



[2018] JMSC Civ.68

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015HCV05407**

<b>BETWEEN</b>	<b>OLGA DUNKLEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>OSWALD JAMES DUNKLEY</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mrs. Tamara Francis Riley-Dunn instructed by Nelson-Brown, Guy and Francis for  
Claimant**

**Mr. George Clue for Defendant**

**April 26<sup>th</sup>, 2018**

**Matrimonial home – Consent Order filed that parties are joint tenants of subject property – order that property to sold and net proceeds of sale be distributed between parties equally – order that either party can elect to purchase property – neither party electing to purchase property – which party is to have first option to purchase property**

**CORAM: MORRISON, J**

**[1]** The parties at bar were married on the 26<sup>th</sup> day of April, 1980 and the marriage was dissolved on the 9<sup>th</sup> day of March, 2012. It appears that though the marriage produced two children, the Defendant, for the most part, certainly up to 2005 spent most of his conjugal time in the Grand Cayman Island where he worked as a Carpenter and Construction worker. The parties who shared a joint account, had initially lived together on the land in question until they eventually purchased

it from their landlord on April 26, 2007. The intermediary facts are the subject of a dispute, however, the unrefuted assertion of the Claimant as contained in her affidavit of 24<sup>th</sup> August, 2016 is that, "In May, 2008 the Defendant told me that he fell in love with someone else and no longer wanted to be a part of the marriage..." Further, she depones, "For more than five (5) years, that is, since April 2008, I never heard from the Defendant." Lastly, the Claimant in endeavouring to show that this Defendant had abandoned the matrimonial home, a fact again unrefuted by him, says at paragraph 30 of her affidavit: "That I know that the Defendant remarried and lives with his wife in the Cayman Islands, in fact when he petitioned for marriage (sic) to be dissolved he stated his home address back then to be in Cayman." She then attached the proof of her claim to the above.

[2] The Claimant then expressed her willingness "to rebuild the home and buy 50% (sic) share in the land held by the Defendant "as she cannot afford to buy along with her daughter, something on the open market and thus prays that she be granted the first option to purchase the said property.

[3] I shall here point out that when the matter came before me on July 28, 2016, the parties being duly represented by counsel, the Formal Order filed on August 16, 2016 reads: ... "By consent it is thereby Ordered:

1. It is hereby declared that the Claimant and the Defendant are joint tenants of **ALL THAT** parcel of unregistered land part of land known as Frankfield located in Waterworks in the parish of Clarendon measuring by survey 2571.52 square meters of the shape dimensions and buttings as appears by the Plan thereof hereunto attached bearing examination number 322163 prepared by Noel K. Brown, Commissioned Land Surveyor from a survey made by him on February 28, 2007 (hereinafter referred to as "the said property").
2. It is ordered that the said property shall be sold and the net proceeds thereof be distributed between the Claimant and the Defendant in equal shares.
3. That the property shall be valued by an appraiser agreed upon between the Claimant and the Defendant, and where an agreement cannot be

reached between the parties within fifteen (15) days of the date of this Order that D. C Tavares Finson Realty Company be retained and the cost for procuring the valuation report shall be shared equally between the Claimant and the Defendant.

4. That the party who is purchasing the other's interest must within thirty (30) days after electing to purchase the said property pay ten per cent (10%) of the market value of the said property to the Attorneys having carriage of sale.
  5. That the Claimant's Attorneys-at-Law shall be appointed as the Attorneys having carriage of sale.
  6. That should either party refuse and/or fail to exercise their option to purchase within the time specified, then it be ordered by this Honourable Court that the said property be offered for sale on the open market and the net proceeds of sale be divided equally between the parties.
  7. Further Affidavits, if any, to be filed and exchanged by August 9, 2016.
  8. Written submissions and authorities to be filed and exchanged by August 12, 2016.
  9. Trial adjourned part heard to August 16, 2016 at 10:00 am for one day.
  10. This Order is to be prepared, filed and served by the Claimant's Attorneys-at-Law."
- [4]** Again it is to be pointed out that the basis of the July 28, 2016 consent order of the Court are the very terms of the Skeleton Submissions on behalf of the Claimant filed on July 8, 2016 with paragraph 4 thereof being reserved for trial, that is, "That the Claimant be given the first option to purchase the said property within (30) days of receiving the valuation report, failing which the Defendant may elect to purchase the said property within sixty (60) days of receiving the valuation report. "
- [5]** The cited extract as noted above formed the basis of the trial which commenced on December 2, 2016 and eliding supervening events the parties agree to rely on their respective written submissions on the matter: The ultimate question being, which party is to have the first option to purchase the subject property?

**[6]** Mrs. Tamara Francis Riley-Duncan's submissions on behalf of the Claimant, is that her client be given the first option to purchase the property. She has, in this connection placed reliance upon:-

- a. The Property (Right of Spouses) Act (PROSA);
- b. The Partitions Act;
- c. Trust of Land and Appointment of Trustees Act 1996 (UK); and
- d. Mitchell v Leach et al 2015 ONSC 6041

**[7]** Mr. George Clue on behalf of the Defendant is of the contrary view. He cites the following authorities in support of his client being given the first option to purchase the property even as he refuted the authorities of the Claimant. He submitted that the Partition Act is inapplicable in this dispute. He relied on the following authorities:-

- a. Gerald Belnavis v Laverne Belnavis (2013) JMSC Civ. 39, and
- b. Vilma Wilson Malcolm v Junior Washington Malcolm (2013) JMSC Civ. 161

**[8]** In resolving the issue I think that a useful starting point is to have regard to section 13 of PROSA: "A spouse shall be entitled to apply to the Court for a division of property-

- a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
- b) ...
- c) ...
- d) ...

**[9]** Further it is my view that Section 14(1) of PROSA, has to be taken into account. It reads that "where under section 13 a spouse applies to the Court for a division of property the Court may", it states under section 14(1):

a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or

b) ...,

or, where the circumstances so warrant, take action under paragraphs (a) and (b)

**[10]** Let me now turn to sections 6 and 7, ..... section 6 deals with the entitlement to the family home, to wit, each spouse shall be entitled to one-half share of the family home, inter marriage or the termination of cohabitation. Section 7 grants to the Court the power to vary the equal share rule under section 6.

**[11]** I am also convinced that a court in considering the division of matrimonial property must hearken to its “Power to make other Orders” as granted by Section 23(1). It reads-

“Without prejudice to any other provisions of this Act, the Court may make any of the following orders, (by way of example) –

a) for the sale of property or part thereof and for the division, vesting or settlement of the proceeds thereof:

b) ...;

c) ...;

d) ...;

e) for the partition or vesting of any property:

f) ...;

g) ...;

h) ...;

i) ...;

j) for the transfer of land;

k) ...;

l) ...;

m) ...;

n) ...;

o) ...;

3) The court may make an order granting to either spouse for such period and on such terms and conditions as it thinks fit, the right to personally occupy the family home or any other premises forming part of the property belonging to either or both spouse

4) The person in whose favour an order is made under subsection (3) shall be entitled, to the exclusion of the other spouse, to personally occupy the family house or other premises to which the order relates

5) ...”

**[12]** It is therefore clear to me that the partitions Act is relevant to the resolution of this dispute, the Defendant’s contrary view notwithstanding. For, according to section 3 of the Particulars Act, “In a suit of partition, where, if this act had not been passed, a decree of partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or by the number of parties interested or presumptively interested therein... a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested that a division of the property between them or among them, the court may, if it thinks fit on the request of any of the parties interested and

notwithstanding the dissent or disability of any others of them, direct a of sale of the property accordingly, and may give all necessary or proper consequential orders.” (Emphasis mine)

- [13] It will serve well to note here that for the purposes of the Partitions Act, according to section 2(2), an action for partition shall include an action for sale and distribution of the proceeds. Further, and relevantly, in such an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.
- [14] Thus, it is fair to say that the scheme of the Act is one which seeks to facilitate the sale and purchase of the property without the property having to be partitioned if the Court so decrees.
- [15] On that observation it again, serves to note that, “where any decree shall be made in any partition suit for a sale or partition of any lands , it shall be lawful for the Court to declare that any party to the suit ... is a trustee of such lands ... and thereupon it shall be lawful for the Court to make such orders as to such trustees and lands as it might make concerning any other trustees or lands held in trust.”
- [16] I agree with the Claimant that though the Partitions Act gives no discretion to the Court as to whether or not the property should be sold at once it is, in spite of this, manifestly applicable here. Accordingly, the contention of the Claimant that the Partition Act does not apply is misapprehended. However, given the terms of reference, the parties having consented, the sole issue for this court is to determine the conditions to be applied to the sale.
- [17] In this respect, the principal law PROSA, is reserved relative thereto. On the other hand, as noted earlier, the expression “may, if it thinks fit” as used in the Partitions Act, unreservedly allows for the application of the Court’s discretion as to what factors should guide its deliberation.

[18] In the United Kingdom where the parties cannot agree as to what is to happen to the property either of them can apply to the court to determine what is to be done. Under their Trusts of Land and Appointment of Trustees Act, 1996 where property is owned by more than one party a trust of land is created. This is stated to mean that the owners are trustees, and hold for each other as beneficiaries of the property. This Act empowers the Court to stand in the stead of the owners and deal with the property as it seems fit according to the dictates of the Act according to section 15. The factors as itemised therein are:-

“a) the intentions of the person or persons (if any) who created the trust;

b) the purposes for which the property subject to the trust is held;

the welfare of any minor who occupies or might reasonably be expected to land subject to the trust as his home; and

c) ...;

2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees ... the matters to which the court is to have regards to also include the circumstances and wishes of each of the beneficiaries who is ... entitled to occupy the land ...”

[19] The language of our Partitions Act and that of the United Kingdom statute though they are not exactly the same in all respects, nevertheless can be construed as conducing to the same end. Consequently, I shall be adopting and applying the cited consideration to the case at hand.

[20] In **Mortgage Corpn v Shaire and others, Mortgage Corpn v Lewis Silkin** (A Firm) and another [2001] Ch. 743 and reading from the head note, the defendant and one F lived together as husband and wife and each had a beneficial interest in their home. The property was the subject of a mortgage executed by the defendant and F. Following F's death it emerged that he had forged the defendant's signature on a number of documents including a charge on the property in favour of the Claimant bank. It was accepted that the charge was valid as against F's estate. Repayments of the charge were not met and the



Claimant applied for order for possession and sale of the defendant's home pursuant to section 14(1) of the Trusts of Land and Appointment of Trustees Act 1996. The defendant opposed the application on the ground that, since section 15 of the Act required the court to take into account factors other than just the interest of a charge when deciding whether to make an order under the section, the claimant's desire for an order for sale should not necessarily prevail over her wish to remain in the house among other things.

- [21] It was held in this highly deliberative judgment that where an application was made pursuant to section 14(1) the court was required to have regard to the matters in both section 15(1) and section 15(3); that the interest of the charge was just one of the factors to be taken into account and there was no suggestion that it was to be given any more importance than the interests of the family residing in the property; that the weight to be given to each factor in particular case was a matter for the Court's discretion.
- [22] I have cited this authority for the proposition that each factor which falls for consideration has to be looked at having regard to the particular case at hand and that the weight to be attached to each factor in a particular case was a matter for the court's discretion. In other words, the principle ought not to be hamstrung by one which favours unvarying sameness of kind and degree in its application.
- [23] If further guidance is needed it would suffice to look to the jurisdiction of Canada, a case supplied by the Claimant, for its impactful assistance.
- [24] In **Mitchell v Leach et al**, 2015 ONSC 6041, in the Ontario Superior Court of Justice the Plaintiff sought, among other Orders, under the Partitions Act, an order directing that the matrimonial home be listed for sale with a certain realty company at a list price to be by the selected realtor, further, if the order for sale is granted, an order that 50% of the proceeds of the sale be paid out to the Plaintiff, and the balance of the proceeds be paid into Court to credit of this suit.

**[25]** I shall here state the blunt fact matrix concerning the parties matrimonial home circumstances: The Plaintiff was the owner of the matrimonial home prior to this third marriage; the parties separated the Plaintiff having left the matrimonial home after the date of separation; the Defendant resided in the matrimonial home since the date of separation; the Defendants permanently disabled daughter resided with her in a part of the matrimonial home sometime before the parties separation; the parties marriage was subject to a marriage contract. Subsequently, the title to the matrimonial home changed hands in it becoming the joint property of them both. After the separation the Plaintiff severed the joint tenancy. There was to be a second marriage contract with one of the terms being an exclusion clause under the rubric “waiver of interest / rights to share in.” There was another clause as to the matrimonial home that the home is to be shared equally. There were issues as to which contract should supercede the other, among other things.

**[26]** It was the considered view of Nasaih, J that the Partition Act applied in agreeing with the motion filed by the Plaintiff and rejecting that of the Defendant that it did not. I shall here cite, in brief, excerpts of the Courts opinion. First, “if contract two is found to be the valid and governing contract [then]... the Defendants Leach’s title and interest in the matrimonial home and other joint property may be confirmed.” Accordingly, by way of the above, the court continued, “she may well be able to borrow funds to purchase the matrimonial home where she says she wishes and needs to stay.

**[27]** As it stands, if the sale is ordered now, she would not be able to exercise her right to buy the home ... She would be unfairly prevented from enjoying that right and she would be left solely with a claim for money paid into court on the sale. “The husband’s motion failed for the considered reasons. Some of the considerations of the Section 15 (1) (UK) provision include namely-

- a) the intentions of the persons who created the trust

- b) the purpose for which the subject-property is to be hold
- c) the welfare of any minor who occupies or might reasonably be expected to occupy and land subject to the trust as his home; and,
- d) the interest of any secured creditors or any beneficiary.

**[28]** However, under S. 15(e) the court is to have regard to all the circumstances and the wishes of each of the beneficiaries who is entitled to occupy the land.

**[29]** In the instant case the parties separated in May 2005. After separation the Claimant remained in sole and exclusive possession of the property along with the children of the marriage.

**[30]** The Claimant raised the children there while the Defendant in flight from the matrimonial home festooned his established residence in the Grand Cayman Island.

**[31]** The Claimant meanwhile has advanced in years. Her age no doubt may well not lend itself to any enhanced financial purchasing power. She has no alternative or alternate home. Though of limited resources, the Claimant has a well-grounded and sanguine determination that through her age -matured daughter she will be able to purchase the Defendants one-half interest in the matrimonial property. To the other end of the scale, the Defendant has failed to evoke any candid readiness on his part over and above that of the Claimant's to be able to purchase the said property.

**[32]** Accordingly, I am prepared for all the reasons advanced, the facts and the law, to accede to the Claimant's application that she be given the first option to purchase the said property on the terms as is set out in her application within (6) months of the date hereof failing which the Defendant/Respondent shall have the option to purchase within (6) months following the expiration of the Claimant's option. If neither party exercises their option to purchase within the time limited then the

property shall be sold on the open market. The Claimant's attorneys-at-law shall have the carriage of sale.

**[33]** There shall be no order as to costs.