; the court is entitled to and may consider other factors, as appropriate. The burden of proof is on the defendant to prove that it is unreasonable or unjust for the

claimant to be awarded fifty percent interest (50%) in the family home. (See: ***Veronica Campbell v Rosvelt Campbell*** Claim no. 2007HCV02189 (jud. del. February 09, 2010) at page 4, per Brooks J (as he then was).

[43] In ***Carol Stewart v Lauriston Stewart***, Brooks JA dealt extensively with how s. 7 should be interpreted and applied. At paras. 31- 35, he enunciated that:

> [31]…it may be said that, if the door is opened, by the existence of a s. 7 factor, for the consideration of displacement of the statutory rule, then very cogent evidence would be required to satisfy the court that the rule should be displaced…
>
> [32] Another aspect of s. 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in s. 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that theme may be considered.
>
> [33] It is true that the first two factors, (a) and (b) mentioned in section 7(1), contain the common element that there was no initial contribution from one of the spouses to the acquisition of the family home. The third factor, (c), does not, however, include such an element. It is conceivable that, despite the marriage being a short one, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses.
>
> [34] The third point to be noted is that the existence of one of those factors listed in s. 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. **What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration...** (My emphasis)
>
> [35] The proposition that matters such as contribution may only be considered if a section 7 gateway is opened may, perhaps, be an

> unconventional view. It is, however, based on a comparison of sections 7 and 14 of the Act. Whereas, by section 14, the legislature specifically allows the consideration of financial and other contributions in considering the allocation of interests in property, other than the matrimonial home, such a factor is conspicuously absent from section 7. Similarly, what may, inelegantly be called, a "catch-all" clause, placed in section 14(2)(e), to allow consideration of "other fact[s] and circumstance[s]", is also absent from section 7. From these absences it may fairly be said that the legislature did not intend for the consideration of the family home to become embroiled in squabbles over the issues of contribution and other general "facts and circumstances", which would be relevant in considering "other property".'

[44] He continued at paragraphs 41- 43 and 50 -51 by stating that:

> [41] Since s. 7 does not allow for contribution and "other fact(s) and circumstance(s)" to entitle the court to consider a departure from the equal share rule, what else, since the section uses the word "include", may be considered as factors that may lead to such a departure? Perhaps only time and experience will bring about an answer to that question. One possible scenario, however, could be where spouses, on deciding to separate, agree that a house, in which the legal interest is vested solely in spouse A, be transferred to spouse B, who is leaving the family home, in order for it to be a residence for spouse B. If the entire legal interest in the family home were vested in A, certainly, in those circumstances, it would be open to the court to consider whether it would be unreasonable or unjust to apportion equal interests in the family home. That is just an example, but it will be sufficient to observe, at this time, that the list of factors contemplated by section 7 is not closed.
>
> [42] The difference, for the purposes of the present analysis, between section 7 and the English legislation is that section 25(1) of the English Matrimonial Causes Act 1973 requires those courts "to have regard to all the circumstances of the case". As mentioned above, there is no rule in that statute which is equivalent to that created by section 6. Section 25(1) of the English statute applies to all property. The effect of section 25(1) would be similar to the effect of the provisions in section 14(1)(b) of the Act, where it deals with property, other than the family home. The cases based on section 25(1), although they would be helpful for assessing cases in which one or more of the factors in section 7 existed, would not be as helpful in identifying whether a particular element constituted a section 7 factor.
>
> [43] Thus, although Lord Nicholls of Birkenhead opined in Whyte v Whyte, at page 8, that "fairness requires the court to take into account all the

circumstances of the case", his comment must be considered against the background of section 25(1) of the English Matrimonial Causes Act 1973. **If, therefore, a section 7 factor existed, fairness would require our courts "to have regard to all the circumstances of the case" to decide whether an unreasonable or unjust situation existed that should lead to a departure from the equal share division.** (My emphasis)

…

[50] Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is, beyond the ordinary imponderables of the trial process. The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists**.**

[51] **If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure** (the principles mentioned in **Graham v Graham** and **Jones v Kernott**, mentioned above**). Before the court makes any orders that displace the equal entitlement rule it should be careful to be satisfied that an application of that rule would be unjust or unreasonable.' (**My emphasis**)**

[45] Then at paragraphs 76 – 78 he concluded on this point:

[76] In order to displace the statutory rule for equal interests in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act, or a similar factor, exists**. Contribution to the acquisition or maintenance of the family home, by itself, is not such a factor, it not having been included in section 7.** This is in contrast to its inclusion, as a relevant factor, in section 14, which deals with property other than the family home.

[77] If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule. The degree of cogency of that evidence is greater than that required

> for other property. In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution.
>
> [78] The court should also bear in mind that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. Post-separation contributions cannot disturb the entitlement at separation.

[46] It is evident from the extensive quotations that very cogent evidence is required to displace the general equal share rule. If there is no s. 7 factor, the equal share rule, must be applied. Where a s. 7 factor exists, it does not automatically entitle the spouse who relies on it, to the entire interest in the property. Section 7 factors are conditions precedent, or put another way, create a foundation from which the court may proceed to have regard to all the relevant circumstances, to ascertain whether it is unreasonable or unjust for each spouse to be entitled to one-half share of the family home; if so the statutory rule is adjusted as appropriate. Such interests as are deemed by the court to exist in the family home, are fixed, in the case where the parties have separated, at the date of separation, and post-separation contributions cannot disturb the entitlement at separation.

[47] The court also reviewed and considered the decisions in ***Diedrick v Diedrick*** (both at first instance Claim no. 2007 HCV 3069 jud. del. December 18, 2007 and in the Court of Appeal SCCA No. 4/2008 jud. Del July 15, 2008) and ***Robert Blake v Doreen Blake*** [2012] JMSC Civ 130, where the equal share rule was applied.

The Evidence

Living Arrangements and Accommodation of Family Members and a Friend

[48] After marriage on July 14, 1985, the parties lived at 2A Sundown Crescent, Kingston 10, which the defendant had rented and resided at, prior to meeting and marrying the claimant. Thereafter, they relocated to the claimant's parents' house at 44 Wavell Avenue, Kingston 11. At the Wavell Avenue residence, the defendant stated that he contributed to the household bills, including utilities and mortgage.

He maintained that the mortgage on the claimant's parents' house had started to accumulate and the claimant had stated that she did not want them to lose the house. The claimant however maintained that while she contributed to the mortgage and the utilities, the defendant's only contribution was to food.

[49] They remained there for approximately two (2) years after which they moved into the family home. It is agreed that before meeting the claimant the defendant solely acquired this premises sometime in 1982-1983, assisted by a mortgage from NHT.

[50] A number of other relatives lived at their house for various periods of time. Among them were the claimant's parents who the defendant claimed he maintained, and the defendant's father. The defendant stated that he made the necessary adjustments to accommodate the claimant's parents. On cross examination, the claimant testified that one room was added on by her and the defendant to have them accommodated. By the time of this action, the defendant indicated one parent died and the other was still living there after eighteen (18) years. The claimant however contended that her parents were supported by her brother, Joseph Johnson, who sent money which she used to purchase food for them.

[51] In respect of his father the defendant stated that he was provided for financially by four (4) of his children until his death in November 2001. Contrary to what the claimant asserted, the defendant denied that the claimant washed or cleaned for his father, as there was a full time helper who carried out such chores and acted as caregiver for his father. The monies which were received from his siblings were used to purchase his father's health products and to pay his caregiver.

[52] The defendant also averred that he maintained the claimant's nephew David Wilson, her two nieces Kayon Johnson and Janel Absalom and Mickel Wint the child of a friend of the claimant who also lived at their house at some point. He said that when Mickel's mother sent money from Canada, the claimant kept all the money for her sole use and benefit. The claimant refuted this and stated that the money she received was used to pay for extra lessons for Mickel and also to pay

his lunch money. She indicated that the defendant did not have to make any contribution to her relatives and Mikel's upkeep.

Expansion and Renovation

[53] As with most of the evidence, on critical points, the positions advanced by the parties are diametrically opposed. On the claimant's account, the parties had extensive discussions and decided that they needed to enlarge the three (3) bedroom house as it was too small. The plan was to add an additional two (2) bedrooms. The defendant however indicated that the expansion started before the marriage as a retirement arrangement, as well as to supplement his income as a teacher. He denied any extensive discussions with the claimant about expansion. He maintained that whenever he introduced those discussions, they were met by the claimant with a shrug and her usual expression of "*whatever" or "whatever you say*" and she showed absolutely no interest in what was suggested. The defendant claimed his only discussions regarding the expansion of the house were with a Mr. Brown, a pensioner, who lived approximately seven (7) blocks away.

[54] He maintained that the idea for expansion after the marriage, was born during the summer of 1991 when the claimant was away in the USA and initially contended that all the expansions were done during the holidays in her absence and whenever the claimant returned, she would always express surprise at the work done. He later conceded that some work was done outside of summer holidays but insisted that most of the work was done during the summer holidays when there could be adequate supervision.

[55] For her part, in supporting her claim the claimant did not just rely on discussions. She stated that over a six month period she contributed to the expansion project by giving the defendant two hundred thousand dollars ($200,000.00). This money she acquired through the JTACU from her shares and a loan of one hundred thousand dollars ($100,000.00) taken in April 2006. She exhibited a copy of the JTACU statement in support and copies of receipts for work done on the house,

which on her evidence, were written by the defendant. Those receipts bore various dates spanning several years. An examination of the back of the receipt dated November 1, 1995, which the claimant asserts contain an acknowledgment of money received from her, seems to show that a sum of $2500 was collected from the claimant. It is however unclear the specific date on which the contribution was made.

[56] The defendant while indicating he could not admit or deny the claimant having taken a loan from the credit union in April 2006, denied receiving any money from her. He specifically made no admission regarding the receipt that purportedly reflects him acknowledging receipt of money from the claimant. He asserted that the claimant's money went towards paying tithes, savings and supporting her family members. He said the monies to commence the expansion came from the AAMM Co-op Credit Union of which he is a member. Monies later also came from salary increases, retroactive salary payments and partners. The expansion started sometime in 1993, was halted in 1994 and restarted sometime in 1996 after he received a salary increase. He maintained all expansion to his house was completed in 2003 and since then no construction (major or minor) had been carried out, though the renovation was still incomplete.

[57] The claimant agreed that the defendant did the popcorn ceiling and indicated that they shared the cost of maintaining the house. She however stated that she put in the kitchen cupboards at her sole expense, as well as tiled the house, upgraded the bathroom fixtures and installed the kitchen fixtures. She also contracted a parent of hers, (this court understood this to mean a parent of one of her students), to wire the new section and install the electrical fittings and fixtures.

[58] The defendant agreed that the cost of the kitchen fixtures was borne by the claimant, who also shared the cost of tiling the living and dining rooms, one (1) bedroom, one (1) bathroom, and the kitchen. He also agreed she had a built in wardrobe made for one of the girl's rooms.

[59] He however stated that he bought the fixtures for both bathrooms and paid the labour cost to install them. Further, he maintained that apart from a single occasion when the claimant bought a five (5) gallon bucket of pink paint used to paint the living and dining rooms and the verandah, he single handedly maintained the property. Further, it was he who paid to have the new section electrically wired and for electrical fittings to be installed by a gentleman known to the claimant. On cross-examination, while he admitted Mr. Trevor Weir did electrical work in 2003, he denied the claimant paid him.

Mortgage Payments

[60] The claimant asserted that the mortgage payments deducted from the defendant's salary were miniscule. On cross-examination she indicated she was unaware that from time to time, he paid monies over the counter. She stated that she made payments in the defendant's name over and above the amounts that were deducted from the defendant's salary, and also closed out the mortgage by paying a lump sum over the counter without the defendant's knowledge. She exhibited the copy receipts she had, though there were others she could not account for. She was also unaware of the total she had paid.

[61] The claimant insisted that she did not "*have an agenda*" when she made the payments, otherwise she would have kept the title for herself. Regarding the final payment owing on the mortgage, she stated that when she gave the defendant the title, he hugged and kissed her and told her that he was going to put her name on the title. She maintained that she did not demand the placement of her name on the title and that she did not want a share in the property at that time. She also claimed that since that time, the defendant had borrowed money using the house as a security. She further stated that the defendant had told her that she cannot get anything out of the house, except to live in it until she died.

[62] The defendant testified that he commenced mortgage payments about two (2) months after he got possession of the family home in 1982 -1983. There is however

documentation which states that he started paying on March 1, 1984. He said he initially paid in cash and later by salary deductions. On cross-examination, he indicated that he was the only person who paid the mortgage and he was uncertain whether the claimant also did so. When it came to his attention that the claimant *"went behind his back*", paid out the mortgage and collected the title sometime during October 2001, he offered to refund her but she refused. The defendant was of the view that the claimant acting as she did, without his knowledge and permission, was in pursuit of a "*hidden agenda*".

[63] The defendant admitted that some years ago he told the claimant that she could live at the house as long as she wants, because she is his wife. This however was not in response to any disagreement over her entitlement, because the question of ownership of the house was never an issue. He indicated that at no time did he make any promise to the claimant to give her a share of the house.

Other Property

[64] The claimant stated in her first affidavit dated October 16, 2009 that she did not own any property as she spent all her money on her family and on the family home. However in her second affidavit, dated June 2, 2010 she averred that when she deponed to her first affidavit, she did not own any other property but that she had purchased the Andersleigh property with money she earned when she worked in the USA in the summer of 2009, with the help of a mortgage and a loan from her church. She maintained this evidence on cross-examination and added that she did not save to buy the Andersleigh property.

[65] The defendant stated that the family home is his first and only house and he would not be able to purchase another. He said he never had any intention of selling it and moreover at the time the parties had two (2) children attending tertiary institutions, who were still dependent on him for support. He stated that the claimant secretly purchased the Andersleigh property and had plans to erect a house on it. He exhibited the Duplicate Certificate of Title for that property.

General Contributions to Household

[66] The claimant essentially stated that all her earnings were used in the household, as she clothed her family and paid all the educational expenses. She got some assistance from the defendant when the children started to attend high school. Other than a few occasions when the defendant assisted with medication, she paid the medical and dental expenses for the children, although the defendant was earning more than she did, (though she did not know how much more), as he was a principal and also did extra lessons. She however denied that the defendant had always been the main income earner in their family. The claimant also denied the defendant's evidence that whenever he received his pay cheque, he would change it at the bank and place all of the proceeds in a drawer in the matrimonial bedroom where she would use whatever she wanted from it and that he never questioned her about how much she used, and for what purpose.

[67] The claimant testified further that on a monthly basis, she sometimes placed ten thousand dollars ($10,000), at other times, five thousand dollars ($5,000) and other sums she was unsure of, in their joint account at National Commercial Bank (NCB). The claimant said that most summers, she went overseas to work and she always left her bank book with the defendant who in July and August, would sometimes collect and lodge her salary in their joint account at NCB. When she came from overseas, she put money in it as well. She exhibited copies of bank statements. The claimant maintained that the defendant would withdraw money at will from this account but never lodged any of his money in it.

[68] The defendant agreed that sometimes he would lodge her salary but denied that she would leave her bank book with him so he could not have made any withdrawals unless she was present. The claimant further stated that whenever she returned from the USA after the summer break, she took with her two barrels of food, which served the whole house. She also said that she maintained herself and received money from her siblings overseas which she spent in the house.

[69] She further stated that she attended Shortwood Teachers College, between 2007-2008, paying for her tuition through her earnings from work, savings and contributions from her brother. She maintained there was no contribution from the defendant.

[70] It was agreed that when the parties' second child commenced university in 2008, the claimant paid one-half of the tuition, which was one hundred thousand dollars ($100,000.00). Then for the 2009/2010 academic year, she also contributed one-half of her tuition costs in the sum of one hundred and fifty thousand dollars ($150,000.00). She further stated that she sent five to seven thousand dollars ($5,000 - $7,000) to her daughter's account on a monthly basis, which was unchallenged by the defendant. However, other than the fact that the contribution was made whilst her daughter was attending university, it was unclear as to the specific period over which the money was given.

[71] For his part, the defendant maintained that he always earned much more than the claimant and contributed up to ninety-five percent (95%) of the household and living expenses. He paid all the utility bills, motorcar upkeep, and purchased all the food. Due to his heavy expenditure, he said he was always indebted to the credit union.

[72] The defendant maintained on cross-examination that on a monthly basis he did place the proceeds of his pay cheque in a drawer not keeping any money for his own use. He claimed that he survived on the travel allowance he received and ate lunch at school. He stated that the money in the drawer was used for everything in the house, save that purchasing groceries was a shared responsibility. He could not say whether the purchase of groceries by the claimant was done from her salary and he admitted that the claimant cooked for the family.

[73] He further stated that although the claimant paid the bills from the drawer, she rarely paid the water and light bills, as often he would pay them. He then expressed the view that the last payment that cleared the mortgage, was made from the

money for the house, as he did not believe that money came from the claimant's salary. He was however unable to provide any basis for his belief. He stated that the claimant kept her money to do as she was pleased and that the money from the drawer would last three (3) weeks or a month. The defendant stated that he was never told that the claimant received money from her siblings whilst the claimant said any money which the defendant received from his siblings, was not shared with her.

[74] The defendant expressed that at no time did he leave his family financially or otherwise unattended. He was the one who shouldered all the educational, medical and dental expenses of the two (2) girls of the marriage. The only expense the claimant covered, was the cost of their uniforms and since the last child had been attending the University of the West Indies (UWI) for the past two (2) years, the claimant had only paid for one (1) semester. Further, he sold his car in 2010/2011 and used the money to pay Keisha's school fee and to offset getting the other car. The claimant paid school fees for Keisha and two (2) periods of boarding but it was not enough. He had to bridge the gap and he ended up paying more than her at all times.

[75] He explained that because the parties never had the same employer, twenty-three (23) years ago, they decided that the claimant would change her Blue Cross Health Policy to a family plan and the defendant would keep his individual policy as the entire family would benefit more from this arrangement. Pursuant to this arrangement, whenever the claimant's policy benefits were exhausted, the defendant would purchase the medication using his resources and he has paid the medical expenses on more than a few occasions.

[76] The defendant claimed that the claimant did not save much money during the marriage stating that she only had thirty-two thousand dollars ($32,000) when she took his name out of the bank book in 2009.

ANALYSIS

The Ownership of the Family Home

[77] It is clear from the evidence that the defendant owned the family home prior to the marriage; a s. 7 factor which opens the gateway to consideration of whether the equal share rule enshrined in s. 6 should be varied. The court must now determine, having regard to all the circumstances of the case, whether a finding that the parties are entitled to equal shares would be unreasonable or unjust.

[78] The documentary evidence in the form of a letter from NHT shows that the defendant commenced mortgage payments on March 1, 1984. His evidence however was that he commenced payments two (2) months after acquiring the property, which he said, was between 1982-1983. The court finds the documentary evidence compelling and more reliable than the defendant's memory. The court therefore accepts that the defendant's mortgage payments commenced on March 1, 1984. However, using the defendant's timeline of acquisition, assuming his date of acquisition though not commencement of payments is correct, that would have been one to two (1-2) years before he met the claimant and two to three years (2 -3) before their marriage. If his timeline is incorrect the acquisition would have been only just over a year before the marriage. Whatever the time period the defendant expended time, effort and resources in acquiring the family home prior to marrying the claimant.

The Duration of the Marriage

[79] The defendant's initial acquisition of what would become the family home, a relatively short time before the parties' marriage, has to be juxtaposed against the approximately twenty-four (24) years duration of their marriage, given that earlier the court found they likely separated in March 2009. The evidence revealed that their lives were significantly intertwined, as would be expected in a co-habiting marriage lasting that duration. The union produced two (2) girls.

Living Arrangements and Accommodation of Family Members and a Friend

[80] Apart from the four members of their nuclear family, several relatives on both sides of the family and the child of one family friend resided with them at the family home for various periods of time. Relations having now soured, each party has tried to paint a picture that they almost exclusively bore the financial burden and arrangements for care associated with the presence of their relatives or friend in the home ,while they assisted with the relatives of the other. I do not accept that. Rather, I accept that the defendant made adjustments to accommodate the claimant's parents and that the claimant's brother contributed to the upkeep of her parents. I also accept that the claimant extended care to the defendant's father, which was not solely left to an employed caregiver.

[81] This court further accepts that both parties received assistance from their respective siblings. It is a common practice where an elderly parent is left in the care of one sibling, for the other siblings to make some form of contribution. I also find that while extra resources were provided by other family members and the mother of Mikel who lived outside the family home, the joint resources of the family were also used to assist in maintenance of relatives. They were therefore intimately involved in the lives of each other and their extended family on both sides.

Expansion and Renovation

[82] The defendant sought to exclude the claimant from participation in the expansion and renovation of the family home. His evidence was however largely unsupported and at times inconsistent. He indicated that the expansion started before the marriage as a retirement arrangement, and to supplement his income as a Teacher. However at another one point he stated that the idea for expansion was born in 1993 but physical expansion actually commenced in 1996. He then maintained that all the expansions were done during the holidays in the claimant's

absence but eventually conceded that some work was done outside of summer holidays.

[83] The claimant on the other hand consistently maintained that she was a part of discussions that led to the expansion and renovation, to which she contributed. She also provided the court with documentary evidence. She exhibited several receipts indicating payment for construction materials and labour costs. These receipts bore various dates, including December 1991, May and November 1995 and April 1998, amongst others. The receipt of 1991 supports the contention that the idea for expansion was born long before 1993 and the other receipts suggest that expansion was not only undertaken during summer holidays when the claimant was away. The defendant did not challenge the accuracy of these receipts and there was no receipt forthcoming from him.

[84] There was a particular receipt for eleven thousand dollars ($11,000.00) dated September 2003, written in the claimant's name regarding electrical work. Whilst the defendant admitted the work was done, he denied that the claimant paid for it, though he could not explain why it was written in her name. The court accepts that the claimant paid this sum. On another receipt dated November 1, 1995, the claimant contended the writing on the back reflects the defendant acknowledging receipt of a minimal sum of money from her. The defendant made no admission but I accept the claimant's evidence that this was from him.

[85] In these circumstances, the court accepts the claimant's evidence as being much more credible than the defendant on this issue. This court accepts that throughout the marriage, the claimant contributed to the expansion of the family home. It is also accepted that the expansion commenced after the parties were married and whilst living in the family home, they had extensive discussion regarding the expansion and the claimant made financial contribution to the expansion. The court is further strengthened in its view by the fact that the claimant's parents and the defendant's father who resided with the parties for considerable periods and other relatives who also stayed at the house would no doubt have welcomed and

benefited from the expansion. As admitted by both parties and accepted by this court, each party made some amount of contribution to the renovation of the family home and some aspects of the renovation and/ or expansion were done whilst the claimant was present.

The Mortgage Payments

[86] Concerning the mortgage payments, it is accepted that the defendant made payments via salary deductions. The claimant however said she was unaware that the defendant also made payments over the counter. For her part the claimant exhibited several receipts bearing various sums of money which she said reflected her payments towards the mortgage. The defendant did not admit or deny these receipts but suggested that some of the money used to pay the mortgage may very well have come from him. That possibility cannot be completely ruled out, however if it is true that the lion's share of the money for running the household came from him, it is reasonable to conclude that the claimant would have used at least some of her own money.

[87] The claimant stated that she made the payments without any hidden agenda but admitted that the defendant was unaware of her payments. The defendant did eventually learn of those payments and on his evidence, he offered to refund her. There was I find a lack of communication between the parties concerning the mortgage payments during days of harmony. Whether that was due to the existence of hidden agendas on one side or the other I do not know. It is sufficient to conclude that on a consideration of the evidence, this court finds that the claimant did make some regular contributions to the mortgage payments, before she made the lump sum payment clearing off the mortgage.

Contribution to the General Management of the House

[88] Regarding contribution to the general management of the household, this court is of the considered view that the parties have overstated their contribution while seeking to significantly diminish the contribution of each other. The claimant

averred that she used all her pay to clothe her husband and children and that up until the children started to attend high school she paid all the educational, medical and dental expenses for the children. This almost complete assumption of the costs of the family by the claimant, apart from groceries, the court does not accept. This is a context where it is common ground that for the duration of the marriage, the defendant earned more than the claimant.

[89] The defendant was however not himself immune from hyperbolic claims as to his contributions. His evidence that he essentially turned over all his salary to the claimant and lived off his travel allowance and eating lunch at school, has been hotly disputed by the claimant. The court observes that if he had in fact done so it is unlikely that he would have still been able to undertake the payment of the utility bills, which he said was still left to him. Further, once he began living in St. Mary, he would have had rent and utility bills for his rented premises.

[90] The court is also not convinced that the defendant shouldered all the medical, dental and educational expenses of the children and that the claimant only supplied their uniforms and made a minimal contribution to the tertiary education of their last child. This is so, especially since he agreed that on two occasions the claimant paid half the tuition costs of their last child and he did not challenge the fact that she regularly sent money to her account. Further, he testified that he and the claimant decided to change her Blue Cross Health Policy to a family plan and he would keep his individual policy as the entire family would benefit more from this arrangement.

[91] The parties were in a marriage partnership. The defendant stated that the claimant cooked and laundered his and their children's clothes and this is accepted. They both contributed financially within their means and the claimant also provided management services for the household and acted as a caregiver for those residing with them including relatives and friends. There was no significant overbalancing of contributions by one party over the other as each party has sought to portray.

Ownership of other property by one party

[92] The claimant accepted that she is the owner of the Andersleigh property, as evidenced by the Duplicate Certificate of Title. The defendant stated that the family home was his first and only house and he would not be able to purchase another. The claimant has not challenged this evidence and the court accepts it. The court also accepts that the claimant secretly purchased the Andersleigh residence.

[93] The court is fortified in this finding as the evidence revealed the Andersleigh property address was used for the letters from the NHT and not the family home. Also at the time of swearing her first affidavit, while it was technically accurate that the claimant did not own the property, as it had not yet been transferred to her, the process of purchase would already have started. The defendant was therefore unaware of the transaction by the claimant. Further, she testified of her plans to build on her property at Andersleigh and that if the family home is sold, she would get a portion that she worked for, to build her house with the assistance of the NHT.

[94] Both the acquisition of the property and the manner of its acquisition are significant. It occurred at the end of the marriage. The claimant however clearly had an exit strategy which she kept secret from the defendant. It began with the claimant closing out the mortgage on the family home and then the purchase – all without the defendant's knowledge. For the duration of the marriage she benefitted from the shared resources of the family. That benefit no doubt helped to enable her to purchase the Andersleigh property, in a manner which sought to exclude the defendant from any knowledge of or interest in that property.

[95] I have considered all the details of this case. The initial ownership of the property by the defendant, and the nature and manner of the acquisition of the Andersleigh property by the claimant are particularly significant factors among the broad sweep of circumstances which include the joint contributions during the marriage. I find the defendant has proven, on a balance of probabilities, that the application of the

equal share rule in this case would be unjust or unreasonable. Fairness requires a departure. On a considered view of all the circumstances this court holds that the equal share rule is varied to vest a sixty-two point five percent (62.5%) interest in the defendant and a thirty-seven point five percent (37.5%) interest in the claimant.

ISSUE IV: Whether the defendant is entitled to a fifty percent (50%) or any interest in the Andersleigh property acquired and owned by the claimant?

[96] Counsel for the defendant submitted that the defendant is entitled to a fifty percent (50%) share of the Andersleigh property. Counsel for the claimant submitted however that s. 12(2) of the **PROSA** sets out the date when a spouse's share in property shall be determined and contended that when the parties separated, the claimant was not the owner of the property. This property was acquired after the separation, so it does not fall to be divided under **PROSA**.

[97] S. 12(1) & (2) provides that:

> (1) Subject to sections 10 and 17 (2), the value of property to which an application under this Act relates shall be its value at the date the Order is made, unless the Court otherwise decides;
>
> (2) A spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the court.

[98] The claimant has maintained that the defendant did not contribute to the acquisition of the Andersleigh property and she does not intend for him to benefit from it. She also stated that she did not inform him of the purchase as they were not together. The defendant accepted that the property was purchased without his knowledge but he affirmed that it was as a consequence of his tremendous provision for the family, that the claimant was able to save her money for her own use and benefit; this was in addition to the fact that she used the family home to provide private lessons, and so was able to purchase the Andersleigh property.

[99] The court has accepted that the parties separated in March, 2009, eleven (11) months before the claimant became the legal owner of the property on February 2, 2010 as reflected on the Duplicate Certificate of Title. There is no doubt that the court has the power to alter interest in property, other than the family home, where property is owned by the spouses jointly or by either spouse in cases where the court considers it just and equitable to do so. (See s. 15 of the **PROSA** and paragraph 46 of ***Brown v Brown***, *supra*, per Morrison JA.)

[100] S**.** 12(2) is however clear and counsel for the claimant's submission is correct. The Andersleigh property was acquired by the claimant after the parties ceased to live together as man and wife in March 2009. She obtained a legal interest in the property post-separation. It does not fall to be divided under the **PROSA**.

[101] Even if there was a basis to have recourse to the presumptions of the common law and equity, which there is not, it could not be said that it was the common intention of the parties for the defendant to acquire a beneficial interest in the property. While the court is mindful that the defendant's indirect financial contribution, through his provision for the family, no doubt assisted to place the claimant in the financial position to purchase the property, that consideration has already been factored into the determination of the respective shares in the family home.

[102] What is clear, is that the claimant's decision to purchase the property without even the knowledge of the defendant, and the steps taken to ensure he did not find out, such as having correspondence from NHT regarding the property delivered to that property, speaks volume as to her intention. The claimant had no intention for the defendant to acquire a beneficial interest in the property. The defendant is not entitled to any interest in the Andersleigh property.

ISSUE V: Whether the claimant is entitled to a fifty percent (50%) interest in the Toyota Caldina?

[103] S. 14 of the **PROSA** makes provision for the division of property, other than the family home. The section makes it clear that in determining proprietary interests in

property other than the family home, the court should divide such property as it thinks fit, taking into consideration the following factors: contribution, the absence of a family home, the duration of the parties' marriage, an agreement with respect to the ownership and division of property and any other fact or circumstance, which the justice of the case requires to be taken into account.

[104] Contribution is given a very wide meaning in the section. It includes : the acquisition or creation of property including the payment of money for that purpose; the care of any relevant child; the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which enables the other spouse to acquire qualifications or aids the other spouse in the carrying on of that spouse's occupation or business; and the management of the household and the performance of household duties (See s. 14(3) of the **PROSA**.

[105] S. 14 also makes it clear that contribution may be financial or otherwise, directly or indirectly made and that monetary contribution is not of greater value than non-monetary contribution. Accordingly, contribution does not have to be calculable or readily calculable, financially.

[106] The claimant contended that she is entitled to a fifty percent (50%) interest in the 1997 Toyota Caldina license no. 0148 DN. She stated that the defendant had previously purchased a Nissan Sunny motor vehicle, and she contributed between Eighty to Ninety Thousand Dollars ($80,000.00- $90,000.00) of the purchase price. She exhibited copies of statements (between January 1997 and May, 2000) as proof of withdrawal from her credit union. The car was registered in the defendant's sole name. She said that the defendant sold that car and used the proceeds along with other funds to purchase the Caldina.

[107] The defendant denied this. He said that between 2000 - 2001, he bought the car for $440,000 to facilitate his job as a Travelling Officer. He indicated the purchase was enabled by a $400,000 loan obtained from AAMM Credit Union, using the title

for the family home as security as well as through funds received from partners. He maintained there was nothing operating in his mind, nor was it the intention of the parties that the car should be joint property or used by the claimant, and she gave him no money towards the purchase of the car.

[108] The documentary evidence once again points the way to the truth. The Duplicate Certificate of Title for the family home indicates that the property was mortgaged to secure the sum of four hundred thousand dollars ($400,000.00). This mortgage was however registered in 2003 and the defendant said he purchased the car between 2000-2001. Consequently the mortgage could not have been a source of funds used to purchase the Caldina.

[109] It may therefore very well have been that as the claimant said, when the defendant sold the Nissan Sunny, those proceeds along with other funds were combined to purchase the Toyota Caldina between 2000-2001. In any event under the **PROSA** contribution is not just limited to money, nor is financial contribution of greater value than other forms.

[110] From the evidence, the parties led shared lives and there is no evidence that at the time of the purchase of the Toyota Caldina, they were no longer engaged in a partnership of equals. The court accepts that the vehicle was purchased to assist the defendant as a Travelling Officer but it does seem likely that once the car was acquired, the claimant may have had to assume more financial responsibility for the household, in order for the defendant to make repayments on any loan and to maintain the car. In any event anything that assisted the defendant to earn would have benefitted the entire family. In the circumstances, the court finds, both parties are entitled to an equal share in the car.

ISSUE VI: Whether the defendant is entitled to mense profit and/or occupation rent from the claimant?

[111] Counsel for the claimant submitted that the court ought not to make any order for occupation rent, as the defendant has not been denied access to the family home

and it would be incorrect to say that the claimant has had exclusive occupation. The claimant further asserted that the defendant has unlimited access to the house and has exercised that access for years. Since 2012, he visits the family home three (3) or four (4) times per week. The family home is occupied by her, her father, their younger daughter and the defendant, who although he does not sleep there, spends considerable time in the house at all hours. She admits however, that she has changed the padlocks to the house and she has not given him any keys. This is because, she explained, that the defendant took away the lock from the house; she gave the keys to his children as she did not see him.

[112] The defendant however asserted, that the claimant excluded him and was benefitting from the property. He maintained that prior to September, 2009, everyone had their own set of keys to the house. However, sometime in September 2009, the claimant locked him and their two daughters out of the family home and changed the locks. The claimant also grilled every door, including the matrimonial bedroom and removed her father from the flat which was built by the defendant to accommodate him, to the matrimonial section of the house. Neither of their daughters nor himself had access to the house. For any of the girls to enter, the claimant had to let them in and at all times they had to call and make arrangements before visiting the house. He indicated that he visited his daughter at the family home and she would let him into the section where she lives.

[113] In ***Mercedes Blake v Andrew Blake*** [2016] JMSC Civ. 63, Brown J, at paras. 24-32, having considered a number of authorities distilled the following principles of law. He said:

> [24] Without an exhaustive review of the cases, it appears to me that the basic proposition is this, where one co-owner goes into sole occupation of jointly owned property the bald fact of occupation does not make him liable to the other co-owners for an occupation rent: **M'Mohan v Burchell**, supra; **Jones v Jones**, supra. That proposition is grounded in the fact that co-owners are together seised of the entire estate and each is entitled to concurrently enjoy possession along with the others: **Bull v Bull**, supra; **Aggie Forbes v Victor Bonnick**, supra.

[25] That basic, general proposition is subject to the qualifications which follow. Firstly, there is a prima facie entitlement to occupation rent by the spouse who left the matrimonial home following a breakdown of the marriage: In **re Pavlou**. However, if the co-owner who voluntarily left the property would be welcome back and would be in a position to enjoy occupation of the property, equity would not normally require an occupation rent of the occupying co-owner: In **re Pavlou.**

[26] Secondly, some forms of occupation by a co-owner will make him liable to the other co-owners for an occupation rent for example, a contract making occupation subject to the payment of rent: **M'Mohan v Burchell**, supra.

[27] Thirdly, an occupation rent is payable if the claiming co-owner was excluded from the property by way of an „ouster": **Jones v Jones,** supra; **Dennis v McDonald,** supra. Actual or constructive exclusion of a co-owner is the typical case in which an occupation rent has been charged: [2003] EWHC 1276 (Ch) (**Byford v Butler**).

[28] Fourthly, an occupation rent is due from the occupying co-owner where he lets part of the property: **Jones v Jones**, supra.

[29] Fifthly, a court of equity will order an enquiry and payment of an occupation rent in the absence of an ouster where it is necessary to do equity between the parties: In **re Pavlou** (a bankrupt) [1993] 1 WLR 1046, 1050 (In **re Pavlou**). Put another way, in declaring an occupation rent chargeable the court is "endeavouring to do broad justice or equity as between co-owners": **Byford v Butler**, supra. This is particularly so where an occupying spouse wishes to be credited for solely amortizing the mortgage debt on the property without being chargeable for his or her sole use of the property. (See, for example, **Suttill** v **Graham** [1977] 1 WLR 819.

[30] So then, a claim may be made against a co-owner in sole occupation, as in the case at bar, in the absence of his exclusion or ouster from the property. Although ouster from the subject property is the typical case, it appears that the overarching endeavour of the court in levying an occupation rent is to do justice between the co-owners.

[31] In fine, the award of an occupation rent is not an arbitrary judicial gesture. An occupation rent only becomes chargeable to adjust the balance between co-owners. Mere occupation has never been a sufficient basis to levy an occupation rent. The balance between co-owners may require adjustment as a result of the unlawful or inequitable actions of one or more co-owners.

> *[32]* Since exclusion from the co-owned property is but one of the several possible transgressions by a co-owner, exclusion cannot be the indispensable conditionality to award an occupation rent. Hence, the co-owner who voluntarily gave up possession may also be eligible to make a claim for an occupation rent: **Beverley Simpson v Anslyn Simpson**, supra. However, if the insufficiency of bare occupation to ground occupation rent is to remain a valid proposition, a co-owner who voluntarily gave up occupation must establish that the equitable or legal balance has been disturbed. He does so by proving, for example, either the existence of a contract to pay rent or that the circumstances require an equitable accounting.

[114] The evidence adduced in this matter has revealed that since the parties' separation in March, 2009, they have had very bitter relations. There has been alleged threats and acts of violence against each other. Both of them identified a confrontation and/ or incident which occurred in October, 2009 and they both agreed that the claimant called the police on the defendant and their daughters, alleging that there were persons breaking into the family home. This was in December, 2009. During the same period, the claimant was engaged in steps to acquire the Andersleigh property, to the ignorance of the defendant.

Furthermore, the parties accepted that the claimant changed the locks, grilled the matrimonial bedroom and the defendant was not given a key. The claimant's father was also now residing in the matrimonial bedroom. The court acknowledges that she gave her reasons for this but even that explanation was urged by acrimonious relations. Both parties also accused the other of engaging in infidelity which both have denied.

[115] In seeking to substantiate his allegation the defendant stated that on April 10, 2010, when he arrived at the family home, at about 2:16 am to drop off their daughter, there was a commotion at the backyard as a neighbour who is a police officer, accosted Gary (Evroy Whyte) who ran from the house through the back door and was trying to jump over the fence, in order to get to his house at Lot 193 Bauxite Crescent. When he asked the claimant '*a dis yuh deh yah a do?'* she replied '*afta yuh nuh deh yah'*.

[116] Mr. Whyte testified that he and the claimant were at the family home at about 2 a.m. one morning when the defendant arrived there, with his two (2) daughters. The claimant's daughters were knocking on the front grill to be let in and the claimant went to let them in. He explained further that while they were coming in through the front grill, he went through the back and was about to go over a zinc fence that separates Lot 190 (family home) and Lot 191, when he had an encounter with a Mr. Johnno. He later said that he went through the back grill to avoid a confrontation.

[117] The court forms the view that this Mr. Johnno is the said neighbour to whom the defendant referred as the police officer who accosted Mr. Whyte whilst he ran from the back door and tried to jump over the fence. It appears the defendant's arrival may very well not have been expected in light of the fact that he resided elsewhere and had no key to the house.

[118] What are the implications of such a state of affairs? Prior to September 2009, the defendant was living at the family home but temporarily resided at other premises due to work obligations. He also gave evidence that he had a key to the house and that evidence is accepted. The claimant maintained that the defendant always had access to the family home and would visit there at all hours. That may be so, as the defendant did admit that he dropped off his daughter after 2 a.m. in the morning. However, even the daughters, whom the claimant asserted had keys, had to wait for her to open the grill. This is on the evidence of Mr. Whyte, who is the claimant's witness.

[119] The state of evident disharmony in the relations between the parties explains why the claimant changed the locks and did not give the defendant a key. The defendant stated that the claimant told him not to return to the family home. However even if she did not, her actions, including moving her father into the matrimonial bedroom, the presence of Mr. Whyte and restricting the defendant's access by changing the locks and not giving him a key, indicates that at the very least, the defendant had been constructively excluded from at least a part of the

family home. I say in part, as he indicated his daughter would let him into the part that she occupied.

[120] In accordance with the third principle outlined in ***Mercedes Blake v Andrew Blake*** supra**,** this court finds that the defendant was ousted and constructively excluded from at least a part of the family home as he was unable to access the section not occupied by his daughter. I am aware that the defendant passed on sometime in 2016. I will therefore award occupational rent between October 2009 when the looks were changed and the time of his passing. Bearing in mind his 62.5% interest in the property and the fact that he was not totally excluded, his estate would be entitled to 30% of what would have been a fair rent for the entire property under the Rent Restriction Act for the period allowed.

ISSUE VII: Whether the defendant is entitled to a portion of the income earned from the flat which was being used by the claimant as a classroom to teach extra lessons at the family home?

[121] Counsel for the claimant submitted that the defendant has not stated how he is grounding his claim for fifty percent (50%) of the income earned by the claimant from teaching at the family home. The defendant gave evidence that the claimant converted the flat into a school without his consent, held classes in the afternoon when she came from school and was keeping all the earnings for herself. The claimant essentially gave conflicting evidence regarding the income she earned from these classes and indicated that she did not keep a receipt book. She claimed that she had only earned about fifty thousand ($50,000.00) but the figures she gave added up to ninety-eight thousand dollars ($98,000.00). She said these were incorrect and sometimes, she basically offered free classes to a small number of students.

[122] S. 2 of the **PROSA** defines “property” as:

> means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other

> chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled

The definition of property includes money, in their possession or not, to which the spouses or either of them is entitled. The defendant is therefore entitled to claim an interest in the claimant's income pursuant to the **PROSA.**

[123] The claimant earned an income from the classes, albeit underdetermined at this point. There may even be arrears. Further, it is the defendant's exclusion from the house and specifically, the matrimonial bedroom, which facilitated the flat being available to be used as a classroom. His exclusion aided the claimant in the carrying on of her business. See: s. 14 (3) (d) (ii) of the **PROSA**. The skill used in teaching the classes was however hers. Using similar reasoning that led to the 30 % occupation rent entitlement awarded to the estate of the defendant, I find his estate would also be entitled to 30% of the claimant's income from any classes held by the claimant in the flat from October 2009 to the time of the defendant's passing in 2016, if they continued until that time.

ISSUE VIII: Whether the court has jurisdiction in these proceedings to order the claimant to:

a. account for and return to the defendant forthwith all documents and/or items, belonging to the defendant and listed at paragraph 3 of the judgment herein, which she has in her possession;

b. compensate the defendant for the destruction of his microscope, tank, repairs to his vehicle and purchase of gas cylinder; and

c. to pay the outstanding amount on the telephone bill.

Documents and Microscope belonging to the defendant

[124] The defendant averred that sometime in October, 2009, whilst he was in Kingston, the claimant went into his rented apartment in Frazerwood, St. Mary and removed a number of personal effects and items, some of which belonged to the Ministry of

Education, including a microscope and which she had refused to return, despite his pleadings. He said he had no access to personal belongings such as his clothing, books, passport, diary and five (5) original certificates of title belonging to his deceased father, Edwin Davis

[125] He exhibited a police report receipt dated October 19, 2009, bearing the time of 6:00 am, as an indication that he had engaged the police in the matter. The wording of the receipt was however illegible and the court was unable to determine what exactly was reported.

[126] The defendant also stated that the claimant admitted to him that she was holding on to his father's titles and other documents and that he would not be getting them. She also promised, he expressed, to personally return the microscope to the Ministry of Education but she had not done so and he stood to incur liability for the loss of these items.

[127] The defendant indicated he further sought the intervention of the May Pen Resident Magistrate's Court. On February 01, 2010, that court ordered the claimant to return his things but she only returned his educational certificates and degrees. He indicated that he ran the risk of being sanctioned by his employers because the claimant has refused to return the ministry's property which includes resource books, and portraits of seven (7) prime ministers and four (4) governors general.

[128] The claimant admitted that on October 19, 2009[1] she went to the defendant's rented house and removed her stove, curtains, pots and nightgown. She however denied that she took any teaching aids or pictures of prime ministers and governors general. She recalled responding to a summons and going to court on February,

[1] It appears there may be an error either in the date on the receipt of the police report, or the date on which the claimant visited the defendant's rented premises given that indications are the report was made as early as 6 a.m. However, nothing turns on the actual date(s).

1, 2010 with “a bundle of papers” which he had left at the family home in a drawer. That bundle contained all the documents she could locate. These included all his academic, professional papers, degrees and an old passport. She denied that the bundle of papers was not left at the family home but was taken by her from his apartment. She also denied that the defendant’s father’s Will and five (5) land titles were in that drawer. She invited the defendant to come to the house and search for his other papers at any time.

[129] Under S. 2 of **PROSA** property means the property to which either or both of the spouses are entitled. It was argued by counsel for the claimant that the portraits, wills, titles and microscope cannot properly be said to be property to which he is entitled as they belong to a third party or parties. That however appears to be too narrow a construction, as the defendant would be entitled to property belonging to a third party which had been unlawfully removed from his custody. He certainly would have a better claim of right to any such property, than the claimant, whether or not she was responsible for removing it. There would also be the possibility of the court acting under its inherent jurisdiction.

[130] The matter can be addressed very shortly. A court of competent jurisdiction, the May Pen Resident Magistrate’s Court has already made an order in relation to the items. The claimant has maintained that she has handed over all she has. No evidence was put before this court that since the order of the Resident’s Magistrate’s Court the defendant obtained proof that the claimant retained certain documents in breach of that order. If proof becomes available that there has been a lack of full compliance with its order the Resident Magistrate’s court has the power to enforce its order. A further order of this court is not required, even if the evidence were available to support it.

Damage to Car

[131] The defendant asserted that on the occasion in October 2009 whilst he was away in Kingston the claimant, went to his apartment in Frazerwood St. Mary and used

the microscope that had been on the front seat of his car, to extensively damage his motorcar. The claimant did admit that she had cut a key to his rented premises and that she had gone there, both without his knowledge. She however denied damaging his car.

[132] There was no direct evidence adduced concerning how the claimant would have gained access to the car. However, the parties were on bad terms. The claimant admitted going to and gaining access to his premises without his knowledge. It is not far-fetched to infer that she managed to get access to the car as well. While it may have been insufficient evidence in a criminal case, on the civil standard I find on the preponderance of probabilities that I am satisfied that the claimant damaged the defendant's car, but the evidence is insufficient for me to conclude that it was a microscope that was used to cause the damage. The cost of the damage can be set off against the claimant's interest in the car.

Damage to Water Tank and Removal of Gas Cylinder

[133] The tank and cylinder constitute property which is subject to the jurisdiction of the **PROSA** and the principles outlined in s. 14 (2) & (3). The defendant contended that the claimant maliciously damaged the water tank which could not be repaired. He also stated that the claimant took away a 100lb gas cylinder which he kept at the family home. The claimant admitted that she broke the pipe on the water tank but it can be fixed and she had made arrangements to have it fixed. At another point, she said it was fixed. The claimant also admitted removing the cylinder but stated that she told the defendant she was going to; she had sold it and bought a book.

[134] On this evidence, it is clear the claimant is to provide an account to the representative of the defendant's estate. Unless the claimant has already fixed or replaced the water tank and replaced the cylinder, the claimant shall be liable to the representative of the defendant's estate for half the monetary value of fixing or replacing the water tank and half the value of the cylinder.

Payment of Telephone Bills

[135] The defendant gave evidence that all the utilities were in his name. He indicated that the February bill alone was ten thousand, two hundred and ninety-one dollars and fifty-five cents ($10, 291.55). He claimed that the claimant incurred telephone bills up to April, 2009, totalling twenty-thousand, eight hundred and sixty-two dollars and forty-six cents ($20,862.46). He did not however provide any documentary evidence substantiating the total sum for which he has made a claim.

[136] Consistent with her overall greater provision of documentary proof, the claimant exhibited a copy of a Cable and Wireless Telephone bill dated February 3, 2009 reflecting the total sum due of ten thousand, two hundred and ninety-one dollars and fifty-five cents ($10,291.55). I accept this as the February bill to which the defendant referred. One of the most frequent numbers reflected on the bill was the defendant's cell phone; (876) 423-1476. The defendant maintained that the claimant constantly called to verbally abuse him, and that at times when he asked her about the unnecessary telephone calls and how the bills were going to be paid, she told him that he would have to pay for it. He further contended that when he terminated the calls, the claimant would call back until he stopped answering his phone. He testified that the claimant had refused to settle the bill and had applied for and installed a new telephone landline in her name at the family home, which she was now paying on time.

[137] The claimant has stated that the sum stated in the disputed telephone bill was incurred for the most part by her daughters and the defendant, a suggestion which he denied. The claimant whilst admitting that she called the defendant and accepting that the defendant would not have been calling his own cell phone, denied that she was the one who used the phone to call him at various hours of the night. She did however admit responsibility for paying some of it. The claimant also admitted that she had obtained her own phone.

[138] It should be borne in mind that during the period covered by this bill, the defendant would still have been travelling between his rented premises and the family home and would therefore not have been consistently present in the family home, to make calls from there. As noted earlier his cell number was also the primary number called.

[139] In the circumstances, I accept that the sum on the bill exhibited was primarily incurred by the claimant. However, having regard to the presence of their younger daughter at the family home periodically, having commenced university in 2008, and the undoubted occasional use of the phone by the defendant when he was there, the court finds a fair estimate is that claimant is responsible for seventy percent (70%) of the total sum due on the bill dated February 3, 2009.

DISPOSITION:

[140] The court accordingly makes the following orders:

a) On the Claim:

(i) The claimant is entitled to thirty-seven point five percent (37.5%) interest and the defendant to sixty-two point five percent (62.5%) interest in property located at Lot 190 Bauxite Crescent in the parish of Clarendon, registered at Volume 1170 Folio 681 of the Register Book of Titles;

(ii) The claimant and the defendant each have an equal share in the 1997 Toyota Caldina motor car;

(iii) Valuations of the family home and the 1997 Toyota Caldina motorcar, if it has not already been disposed of, are to be done by a valuator agreed between the claimant and the representative of the defendant's estate and the costs are to be borne equally. If there is no agreement within thirty-five (35) days of this order, then the said property shall be valued by D.C. Tavares and Finson Realty Company Ltd;

(iv) The representative of the defendant's estate is given the first option to purchase the claimant's interest in the family home at the value outlined in the Valuation Report. The representative is to exercise this option by paying a ten percent (10%) deposit in respect of the family home and signing an agreement for sale within ninety (90) days of the date of the orders herein;

(v) If the representative of the defendant's estate fails to exercise the option to purchase the claimant's interest in the family home, within the time stipulated, the claimant shall have the option to purchase the defendant's interest. The claimant is to exercise this option by paying a ten percent (10%) deposit in respect of the family home and signing an agreement for sale within ninety (90) days of the last day the representative of the defendant's estate had to exercise the option on behalf of the estate. In the event that neither the representative of the defendant's estate nor the claimant exercises or wishes to exercise the options open to them, the family home shall be sold on the open market and the net proceeds of sale divided according to the parties' respective entitlements as declared;

(vi) Chambers, Bunny & Steer, Attorneys-at-Law, are to have carriage of sale in respect of the family home;

(vii) Attorneys' costs incurred in the transfer of the family home are to be borne equally between the parties;

(viii) In the event that either party fails and/ or refuses to sign the agreement(s) for sale and/ or instrument(s) of transfer within a reasonable time after having been requested to do so by the attorney who has carriage of sale, the Registrar of this court is authorized to sign for and on behalf of the defaulting party;

(ix) In the event that the 1997 Toyota Caldina motorcar has already been sold or otherwise disposed of the representative of the defendant's estate party who disposed of the vehicle should account to the claimant for her half-share interest, subject to the deduction for the cost of the damage to the Caldina caused by the claimant. If the Caldina has already been disposed of orders (x) and (xi) will automatically lapse.

(x) In the event the 1997 Toyota Caldina motorcar has not already been sold or otherwise disposed of, the representative of the defendant's estate is given the first option to purchase the claimant's fifty percent (50%) interest in the 1997 Toyota Caldina motorcar to be exercised by the paying of the fifty percent (50%) purchase price less the deduction for the cost of the damage to the Caldina caused by the claimant within sixty (60) days of the date of this order;

(xi) If the representative of the defendant's estate fails to exercise his option to purchase the 1997 Toyota Caldina, it shall be sold on the open market and the net proceeds of sale divided according to the parties' respective entitlement as declared, subject to the deduction for the cost of the damage to the Caldina caused by the claimant.

b) On the Counter Claim:

(i) The defendant's claim for fifty percent (50%) interest in property located at Lot 3 Andersleigh Close in the parish of Clarendon, registered at Volume 1132 Folio 186 of the Register Book of Titles is refused;

(ii) The claimant is to pay to the representative of the defendant's estate occupational rent at a rate of thirty percent (30%) of what would be a fair rent under the **Rent Restriction Act,** for the period October, 2009 to date of death of the defendant**;**

(iii) The claimant is to account to the representative of the defendant's estate by December 7, 2018, for all income earned from the classes held at the family home between the period September, 2010 to September 4, 2018, and to pay to the representative of the defendant's estate thirty percent (30%) of the amount so accounted for;

(iv) The claimant is to account to the representative of the defendant's estate concerning the water tank and the gas cylinder by December 7, 2018. Unless the claimant has already fixed or replaced the water tank and replaced the cylinder, the claimant shall be liable to the representative of the defendant's estate for half the monetary value of fixing or replacing the water tank and half the value of the cylinder;

(v) The claimant is responsible to the defendant's estate for seventy percent (70%) of the total sum on the Cable and Wireless telephone bill due February 3, 2009.

(vi) The defendant's claim for the return of the portraits, wills, and duplicate certificate of titles is refused, there already being a relevant order made in the Parish Court (formerly Resident Magistrate's Court) for the parish of Clarendon holden at May Pen. The claim for the return of the microscope is refused.

(vii) In respect of the defendant's claim for the repair of the Toyota Caldina motorcar, the claimant is responsible to account to the representative of the defendant for the cost of the damage occasioned, in accordance with order number (x) made in respect of the claim.

c) Each party shall bear their own costs regarding the claim and counter-claim;

d) Counsel for the claimant shall file and serve this order.