



[2016] JMSC Civ. 190

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

**CIVIL DIVISION**

**CLAIM NO. 2014 HCV 05052**

<b>BETWEEN</b>	<b>CORDELLA EDWARDS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DERRICK EDWARDS</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Ms. Olivia Derrett instructed by Oswest Senior-Smith & Co. for the Claimant

Mrs. Tanya L. Walters Powell for the Defendant

Heard on October 11, 2016 and November 7, 2016

**Matrimonial Property - Parties Separated- Division of Family Home - Sections 6, 7, 12, 13, 14 of the Property (Rights of Spouses) Act - Variation of Equal Share Rule - Pre-separation and Post - Separation Mortgage Payments by one Party - Financial Provision - Sections 4, 5, 8, 14 of the Maintenance Act - Child Maintenance - Spousal Maintenance.**

**CORAM: JACKSON-HAISLEY, J. (AG.)**

[1] A marriage which lasted over twenty years has ended. Although the parties still reside at the same address, Mrs. Cordella Edwards (the Claimant) avers that she has been separated from her husband Mr. Derrick Edwards (the Defendant) since November 2013. Consequent upon this separation the Claimant by way of a Fixed Date Claim Form filed on October 24, 2014 seeks the orders set out below:

1. A Declaration that the Claimant is entitled to seventy-five percent (75%) and the Defendant twenty-five percent (25%) interest in ALL THAT parcel of land part of CHARLTON in the parish of ST CATHERINE being the lot numbered NINE on the plan of part of Charlton aforesaid deposited in the Office of Titles on the 17<sup>th</sup> day of January, 1978 of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being the land comprised in Certificate of Title registered at Volume 1328 Folio 943 of the Register Book of Titles.
2. That the property be valued by a reputable valuator to be agreed by the parties within twenty-eight (28) days of this Order. The cost of the said valuation be borne by the parties according to the shares declared.
3. That the Claimant should notify the Defendant's attorney-at-law that she intends to exercise the option to purchase the Defendant's interest in the property within fourteen (14) days of the date of the receipt of the valuation report.
4. If the Claimant chooses not to exercise the option to purchase, the said property will be sold by private treaty or public auction with the valuation being the reserve price. The Claimant's attorney-at-law shall have carriage of sale of the said property in any event.
5. That upon the failure of any of the parties to execute any of the documents relevant to effect a registrable transfer of the said property then the Registrar of the Supreme Court be empowered to sign on their behalf.
6. That all costs attendant to the transfer fall under the Property (Rights of Spouses) Act.
7. A Declaration that the Claimant is entitled to fifty percent (50%) interest in motor vehicle bearing registration number GC 7198.
8. That the Defendant pays the sum of \$35,000.00 per month to the Claimant for the maintenance of the minor child D. E. born on the 26<sup>th</sup> November, 2005 plus half education and half medical expenses.
9. That the Defendant pays half educational expenses and half medical expenses for the child C. E. born on the 13<sup>th</sup> day of July 1995 until he attains the age of 23 years.
10. That the Defendant pay the sum of \$20,000.00 per month to the Claimant for maintenance.
11. That the Claimant do have such further or other relief as the Honourable Court may deem fit.
12. Costs to the Claimant.

13. Liberty to apply.

**[2]** At the hearing of the matter on October 11, 2016 Counsel for the Claimant asked the Court, in the exercise of its inherent jurisdiction, to consider granting, in the alternative, the following orders:

- a. A Declaration that the Claimant is entitled to fifty percent (50%) interest and the Defendant a fifty percent (50%) interest in the family home.
- b. That the following sums be deducted from the Defendant's fifty percent (50%) interest or his net proceeds of sale:
  - i. The mortgage payments made for and on behalf of the Defendant by the Claimant since June 2010 to present and continuing;
  - ii. The maintenance payments due and outstanding to the Claimant pursuant to the Orders of this Honourable Court dated February 9, 2016; and
  - iii. The National Water Commission (NWC) bill due and outstanding for the said property.

**[3]** The Defendant, on the other hand is asking that with respect to the property in question, the court declare that both the Claimant and the Defendant have an equal share and find that the Claimant is only entitled to the mortgage payments made for and on behalf of the Defendant since the date of separation. In respect of child maintenance the Defendant is asking the court to order only that he pay \$10,000.00 per month for the younger child. In respect of spousal maintenance he is asking that the court make no order for spousal maintenance at this time.

**[4]** The facts which govern this application are set out in the affidavits filed by the parties. The Claimant first filed an affidavit in support of her Fixed Date Claim Form on October 24, 2014 and the Defendant responded by filing an affidavit on June 2, 2015. The Claimant in turn responded by way of an affidavit filed November 10, 2015 and Defendant's response is further contained in an affidavit filed December 10, 2015. Two further affidavits were filed by the Claimant on

February 8, 2016 and on June 24, 2016. Other facts were given by way of oral testimony on the date set for trial.

## **FACTS**

- [5] This separation followed a marriage which lasted from June 26, 1993 to November 2013. At the time of the marriage the Claimant was a store clerk but is now a teacher, having pursued and completed further education during the life of the marriage. The Defendant was a process operator but is now a sales representative but at some other time during the marriage had a job as an accountant. The marriage produced two children, the first is C. E. born on July 13, 1995 and the second is D. E., born on November 26, 2005. The parties purchased the property in question described as part of Charlton in the parish of St. Catherine and were registered as joint tenants of that property on October 17, 2000 and this is where they resided. It was agreed that they would each pay their individual mortgages and equally take care of the household and child care expenses.
- [6] In cross-examination further evidence was given by the Claimant that at first it was Mr. Edwards alone who held a mortgage on the property and it was later that Mrs. Edwards obtained a mortgage. It was agreed that during the marriage a second property was purchased also in their joint names but which was subsequently sold. For ease of reference this property will be referred to as “the second property” throughout this judgment.
- [7] According to the Claimant, initially the Defendant contributed to the mortgage and paid the light bill but since June 2010 she has been paying both her individual mortgage and that of the Defendant because he has refused to pay his. Further, she has had to assume 98% of the expenses of the household including the maintenance of the children. In cross-examination she gave further evidence that when Mr. Edwards’ mortgage fell into arrears she paid a total of \$23,000.00 for mortgage each month so as to cover her mortgage payments and his arrears and mortgage payments but now she pays approximately \$15,700.00

monthly which represents \$10,000.00 for her mortgage payment and the balance for Mr. Edwards' mortgage payment. She had also incurred expense in fencing the property without any financial assistance from the Defendant.

**[8]** There is an outstanding NWC bill which the Defendant had promised to pay but has not. The Claimant spoke about her non-financial contributions as being household chores and taking care of the children. During the marriage the Defendant, she said, used his money to purchase motor vehicles. They jointly purchased the second property, a parcel of land in Charlton but the Defendant sold this and did not account for the proceeds of sale nor did he share such proceeds with her.

**[9]** She indicated that the overall expenses of the children have been covered by her except that the Defendant provides Derran with lunch money and sometimes provides for his evening meals. Codrick is attending the Caribbean Maritime Institute and the Defendant, she alleged, has not even contributed to one-third of the children's overall expenses. Her monthly and yearly expenses are outlined in her affidavit. No significant challenge was mounted to this. She pointed out that during the earlier years of marriage when she was studying, she was also working and that the Defendant did not help her financially. She paid her own tuition and he would give her a sum towards her lunch money. She exhibited copies of her pay advices and those of the Defendant and pointed out that her take home salary after deductions is less than \$20,000.00. An examination of her pay advices during the year 2016 reflected a net figure of between \$24,584.25 and \$25,962.14.

**[10]** The Claimant is of the view that because of the Defendant's breach of the agreement to pay his mortgage and to assist equally with the expenses of the household and children he is not entitled to an equal share in the property.

**[11]** The Defendant admitted that the Claimant has been paying both mortgages since 2010 but denied that she pays 98% of the household expenses as he assists where he can, given his current financial problems. He alleged that when

his mortgage went into arrears they both discussed how they would go about dealing with that and the Claimant arranged to pay the arrears and to pay the mortgage in its entirety. He however would pay only by virtue of his NHT refunds which would go directly to the mortgage. Further, that for the first seventeen years of the marriage he carried 70% of the household expenses and at times 100%. This was because during that time the Claimant was furthering her education and he at that time paid all the bills and assisted her. He admitted to the outstanding NWC bill and agreed to cover it. In respect of the motor vehicle he said the Claimant has never contributed to the purchase of his motor vehicles.

**[12]** In respect of the second property he said the land was purchased from a loan from the St Catherine Cooperative Credit Union Limited so when the land was sold the Credit Union had to be paid. When asked in cross-examination about the second property and how much it was sold for, he indicated that he could not recall. He averred that she is not entitled to more than a 50% share in the property in question as her claim is based on the past five years of marriage and she has forgotten about the first eighteen years. During the first 18 years he had held a position as an accountant and dealt with the major expenses of their lives. He reiterates that he has gone through a very difficult financial rut and has exhibited copies of documents evidencing loans with various financial institutions. He also exhibited his pay advices.

**[13]** In cross-examination he was asked about his monthly payments to various financial institutions. He answered that in relation to National Commercial Bank his monthly payment is \$25,000.00 and in relation to First Union his monthly payment is in the region of \$35,000.00. He doesn't recall the monthly payment to New Era Finance. When asked if most of his salary went to the payment of his loans he replied in the affirmative. Evidence was elicited in cross-examination that he has taken out at least three loans since the start of this year. His net pay varies from a low of \$75,000.00 to a high of \$205,612.04. Currently he has three outstanding loans and his total monthly payment is \$90,000.00 which at times he

says he is unable to cover. In re-examination he explained that the loans he borrowed resulted from being unemployed at one point in time.

- [14]** On the 9<sup>th</sup> February, 2016 the Claimant obtained an interim Order for maintenance from this court. The Order required the Defendant to pay to the Claimant \$40,000.00 per month commencing on February 29, 2016 until the determination of the matter. The Claimant avers that since the date of that order she has only received a total of \$40,000.00. This is despite the fact that the Defendant has borrowed several loans since that time. As a result of his failure to pay the Claimant has also been borrowing to cover her everyday expenses.
- [15]** I have considered the points in dispute and below I have set out some of my findings. On a balance of probabilities I find as a fact that for the first eighteen years of marriage the Defendant bore the majority of their expenses. This was no doubt because the Claimant for some time was a store clerk and was also engaged in furthering her education during the marriage. Although the Claimant has indicated that she was contributing to the household during the time she was furthering her education, when I consider the fact that she was a store clerk at the time and the Defendant was an accountant I find that her contribution must have been minimal. I accept that the Defendant must have provided her with some financial assistance during this time and find as a fact that for the first eighteen years of marriage the Defendant was the main bread winner of the family and bore most of the financial expenses.
- [16]** The Claimant has asserted that the Defendant has refused to pay the mortgage but I bear in mind that he explained that he has not paid it because of financial difficulties. I also take into account the undisputed evidence that for the first few years after purchasing the property he was the only one who paid the mortgage, that for the first eighteen years he made the necessary mortgage payments and assumed most of the financial responsibilities. In light of that I am more inclined to believe that his failure to pay now is due to financial difficulties including the fact that he was unemployed at some point.

[17] The Claimant has alleged that she is responsible for 98% percent of the expenses but in cross-examination she admitted that he provides lunch money for Derran as well as assists with his evening meals and other expenses. As such I do not accept that the Claimant has borne 98% of the household expenses. I find as a fact that the Claimant's current net pay after deductions ranges between \$24,584.25 and \$25,962.14. I find that the Defendant's net pay fluctuates from a low of \$70,000.00 to a high of \$205,000.00 and that every month he receives an additional sum of \$30,000.00 for his travelling expenses. I accept that his net pay far exceeds that of the Claimant. However I also find that he has monthly payments on loans in the region of \$90,000.00 which significantly reduce his available income.

[18] In respect of the second property I accept that the Defendant alone benefited from the proceeds of sale and that up to now he has not accounted for that.

#### **CLAIMANT'S SUBMISSIONS**

[19] Although not expressly stated in the Fixed Date Claim Form, the Claimant grounded her application under the Property (Rights of Spouses) Act, 2004 (hereinafter referred to as PROSA) and submitted that the property where the parties reside is the family home. The Claimant, it was submitted, has locus standi based on the fact that the parties separated in November 2013 and the application was filed on October 24, 2004 which is within the time prescribed by section 13(1)(c). Counsel submitted further that the Claimant is entitled to either a 75% interest in the family home or alternatively a 50% interest and compensation for the sums she paid towards the Defendant's mortgage and also a deduction from the Defendant's share to cover the NWC bill and the outstanding maintenance payments.

[20] Counsel submitted firstly that the Claimant is entitled to a 75% interest in the family home because of the fact that the Defendant sold the second property that was purchased by both of them and yet neither the Claimant nor the household benefited from this. Further, that the fact that she has made no claim in respect

of this second property be taken into account. She relied on the case of **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ. 47 and submitted that although the court may not be minded to vary the equal share principle on the basis of contributions, the court can vary it if a section 7 factor exists. She submitted further that the fact of the Defendant alone benefitting from the sale of this second property to the detriment of the Claimant constitutes the extraordinary circumstance required to invoke section 7. Counsel submitted that the Claimant has had to bear the majority of the household expenses and has solely renovated the property thereby increasing its value. Based on these factors the Claimant is entitled to a 75% interest.

- [21] In respect of her alternative claim of a 50% share she also relied on the **Stewart's** case and submitted that the court in that case adopted a practical method of compensating the party who had borne a property related expense. In the **Stewart's** case reliance was placed on the authority **Forrest v Forrest** (1995) 32 JLR 128, a case decided before the passage of PROSA, where Carey JA stated that in the redemption of the mortgage the Respondent must be regarded as having made a loan to the appellant to the extent of the proportion of his interest in the property. That amount is a debt recoverable on the order for accounts to be taken, made by the judge.
- [22] She submitted also that the fact that the Claimant paid the mortgage solely for a particular period cannot take away from the fact that she is entitled to a 50% interest and the Defendant is entitled to 50% interest in the property as at the time of acquisition. Further, as a consequence of the Claimant solely paying the Defendant's share of the mortgage for a period of time, the Claimant would have made a loan and is continuing to make a loan to the Defendant which she can recover as a debt from the Defendant's proportion.
- [23] In respect of the claim for maintenance she relied on the unreported decision of **Maragh (Gloria) v Maragh (Eric)** Claim No. 2005 FD 2343 where the court awarded a figure on the basis that the Respondent was able to have financed

that amount per month prior to the application for maintenance. She suggested that an analysis of the matter should entail a consideration of the principles enshrined in the Maintenance Act which includes the length of time of the marriage or cohabitation. The marriage, she submitted, was not of short duration and the Defendant at all times took home a higher net pay than the Claimant. She submitted also that the Claimant has had to bear the majority of the household expenses including the expenses for herself and the children.

- [24] Counsel asked the court to consider the fact that the Defendant has taken out several loans and so his earnings must have been able to facilitate the monthly payments. The court was also asked to take into account the fact that both Claimant and Defendant are currently employed and there is no likelihood of an increase in earnings portrayed in the affidavit evidence of either. She also asked the court to find that the Claimant is incapable of meeting her reasonable needs in whole or in part and the needs of the two children. Further, that the Defendant is in a financial position to provide such maintenance and therefore should be ordered to do so.

#### **DEFENDANT'S SUBMISSIONS**

- [25] The Defendant relied on the case of **Margaret Gardner v Rivington Gardner** 2012 JMSC Civ. 54 where Edwards J. noted that Section 6 of PROSA requires the court to make a determination firstly as to whether the property in question was indeed family home and upon that question being answered in the affirmative, each spouse, subject to the named sections, would be entitled to half share of the beneficial interest in the family home.
- [26] Reliance was also placed on **Stack v Dowden** [2007] 2 WLR 831 in pointing out that in order to vary the equal share rule, the onus of proof lay upon any party seeking to establish that equity should not follow the law. In light of that, Counsel for the Defendant submitted that the Claimant is only entitled to the mortgage payments made for and on behalf of the Defendant since the date of separation

and not before as this was the agreement between the parties until the Defendant was in a better financial position.

[27] In respect of maintenance, Counsel for the Defendant conceded that the parties both have an obligation to maintain the minor child according to their respective capacities and that the sum of \$10,000.00 is what the Defendant should pay based on his current salary and expenses taking into account the debts that he has outstanding to various financial institutions.

[28] In respect of the claim for spousal maintenance Counsel again relied on the case of **Gardner v Gardner** (supra) and highlighted the requirements under the Maintenance Act of their being an obligation by either spouse to maintain the other, but only if it is necessary in order to meet the reasonable needs of the spouse. The Defendant's position is that no order should be made for spousal maintenance at this time.

#### **ANALYSIS OF THE LAW AND EVIDENCE**

[29] The court has concurrent jurisdiction to hear an application under PROSA and at the same time consider an application for maintenance under section 3(2) of the Maintenance Act.

#### **APPLICATION UNDER PROSA**

With the advent of PROSA emerged the principle of equal share in the family home. Approximately twelve years and many judicial decisions later, the principle seems to be fairly well settled, that where the family home is concerned there is a presumption that each party to the marriage is entitled to an equal share. Many decisions have elucidated the concept of equal share which is also referred to as the 50/50 rule. I am particularly attracted to the dictum of McDonald-Bishop J, in **Donna Marie Graham v Hugh Anthony Graham** [2006] HCV 03158 (unreported) in which she pointed out that the equal share rule is derived from the now well established view that marriage is a partnership of equals.

[30] There is no dispute in this case that the property where the parties reside during the marriage is the “family home”. Under the interpretation section of PROSA the “family home” is said to mean:

*“the dwelling house that is wholly owned by either or both spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit”*

[31] This property was purchased in 2000 and this is where the parties reside even now. There is no evidence of any other property being the principal residence so not only do I find that it is the principal place of residence but also the only place of residence. I accept that this property is in fact the family home.

[32] For the court to consider such an application pursuant to section 13(2) of PROSA the application must be made within twelve months of the grant of a decree of dissolution of marriage or the termination of cohabitation or the grant of a decree of nullity of marriage or upon separation where there is no likelihood of reconciliation. The fact and date of separation is not the subject of any contest. The date of separation is said to be November 2013. The Claimant filed her application on the 24<sup>th</sup> of October 2014, less than a year later. I accept therefore that the application was made within the stipulated time.

[33] The first substantial issue to be determined is whether or not the Claimant is entitled to a 75% share and the Defendant a 25% share in the family home. The case **Carol Stewart v Lauriston Stewart** (supra) is of assistance in ascertaining the principles that ought to guide a court in determining how the interest in the family home should be apportioned. The court at first instance found that Mr. Stewart bore the more substantial portion of the financial burden of obtaining and maintaining the property and also of the general expenses of the household and the children whilst the financial contribution of Mrs. Stewart to her household was small, compared to her husband’s contribution. The court found that Mr. Stewart should be entitled to the majority of the family home and declared a 75% to 25%

apportionment in favour of Mr. Stewart. The Court of Appeal set aside that order and substituted an order that they be equally entitled to the legal and beneficial interest in the family home.

**[34]** The Court of Appeal indicated quite clearly at paragraph 76 of the judgment that in order to displace the statutory rule of equal interest 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. Such factors are that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation, that the family home was inherited by one spouse or that the marriage was of a short duration. None of these factors exists in the instant case.

**[35]** Although the wording of the section suggests that this category is not closed and that the court is empowered to consider broadly other factors which it thinks relevant, what is clear is that 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. Section 7 gives the court the power to vary the equal share rule in circumstances where in its opinion it would be unreasonable or unjust for each spouse to be entitled to one-half the family home. This can only be varied upon an application by an interested party. The Court is empowered to make such order as it thinks reasonable taking into consideration such factors as it thinks relevant.

**[36]** The Claimant, in asking the court to vary the equal share principle does not rely on any factor set out in section 7 but rather relies on other factors. These factors are firstly that the Defendant had sold a property previously owned by both of them and has kept the proceeds therefrom for himself and secondly on the basis of improvements she made to the property by fencing it. I therefore have to consider whether the fact that this second property was sold and the Claimant did not benefit from it requires me to vary the equal share rule. The Claimant has chosen not to make a claim in respect of this second property. Had she done so it would have fallen under the ambit of property other than the family home. It is

because she makes no claim for this second property why she submits that this represents an extraordinary circumstance and should result in a variation of the equal share rule.

[37] This second property was held jointly by both parties. In the normal course of things the proceeds of sale should be shared by both parties. There is no evidence as to the equity if any that the parties had in the property at the time it was sold. Nor is there any evidence as to the sum total of the benefit to the Defendant or that he benefited at all. According to the Defendant the proceeds was used to pay the outstanding sum owed to the Credit Union. The Claimant does not provide any evidence to rebut the Defendant's assertions. She however expressed that when the land was sold in August 2006 she asked the Defendant what he did with the proceeds of sale and yet she is still without an answer today. In cross-examination the Defendant was again asked about the proceeds but he indicated that he couldn't recall.

[38] Consequently, there is no evidence that the Defendant benefited from the proceeds of sale. It is the Claimant who bears the burden of proving that she is entitled to this 75% share as opposed to the 50%. According to Brooks JA in the **Stewart's** case, very cogent evidence is required for a court to depart from the principle of equal share. The Claimant has not provided any cogent evidence to substantiate her claim and as a consequence I have not been provided with any exceptional factor or extraordinary circumstance that would cause me to vary the equal share rule.

[39] I should state here that had the Claimant made a claim for division of this second property I would have felt obliged at the very least to order the Defendant to account for the proceeds of sale of this property and to consider whether or not the Claimant should be provided with a 50% share of such proceeds of sale.

[40] In the same vein, the Claimant's improvement to the property would be viewed as a contribution to the maintenance of the property and cannot serve to vary the equal share principle. There is therefore no basis for me to depart from the equal

share principle. I find that the equal share principle is applicable to the family home.

- [41] In the alternative and under the inherent jurisdiction of the court the Claimant requests a declaration that she is entitled to a 50% share and the Defendant to a 50% share in the property and additionally to several deductions from the Defendant's share. I therefore have to determine the issue of whether these deductions should be made from the Defendant's share. I have to decide whether or not she is entitled to the deductions claimed. Before deciding on that I have to grapple with the issue as to whether or not there should be a distinction in how to treat with the sums paid towards the Defendant's mortgage pre-separation and those paid post-separation. This is because under section 12(2) of PROSA the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. The **Stewart's** case also supports the position that post-separation contributions cannot disturb the entitlement at separation.
- [42] The Claimant gave evidence that she paid these sums towards the Defendant's mortgage so as to prevent the mortgage falling into arrears and to avoid the consequence of losing their home. I have to say that I do not find this to be extraordinary or exceptional on her part and I accept it to be part and parcel of the exigencies of marriage, as is commonly said in the vows of marriage, for better, for worse. The payments commenced during a time when the Defendant was experiencing financial difficulties. It is of note that during the first few years after the property was acquired, it was the Defendant alone who held a mortgage on the property. Should I also deduct the mortgage payments made by him from the Claimant's share?
- [43] The view of Lord Nicholls of Birkenhead in **Jones v Kernott** [2012] 1 All ER; 1265; [2011] UKSC 53, does not support this approach. He emphasized the effect of joint hopes and aspirations with which parties embark on a life together in a property used as their matrimonial home and the absence of any intention to

adopt anything akin to a tally-sheet in respect of their contribution to the property. If I were to order a refund of the mortgage payments claimed by the Claimant I would be doing just that. I am of the view that the mortgage payments made by the Claimant during the existence of the marriage would be tantamount to contributions and would have to be viewed in the same way that Brooks JA suggested in the **Stewart's** case, that the fact of contributions is not sufficient to displace the equal share rule.

[44] I am fortified in this position by the recent decision of **Denise Harriott-Simms v Lenroy Simms** [2016] JMSC Civ. 125 in which Anderson J arrived at a decision of equal share in the family home after an assessment of the dicta in **Stewart v Stewart** (supra). Similarly in the **Simms** case the Claimant had paid the Defendant's arrears to N.H.T. for 7 years from her earnings so he could qualify for a loan and she had been solely paying the mortgage. This Claimant had also been maintaining the entire household and maintaining the children. The court found that although there was no question that the Claimant made significant contributions to the acquisition and upkeep of the property and the Defendant at best had made minimal contributions, the authorities remain clear that contribution is not a section 7 factor and the Claimant has not proved that a section 7 factor exists or provided any evidence of such cogency to displace the equal share rule.

[45] On the other hand the mortgage payments made after separation must be given separate consideration. The provisions of section 12(2) have the effect of determining the beneficial interest of each spouse as at the date of separation. The sums paid by the Claimant after separation must therefore be viewed differently. If she is not able to get a refund of these payments it may mean that at the end of the day the Defendant would have received more than a 50% share. Moreover the authorities have shown that once the parties are separated such payments should be calculated as if it were a loan made by one party to the other.

[46] In the **Stewart's** case at paragraph 68 the court considered a pre PROSA case **Forrest v Forrest** (1995) 32 JLR 128 in which Carey JA stated this principle:

*“Once the interest of the parties are defined at the time of acquisition, the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore, diminish or increase the proportions in which the parties intended to hold at the time of acquisition. In the redemption of the mortgage the respondent must be regarded as having made a loan to the appellant to the extent of the proportion of his interest in the property. That amount is a debt recoverable on the order for accounts to be taken”*

[47] The court in the **Stewart's** case suggested that the phrase “time of acquisition” should be replaced with the phrase “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”. I therefore accept this principle that in the redemption of the mortgage the Claimant must be regarded as having made a loan to the Defendant. That amount is a debt that she should recover. In light of that, the mortgage payments made by the Claimant after separation should be refunded to her.

[48] She is also asking that the NWC bill in the sum of \$95,913.36 due and outstanding for the said property be deducted from the Defendant's share. This is because the Defendant had promised to pay it but has not done so. The Defendant agreed that there is this bill and admitted to being responsible for it. It appears from this concession on his part and he has assumed the responsibility for the payment of the NWC bill for the home. I find as a fact that he was the party responsible for paying the NWC bill. In light of that he should pay the outstanding NWC balance and so this should be deducted from his share.

[49] The Claimant is also asking that outstanding payments for maintenance based on the interim Court Order be deducted. I find that the Defendant's failure to pay is not only a breach of a Court Order but is also a debt owed to the Claimant and therefore should be deducted from the Defendant's share.

[50] The Claimant had claimed that she is entitled to a 50% share in the motor vehicle but this claim was abandoned.

## **THE MAINTENANCE ACT**

### **SPOUSAL MAINTENANCE**

[51] Section 4 of the Act sets out the threshold test that must be met by the applicant seeking spousal maintenance. There is a mutual obligation on the part of a spouse to maintain the other spouse. Section 4 provides as follows:

*“Every spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or part of those needs having regard to the circumstances set out in section 14(4) and any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.”*

[52] Other circumstances are listed in Section 14 (4) of the Maintenance Act. Those include the current and future assets of both, the capacity of both to contribute to the dependant’s support, their mental and physical health and age, their capacity for appropriate gainful employment, any legal obligation of either to provide support for another person as well as the quality of the relationship between both spouses. What is clear from section 4 is that maintenance of a spouse, unlike maintenance of a child, is not compulsory. A spouse becomes entitled to maintenance where he or she is incapable of meeting his/her reasonable needs in whole or in part. In determining the amount and duration of support the Court shall have regard to the circumstances set out above as well as other factors which are set out in Section 5(2) and which include the length of the marriage, the spouses contribution to the relationship and the economic consequences of the relationship for the spouse, the effect of responsibilities assumed during the marriage as well as the spouses’ needs, having regard to the accustomed standard of living during the marriage or cohabitation.

**[53]** On the face of it, the Claimant's net pay averages in the region of \$25,000.00 monthly and the Defendant's net pay ranges from \$70,000.00 to \$205,000.00 plus an additional sum of \$30,000.00 for travelling allowance. The net income of the Defendant in this case is between three to ten times that of the Claimant. From an examination of the pay advices of the Defendant it appears that his income is not fixed and may vary from month to month. The Defendant's assets, unlike the Claimant's are not limited to the home in which they reside but also extends to a motor vehicle. The Claimant is a teacher and the Defendant, a sales representative.

**[54]** Based on the nature of his job he is more likely than her to earn additional sums. That has to be taken into account. I have to also consider the evidence provided by the Claimant as to all her monthly expenses. Based on that and taking into account her net pay there would be a shortfall each month. The Defendant, although indicating that he is indebted to a number of lending institutions has not indicated for how much longer he is obligated to make these payments. The evidence suggests that these loans are short term loans. I find that in all the circumstances he has the ability to maintain the Claimant and should therefore provide a monthly sum for her maintenance.

**[55]** In determining what figure to impose I take into account the fact that both spouses are obligated to maintain their children. The Claimant has indicated that she has been maintaining both children and although the Defendant gives lunch money to the younger son, she has been the one solely responsible for her adult son. Maintenance of the adult son is compulsory because of his enrolment in an educational institution. She has not claimed a monthly maintenance sum for him but has claimed half educational and half medical expenses.

**[56]** In all the circumstances I find that a figure of \$15,000.00 per month is an appropriate sum of spousal maintenance. In determining the duration I bear in mind that the parties have been married for in excess of twenty years. It is agreed that for the major part of the marriage the Defendant was financially in a

better position than the Claimant. The Defendant assisted the Claimant during her attendance at College and therefore assisted in making her self-sufficient. She now has a stable income which may provide her with benefits in the future. In terms of her age, she is now forty-four years old and so has a significant number of years left before retirement. In light of all of that I find that a period of two and a half years is appropriate.

### **CHILD MAINTENANCE**

**[57]** It is not being contested here that the law mandates a parent to maintain his/her child. Section 8 of the Maintenance Act stipulates that every parent has an obligation to the extent that the parent is capable of doing so, to maintain the parent's unmarried child. In determining the amount of maintenance to be paid there are certain factors that the court must have regard to. Section 9 of the Act provides that a maintenance order for the support of a child:

*“(a) Shall apportion the obligation according to the capacities of the parents to provide support; and (b) may make an award for the payment of a sum of money for expenses in respect of the child’s prenatal care and birth”.*

**[58]** In considering the circumstances of a dependant who is a child, the court shall have regard to the fact that each parent has an obligation to provide support for the child as well as the child's aptitude for and reasonable prospects of obtaining an education and also the child's need for a stable environment. Additionally the Court shall also have regard to the circumstances set out in section 14(4) of the Act. These circumstances include the assets and means of both parties, any legal obligation of both to provide support for another person and also any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

**[59]** The Defendant has suggested that he should only pay \$10,000.00 per month based on his income. Taking into account the bills he has to pay as well as his

liabilities and the fact that he also has to maintain the Claimant, I find that a reasonable figure for the Defendant to pay for the minor child Derran is \$20,000.00 per month up until he has attained the age of 18 years. A monthly figure for maintenance has not been requested for Codrick but the Claimant requests that he pay half medical and half educational expenses. There is evidence that he is engaged in further education. The Claimant has indicated that she has paid for his educational expenses for the last year or so. It cannot be fair for her to bear all the costs in relation to Codrick. The Defendant should pay half educational and half medical expenses for Codrick.

## **CONCLUSION**

**[60]** I hereby make the following orders:

1. It is declared that the Claimant is entitled to fifty percent (50%) and the Defendant fifty percent (50%) interest in ALL THAT PARCEL OF LAND PART OF CHARLTON in the parish of St Catherine being the lot numbered NINE on the plan of part of Charlton aforesaid deposited in the Office of Titles on the 17<sup>th</sup> day of January 1978 of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being the land comprised in Certificate of Title registered at Volume 1328 Folio 943 of the Register Book of Titles.
2. That the property be valued by a reputable valuator to be agreed by the parties within twenty-eight (28) days of this Order. The cost of the said valuation is to be borne by the parties equally.
3. That the Claimant should notify the Defendant's attorney-at-law that she intends to exercise the option to purchase the Defendant's interest in the property within fourteen (14) days of the date of the receipt of the Valuation Report.
4. That if the Claimant does not exercise the option to purchase and after the expiration of fourteen days after the receipt of the valuation report, and if the Claimant has not notified the Defendant's attorney-at-law that she intends to exercise the option to purchase the Defendant's interest, the Defendant shall have the option to purchase the Claimant's interest.
5. That if the Defendant intends to exercise the option stated in paragraph 4 above, the Defendant should notify the Claimant's attorney-at-law that he intends to exercise the option to purchase the Claimant's interest in the property within fourteen (28) days of the date of the receipt of the Valuation Report.

6. If neither the Claimant nor the Defendant chooses to exercise the option to purchase, the said property will be sold by private treaty or public auction with the valuation being the reserve price. The Claimant's attorney-at-law shall have carriage of sale of the said property in any event.
7. That upon the failure of any of the parties to execute any of the documents relevant to effect a registrable transfer of the said property then the Registrar of the Supreme Court shall be empowered to sign on their behalf.
8. That all costs attendant to the transfer fall under the Property (Rights of Spouses) Act.
9. That the following sums be deducted from the Defendant's fifty percent (50%) interest or his net proceeds of sale:
  - i. The mortgage payments made for and on behalf of the Defendant by the Claimant from December 1, 2013 to the date on which she ceases to make the said mortgage payments;
  - ii. The maintenance payments due and outstanding to the Claimant pursuant to the Order of this Honourable Court made on February 9, 2016;
  - iii. The National Water Commission bill due and outstanding in the sum of \$95,913.36;
  - iv. That there be a proper accounting to determine the actual figures due above.
10. That the Defendant pay the sum of \$20,000.00 per month to the Claimant for the maintenance of the minor child D. E. born on the 26<sup>th</sup> November, 2005 plus half educational and half medical expenses until he has attained the age of eighteen years commencing on December 1, 2016.
11. That the Defendant pay half educational expenses and half medical expenses for the child C. E. born on the 13<sup>th</sup> day of July 1995 until he attains the age of 23 years with effect as of December 1, 2016..
12. That the Defendant pay the sum of \$15,000.00 per month to the Claimant for her maintenance for a period of thirty (30) months from the date of this Order commencing on December 1, 2016..
13. Each party to bear his/her own cost.
14. Liberty to apply.

