



[2018] JMSC Civ 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2015HCV06195

BETWEEN SHARON NAOMI GRANT-NELSON CLAIMANT
AND NABURN ABURGER NELSON DEFENDANT

IN CHAMBERS

Mr. Raymond Samuels, instructed by Samuels, Samuels, for the claimant.

Mrs. Judith Cooper-Batchelor, instructed by Chambers, Bunny & Steer, for the defendant.

Heard: February 13, 2018, & May 11, 2018

TRIAL – FAMILY LAW – DIVISION OF PROPERTY POST-SEPARATION – EQUITY – INAPPLICABILITY OF PROPERTY (RIGHTS OF SPOUSES) ACT – PRESUMPTION ARISING FROM HAVING NAME ON TITLE - ALLEGED POOLING OF PARTIES' FUNDS – NO EVIDENCE OF CHILDRENS' DATES OF BIRTH – INSUFFICIENT EVIDENCE OF THE PARTIES AS TO MAINTENANCE OF CHILDREN – BURDEN OF PROOF – WHETHER LIMITATION OF ACTIONS ACT IS APPLICABLE

ANDERSON, K., J

THE BACKGROUND

[1] The parties to this claim are a married couple who are now living separate lives from each other. While they cohabitated as husband and wife, they both acquired certain properties in the form of realty. With respect to three of those properties, the parties were both registered as joint owners, while, the titles for the remaining properties bore the defendant's name as their sole owner.

- [2] The first of the three properties which bore the parties' names jointly, as registered owners, was lot two hundred and twenty-eight Westmeade, Portmore, in the parish of Saint Catherine ('the Westmeade Property'). This was where the parties resided during the subsistence of the marriage, and it was transferred to them on April 28, 1989, as tenants in common.
- [3] The second of those properties was lot two hundred and eighty-four Mount View ('284 Mount View'), and the third property was lot two hundred and eighty-five Mount View ('285 Mount View'), both of which are located in the parish of Saint Andrew. Both of these properties were transferred to the claimant and the defendant on June 11, 1992, as joint tenants.
- [4] The remaining properties, which are registered in the sole name of the defendant, are: Lot two hundred and fifty Cedar Grove in the parish of Saint Catherine ('the Cedar Grove property'), and Lot eight hundred and ninety-nine, West Cumberland, Greater Portmore, in the parish of Saint Catherine ('the West Cumberland property'). The Cedar Grove property was transferred to the defendant on September 28, 1999, while the West Cumberland property was transferred to him on September 4, 2000. No evidence was presented to this court, of there being any mortgage on either of those properties, which are solely registered in the defendant's name.

THE CLAIMANT'S CASE

- [5] The claimant permanently moved out of the Westmeade property, in the year - 2000. The year - 2000, was the year when the parties permanently separated from one another. Subsequently, the claimant, on December 31, 2015, filed a Fixed Date Claim Form to commence this claim against the defendant seeking, inter alia, the declarations that the claimant is legally entitled to half interest in: (i) the Westmeade property, (ii) 284 Mount View, and (iii) 285 Mount View. Additionally, the claimant also sought declarations that she was both legally and beneficially entitled to both the West Cumberland property and the Cedar Grove property. Further, the claimant also sought a declaration that the defendant held

the West Cumberland property and the Cedar Grove property on trust for himself and the claimant as tenants in common.

- [6] The claimant's claim was supported by the affidavit of Sharon Naomi Grant-Nelson also filed on December 31, 2015. The defendant filed an Acknowledgement of Service on September 16, 2016 and, on June 13, 2017, he filed an affidavit to which, he had personally deponed, in response to the claimant's claim. The matter came up for trial in chambers on February 13, 2018, and I had presided over the trial.
- [7] The claimant, at paragraphs 3 and 4 of her affidavit, stated that the Westmeade property was purchased by both herself and the defendant through mortgages. She further explained that the mortgages were serviced by both herself and the defendant by way of direct payments to the lending institutions. She stated further in her affidavit that at the time of the purchase of that property, the house consisted of only two bedrooms, one bathroom, a living room and a dining room. At paragraph 8 of her affidavit, she further added that in 1997, expansions to the Westmeade property were undertaken by her, with the following being constructed on the property: one bedroom, one bathroom, staircase, library, kitchen, patio and a washroom.
- [8] The claimant also stated the following at paragraph 8 of her affidavit: *'these additions were undertaken and paid for by me the Claimant herein. However throughout our marriage no distinctions were made as to who contributed to what as anything purchased was to be shared by the Defendant and myself.'* In relation to properties 284 Mount View and 285 Mount View, the claimant stated at paragraph 9, that those properties were purchased by both herself and the defendant through 'inter alia, a loan from PWD Credit Union.' This loan, she continued, was at all times, serviced by both herself and the defendant.
- [9] Additionally, the claimant testified under cross-examination that she left the Westmeade property as the defendant was physically abusing her, and she feared for her life. That evidence is illustrated as follows:

'Q: Before you actually left the family home at Westmeade, you and Mr. Nelson's relationship was quite bad.

A: I was abused and our relationship was quite bad, yes.

Q: When did you make the decision to move out of Westmeade?

A: I can't recall but I knew when I had to leave when I was in danger of my life.'

[10] Further, as it relates to the Cedar Grove property and the West Cumberland property, that were both registered in the sole names of the defendant, the claimant stated at paragraphs 13 and 14 of her affidavit that:

'13. ... the said properties were purchased in the names of the Defendant on behalf of myself and the Defendant as we agreed that both properties would be purchased in our names but he failed to register both our names on the title and solely placed his name alone on the said title to my detriment.'

14. That the sums used to purchase these properties was as a result of our hard work as we would pool our resources to purchase properties as we shared in the purchase of everything and we had an understanding that I would also be entitled to an interest in such properties that is how we would operate.'

[11] Moreover, in addition to jointly purchasing properties with the defendant, the claimant also worked to provide for their children, pay their school fees and other expenses. At paragraph 16 of her affidavit, she further added that the defendant was able to purchase both the Cedar Grove and West Cumberland properties because she managed the household and its expenses. She also added that owing to the manner in which they conducted their family responsibilities, it was an 'express' or 'implied' term that she would have an equal share interest in these properties.

[12] Under cross-examination, the claimant said that there are still loans on both Mount View properties, which are still being serviced by her. Further, she said, that she had purchased a property in the West Cumberland community, (not part of these proceedings), whilst she was still residing at the Westmeade property, prior to their separation. The purchase of this property, she continued, was conducted by her without the defendant's participation and was registered solely in her name. The claimant further stated that there was an agreement between

herself and the defendant that, whilst she purchased this property, the defendant would also purchase the West Cumberland property. The following are excerpts from her cross-examination:

'Q: Why wasn't Mr. Nelson's name included on the title to the West Cumberland?

A: Mr. Nelson's name was not included on the title to West Cumberland because we had an agreement for Mr. Nelson to go ahead with the purchase of another property, on 20th Avenue in West Cumberland.

Q: And so that property would be in just Mr. Nelson's name?

A: Yes.

Q: And that property that you're speaking about, is 899 West Cumberland?

A: Yes.

Q: So it is not true that Lot 899 West Cumberland was to be in both your names?

A: My previous answer stands. Lot 899, if it is the lot at 20th Avenue West Cumberland, it belongs to Mr. Nelson, that's my answer.'

[13] The evidence given by the claimant, under cross-examination, continued around the Cedar Grove property. The following, again, is another portion of the claimant's evidence as given during cross-examination:

'Q: And the lot at 250 Cedar Grove, does that belong to Mr. Nelson as well?

A: It is registered in Mr. Nelson's name, but it was purchased with the understanding that it was acquired during the course of the marriage. We had an understanding that I would be taking care of other pertinent expenses at the time, in order to facilitate this purchase.'

Her cross-examination on Mr. Nelson's acquisition of the Cedar Grove property continued:

'Q: The money to purchase Cedar Grove, it came from a lump sum received by Mr. Nelson from his employment?

A: The lump sum that Mr. Nelson deposited came from his gratuity at his place of employment. We decided that he would use that lump sum and make the deposit while I took care of other expenses.

Sugg: The lump sum didn't only pay for the deposit, it paid for the full purchase price.

A: If the lump sum paid for the full purchase price, then it means that Mr. Nelson acted deviously in his disclosure to me at the time.'

THE DEFENDANT'S CASE

- [14] The defendant, on the other hand, stated in his affidavit that the Westmeade property was purchased by his payment of the deposit, and with the assistance of the claimant's National Housing Trust benefit. He continued that, he paid almost 90% of the monthly mortgage instalments since the property was acquired. He stated further that since the separation, he has been fully responsible for those payments. Additionally, he said, the claimant left the Westmeade property in or around the year 2000, with the children and most of her personal items. She then returned six (6) months thereafter for the balance of her personal items. Since that time, he continued at paragraph 11 of his affidavit, the claimant has not been inside the property or otherwise dealt with the property.
- [15] At paragraph 13 of his affidavit, the defendant stated that there was no agreement between himself and the claimant, that anything purchased was to be jointly owned between them. Also, he continued, at the time of the claimant's departure from the Westmeade property, she took only the furniture that she purchased and left those which were purchased by him.
- [16] The defendant further stated at paragraph 14, that there was an agreement between himself and the claimant that both Mount View lots would belong to them separately. That is, one lot belongs to him, while the other, belongs to the claimant. Further, the defendant continued, that up to the time of trial, they both paid taxes separately on each lot.
- [17] The defendant further stated in his affidavit that he is denying that there was any agreement between himself and the claimant that the West Cumberland property and the Cedar Grove property, were to be jointly owned by them. Moreover, at paragraph 19 of his affidavit, the defendant stated that they did not pool resources and that he only added the claimant's name to one of his bank accounts. The, 'sums' in that account, he continued, were deposited there by him, and the claimant withdrew those 'sums,' without his permission. Additionally,

the defendant also stated at paragraph 22 of his affidavit, that he was responsible for the payment for their children's school fee and most of the household expenses.

SUBMISSIONS

Submissions on behalf of the claimant

[18] Counsel for the claimant submitted that, as it relates to the West Cumberland property, the claimant's claim was not statute-barred but rather, it was properly before the court. Further, counsel argued, that the Mount View properties were registered in both the joint names of the claimant and defendant, and hence they ought to be equally divided between them.

[19] Counsel then added that both the West Cumberland and Cedar Grove properties, were acquired whilst they were still cohabiting as husband and wife at the Westmeade Property. The court, counsel urged, ought to take into consideration the entire course of dealing between the parties and the evidence of the claimant that she managed the expenses of the household, which is what enabled the defendant, to have had the financial means available to him, to have acquired those two properties.

Submissions on behalf of the defendant

[20] Counsel on behalf of the defendant, on the other hand, argued that the limitation defence in relation to the Westmeade property, is proper. The defendant's evidence in that regard, counsel posited, was that the claimant left the Westmeade property in the year 2000 and has not dealt with the property since that year, until the claim was filed in 2015. According to counsel, the claimant must show that she did acts of ownership during this time, failing which, she would have been dispossessed by the defendant. In that regard, counsel submitted that the case of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, is authority for that position. The claimant, counsel argued, has

failed to show acts of ownership during that time and the result is that her title to the property has been extinguished by the defendant.

[21] As it relates to the Mount View properties, counsel for the defendant submitted that the proper course to be taken with these properties, would be for this court to grant a declaration that those two lots are owned, by the parties, in equal shares.

[22] Counsel continued that the claimant has been discredited on cross-examination, regarding her evidence in relation to both the West Cumberland and the Cedar Grove properties. Her evidence in relation to the West Cumberland property was that it belongs to the defendant and that the agreement between them was that he was to acquire that lot whilst she purchased another property of the same community. The claimant, therefore, has no interest in the West Cumberland property. Counsel concluded that the claimant does not hold an interest in the Cedar Grove property as she cannot show, in a practical sense, what is meant by them 'pooling their resources' to make the purchase of that property.

ISSUES

[23] The primary issues for my determination are: whether the claimant is entitled to a half-share interest in the Westmeade property, properties located at 284 and 285 Mount View, the West Cumberland and the Cedar Grove properties.

LAW AND ANALYSIS

[24] In respect of this claim, the onus was on the claimant to prove, if she could, on a balance of probabilities, before this court, that she is entitled to a half share of all of the disputed properties. If she has failed, in respect of either of the disputed properties, to meet that onus, then her claim in respect of any such property, must be considered by this court, as having been unproven and thus, the claim will fail in that respect. Of course though, in that regard, the claim in respect of each of the disputed properties, must be considered separately and this is precisely what has been done, as reflected in these reasons for judgment.

[25] The parties have been separated fifteen years prior to the filing of this claim before the court, and no application was made herein, by the claimant, to bring this matter under the **Property (Rights of Spouses) Act** pursuant to **section 13(2)** of that Act which reads:

'13(2) An application under subsection (1)(a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment or marriage or separation or such longer period as the Court may allow after hearing the applicant.'

An application under **section 13(2)** is necessary as the claimant's claim is being brought upon the grounds that the parties were separated. In that regard, see **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, at paragraph 2, per Cooke JA. This court is of the view that the issues herein, are to be decided, based on the principles of equity. The result, by virtue of the claimant's failure to so do, is that this court has no jurisdiction to consider this claim pursuant to the **Property (Rights of Spouses) Act**. This court is fully able to determine whether there exists a trust in favour of the claimant, with respect to any of the disputed properties.

[26] The principles of to be applied by a Jamaican Court, in determining whether a trust exists, were succinctly summarized in **Kenneth Guy Thomas v Irene Victoria Thomas** [2016] JMCA Civ 57, where Phillips JA (with whom the rest of the panel agreed) stated the following at paragraph 67:

*'On the evidence in this case, even if the transfer by the respondent to the appellant remained extant, the registration of their interest was as "tenants in common". There was no indication as to how the beneficial interest was to be shared by the parties. On the basis of all the authorities, the presumption would be that the interest would be shared equally. However, that presumption is rebuttable by evidence to the contrary, for example, "evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship" (see Lord Hope in **Stack v Dowden** [2007] UKHL 17 at paragraph 8). One would also have to examine the general intention of the parties by the conduct of their affairs throughout the marriage with particular regard to this disputed property (see **Stack v Dowden** and **Abbott v Abbott** [2007] UKPC 53).'*

[27] It follows then that, the principles to be gleaned are: (i) The registration of the parties' names as joint owners of property, (without agreement between the

parties, as to the manner in which the beneficial interest is to be shared), raises the presumption that the parties' ownership interest in that property, will be shared equally, (ii) The presumption is rebuttable by evidence to the contrary, demonstrating matters such as that the title was to be held in trust, or an examination of the contributions by the parties towards the purchase of the house and its maintenance, and (iii) also, the court must assess the general intention of the parties in relation to the disputed property throughout the marriage. Such intention is to be gleaned from the over-all conduct of the parties. I will now assess the extent of the parties' interest in the disputed properties before the court.

The Westmeade property

[28] As outlined above, counsel for the defendant relied heavily on the case **Winnifred Fullwood v Paulette Curchar**, (*op. cit*), for the submission that the claimant's interest in the Westmeade property has been extinguished. The facts of that case are that, the respondent was married to Mr. Curchar (who was deceased at the time of trial). They were the registered owners of property located at Independence City, Saint Catherine, where they cohabited. At some point in the 1980's, the respondent migrated to the United States of America, then later was separated from Mr. Curchar, and then the parties eventually divorced. The respondent, since migrating, has never returned to the premises and has no dealings whatsoever with it. The appellant, on the other hand, started living on the premises with Mr. Curchar in 1985 at his invitation, and cohabited with him as man and wife. She continued to reside on the premises, taking care of Mr. Curchar and maintaining the premises up until September 2009 when Mr. Curchar died. On May 25, 2010, the respondent was served with a notice to quit and a claim for recovery of possession was filed subsequently.

[29] The Court of Appeal there found that the respondent had no legal right to recover possession by virtue of the operation of the **Limitation of Actions Act**. At paragraph 33 of its reasons, that court also found that a co-tenant could obtain

title by possession against the other co-tenant. The court later went on to find, at paragraph 35, the following:

*'Prior to **Wills v Wills**, it was made abundantly clear by Wilfred Green MR in **Re Landi, Georgi v Navani** [1939] 3 All ER 569; 572, that the operation of the statute is triggered when the occupation by the co-tenant of the entirety is "for [his] own benefit".'*

In considering whether the principles enunciated in **Winnifred Fullwood v Paulette Curchar**, (*op. cit*) apply to the present case, this court must necessarily look to see whether the claimant has left the Westmeade property for the defendant's sole benefit since the year- 2000. If it is found that the claimant did not leave the Westmeade property for the defendant's own benefit, then it follows that the defendant could not have dispossessed the claimant of her share of that property.

[30] The claimant's testimony, under cross-examination, was that prior to the separation in 2000, the relationship between herself and the defendant was '*quite bad*' and that she was abused. Her unchallenged testimony also continued that, owing to the abusiveness of the relationship, she ultimately left when her life was threatened. I accept that, that was the state of the relationship when the claimant moved out of the Westmeade property in 2000. For my part, this is not analogous with **Winnifred Fullwood v Paulette Curchar**, (*op. cit*), that is to say, the **Limitation of Actions Act**, in my view, has not been triggered as the claimant did not leave the Westmeade property for the defendant's sole benefit. The claimant left the Westmeade property, as her life was imperilled by the abusive nature of her relationship with the defendant. She left as a co-owner of the Westmeade property with no intention of giving up possession to the defendant for his sole benefit.

[31] Having arrived at that finding, the court will now go on to assess what interest the claimant has in that property. A perusal of the title of the Westmeade property, disclosed that both the claimant and the defendant were the registered owners as tenants in common since April 28, 1989. The presumption then, is that, both owned the property in equal shares, unless or until a contrary position is shown

to this court, which is sufficient to displace that presumption. The claimant gave evidence that the Westmeade property was purchased by the mortgages, and that both herself and the defendant serviced the loans. The defendant, on the other hand, gave evidence that the Westmeade property was purchased by his deposit and the claimant's National Housing Trust benefit, while he repaid almost 90% of the monthly instalments. The claimant's evidence on this point, in my view, is to be preferred to that of the defendant, as there was no evidence before the court to show the portions of the purchase price contributed by the parties, neither was there any evidence of the portions of the mortgage instalments contributed by them.

[32] This court accepts the claimant's evidence, that the parties both contributed to the acquisition of the Westmeade property, and to the monthly mortgage repayments. Since the defendant asserted that he paid '*almost 90%*' of those instalments, he ought to have, if he could have, adduced evidence to prove this. There was no evidence advanced to prove that assertion, and as such I find that they both made those payments on an equal footing.

[33] Further, the defendant gave evidence that there was no agreement between himself and the claimant that anything purchased was to be shared equally between them. I also accept that evidence. The claimant's evidence to the contrary, was belied by other evidence which she gave, as to agreements having been made, as between the defendant and herself, as to one other property, being individually divided as between themselves. Some of that evidence is referred to, further on in these reasons. That evidence pertained, in particular, to the West Cumberland property.

[34] It was the unchallenged evidence of the defendant that he was fully responsible for the mortgage instalments of the Westmeade property, since the parties' separation in 2000. There was no evidence to show what mortgage balance was due, as at the date of the separation of the parties from one another, nor as to how much is still left owing at the time of trial (if any sum is still owed). I find

therefore, that the defendant was fully responsible for the balance of the repayments of the mortgage loan after the year of the parties' separation, that is, 2000. In my view, the claimant's interest in the Westmeade property, therefore, is equivalent to the value of the total property, less the outstanding mortgage balance in 2000, when the defendant became fully responsible for those instalments.

- [35] The parties' counsel are to use their best efforts to reach agreement as to what was owed with respect to the mortgage on the Westmeade property, as at December 31, 2000, as that will be the date used by the court as constituting the date of separation, since neither party provided any evidence to this court, as to their precise date of separation.

The Mount View Properties

- [36] The submissions of both counsel in relation to these properties accorded, in that, they argued that 284 Mount View and 285 Mount View, were both registered jointly in the names of the parties, and ought therefore to be shared between the parties in equal shares. I agree with those submissions, and accordingly I am of the view that those properties are to be so divided.

The Cedar Grove property

- [37] I will now consider the interest of the claimant, if any, in those properties that were registered in the sole names of the defendant.
- [38] The claimant has claimed for one-half share of the Cedar Grove property which was registered in the defendant's name. The claimant, by this claim, essentially claims one-half share of the beneficial interest, since the legal interest was vested in the sole name of the defendant. The law in this area was settled by the House of Lords decision in **Stack v Dowden** [2007] UKHL 17, which has been, as outlined above, adopted and applied by the courts in this jurisdiction, and was also followed by the Privy Council in **Abbott v Abbott** [2007] UKPC 53. In **Stack v Dowden** (*op. cit*), Lord Hope, at paragraph 4 stated the following:

'The cases can be broken down into those where there is a single legal ownership and those where there is joint legal ownership. There must be consistency of approach between these two cases a point to which my noble and learned friend Lord Neuberger of Abbotsbury has drawn our attention. I think that consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. In this context joint beneficial ownership means that the shares are presumed to be divided between the beneficial owners equally. So in a case of sole legal ownership the onus is on the party who wishes to show that he has any beneficial interest at all, and if so what that interest is. In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally.'

[39] The principle, therefore, as the starting point is that, where the registered title is in the sole name of a party, the presumption is that, that party is the sole holder of the beneficial interest in property. On the other hand, where there is joint legal ownership then the presumption is that the beneficial interest is owed jointly. It follows then, that the onus is on the claimant to show that she has any beneficial interest in the Cedar Grove property, and if she does, to what extent is that interest, since the presumption is that the defendant (being the sole legal owner) is the sole beneficial owner of that property. The presumption then, is a rebuttable one, capable of being displaced by evidence to the contrary.

[40] The question then is, how does one go about, rebutting that presumption? **Stack v Dowden**, (*op. cit*), at paragraph 60 stated: *'the search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it.'* That reasoning was followed in **Abbott v Abbott**, (*op. cit*), at paragraph 4:

'There are, of course, two separate questions: first, was it intended that the parties should share the beneficial interest in a property conveyed to one of them only; and second, if it was so intended, in what proportions was it intended that they share the beneficial interest? There are two separate concepts which may help in answering those questions, explained by Peter Gibson LJ in Drake v Whipp [1996] 1 FLR 826 at 827:

"A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."

It is now clear that the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases.'

[41] Thus the claimant, in the case at bar, must show that it was intended that the parties should share the beneficial interest in a property conveyed to one of them only, and if it was so intended, in what proportions was it intended that they share the beneficial interest. Or, an examination of the contributions, by their conduct, which each party made to the purchase of the property, as aptly stated by Phillips JA , in the **Kenneth Guy Thomas v Irene Victoria Thomas** case (op. cit):

'However, that presumption is rebuttable by evidence to the contrary, for example, evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship'

[42] The claimant, in her affidavit, at paragraphs 13 and 14, essentially stated, that the Cedar Grove property was purchased by the defendant by: (i) their pooled resources, (ii) a gratuity he received at the place of his employment, and (iii) her taking care of other expenses including taking care of the children.

[43] The defendant, however, denied that they pooled resources, and stated that the claimant was only added to one of his bank accounts, and gave evidence that he was responsible for the maintenance of their children. As reasoned above, marriage is a partnership, and owing to that, there is no doubt that the parties would have acted together, or in turns, in managing the household affairs and in their expenditures. The claimant, however, has not put forward sufficiently cogent evidence to place the court in a position to ascertain, by the conduct of the parties, whether there was a common intention that the Cedar Grove Property was to be owed by both of them. Neither has the claimant demonstrated what was her contribution towards the acquisition of this property.

[44] Did the parties speak about the changes they would have had to undertake in order to acquire the Cedar Grove property? Or, did they, by their actions, adjusted their lifestyle to such an extent that the claimant managed additional expenses to that which she would ordinarily manage during the course of the parties' cohabitation, so as to put the defendant in a position in which he could

purchase this property? There was no evidence from to claimant to demonstrate same.

[45] The claimant also has not adduced any evidence to show what were the precise expenses that she ‘took care of’ while the defendant purchased the Cedar Grove property. Similarly, she did not show what was the nature of the care given to the children, and no evidence was provided as to the childrens’ respective dates of birth. Accordingly, the claimant has not crossed the first hurdle, enunciated by the authorities, of there being a common intention that the beneficial interest in the Cedar Grove property was to be shared between the parties. Since that first requirement was not met, there is nothing then for this court to assess, as it relates to the Cedar Grove property, and according the claim in respect of this property, must fail.

[46] I am further fortified in that finding as the claimant has not adduced any evidence of the duration of the marriage, and for this court to find what period of time the claimant made financial and non-financial contributions towards the defendant’s acquisition of the Cedar Grove property. As also found earlier, the claimant stated that she took care of their children without stating how long the children were actual dependents. For the claimant to claim an interest in the Cedar Grove property on the basis of her caregiving to the children, she would have to show evidence that her caregiving went above and beyond the duty the law places on her to do so. Section 8(1) of the **Maintenance Act** states the following:

8-(1) Subject to section (2), every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent’s unmarried child who –

a) Is a minor; or

b) Is in need of such maintenance, by reason of physical or mental infirmity or disability.

The claimant, therefore, needed to discharge the evidential burden of showing that the defendant was able to acquire the Cedar Grove property by virtue of her giving care to the children, above and beyond what was required of both parties,

under the law, and that, that caregiving placed the defendant in a better financial position, whereby, he was able to have acquired this property.

The West Cumberland property

[47] The final property, which the claimant claims a half share of, is the West Cumberland property. The claimant's evidence, in relation to this property, yielded irreconcilable inconsistencies between her evidence as stated in her affidavit, and under cross-examination. Firstly, in her affidavit at paragraph 14, she stated that the West Cumberland property was purchased from their pooled resources, and that there was an understanding that she was to be a co-owner of it as well. Her cross-examination evidence on this point however, contradicted that stated affidavit evidence of hers.

[48] The claimant's evidence under cross-examination was that both herself and the defendant had an existing agreement whereby they would both acquire properties in the West Cumberland community. She clearly testified that the West Cumberland property, located at Lot 899, belonged to the defendant pursuant to their arrangement. The claimant was pellucid in her testimony on this point, and further she said, that the West Cumberland property purchased by Mr. Nelson, belonged to him. The evidence here shows that the claimant regards the West Cumberland property to be that of the defendant. Accordingly, I find that, not only that the claimant is not interested in this property, but also that the claimant has not adduced any evidence to show that she contributed towards its acquisition or maintenance.

Conclusion

[49] I conclude, therefore, that the claimant is entitled to one-half share interest in the net value of: (i) the Westmeade property, (ii) 284 Mount View, and (iii) 285 Mount View. As it relates to the Cedar Grove property, and the West Cumberland

property, the claimant has not made out her claim for half share or any share, of those properties.

Orders

1. The claimant and the defendant each own the Westmeade property in equal shares of fifty percent (50%) of the net value of that property, which is the assessed market value of same, less the outstanding balance of the mortgage owed on that property.
2. The claimant and the defendant each own 284 and 285 Mount View properties in equal shares of fifty percent (50%).
3. The claimant has no beneficial interest in the Cedar Grove property.
4. The claimant has no beneficial interest in the West Cumberland property.
5. The Westmeade property, along with 284 Mount View and 285 Mount View are to be valued by a valuator, agreed upon by the claimant and the defendant. The cost of the valuation is to be borne equally by the claimant and defendant.
6. If the parties are unable to agree a valuator within twenty-one (21) days of the date of this judgment order, the Registrar of the Supreme Court shall promptly thereafter, appoint a valuator.
7. The Westmeade property, along with 284 Mount View and 285 Mount View, are to be sold on the open market by public auction or by private treaty, and the costs associated with the sale of any or all of such properties, as are required to be borne by the vendor(s), shall be borne by equally by the parties.
8. The defendant is to be given first option to purchase the Westmeade property, at market value, and such option shall be exercisable by him, by or before December 31, 2018, failing which, said option shall have lapsed and will no longer exist.

9. The Registrar of the Supreme Court is empowered to sign any and all documents necessary for the sale of any of the properties if either party is unable, or refuses, or apparently refuses, within a reasonable time, to do so.
10. Liberty to apply.
11. Each party to bear his and her own costs.
12. The claimant shall file and serve this order.

Hon. K. Anderson, J.