



[2016] JMSC Civ 125

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2014HCV01278**

<b>BETWEEN</b>	<b>DENISE HARRIOTT-SIMMS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>LENROY SIMMS</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mr. H.S. Rose and Miss Michelle Thompson, instructed by H.S. Rose & Co., for the claimant

The defendant appeared in person

Heard: May 11 and July 15, 2016

**APPLICATION FOR DECLARATION OF ENTIRE INTEREST IN FAMILY HOME – SECTION 6 OF PROSA – STATUTORY EQUAL – SHARE RULE – SECTION 7 OF PROSA – VARIATION OF STATUTORY EQUAL SHARE RULE – SECTION 7 FACTORS – MONETARY CONTRIBUTION NOT A SECTION 7 FACTOR-WHETHER MAINTENANCE OF CHILDREN CAN BE A SECTION 7 FACTOR – DURATION OF MARRIAGE – UNDEFENDED CLAIM – BURDEN OF PROOF REGARDING DISPLACEMENT OF PRESUMPTION THAT PARTIES ARE ENTITLED TO AN EQUAL SHARE OF THE FAMILY HOME – POST – SEPARATION FINANCIAL CONTRIBUTIONS**

**ANDERSON, K. J**

**BACKGROUND TO CLAIM**

[1] This is a claim for the division of matrimonial property, specifically the family home (hereinafter referred to as, 'the property'), pursued by way of a fixed date

claim form filed on March 13, 2014 and supported by an affidavit filed on the said date. Therein, the claimant sought, inter alia, the following orders:

- (i) An order that the property situated at 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour, in the parish of St. Catherine registered at Volume 1410 Folio 362 is the family home and that the claimant is beneficially entitled to full interest in the said property known as all that parcel of land part of Rodons Pen and Rest Pen now called The Aviary, Old Harbour, in the parish of St. Catherine registered at Volume 1410 Folio 362 in the registered book of titles by virtue of the Property (Rights of Spouses) Act and the defendant has no beneficial interest therein;
- (ii) A declaration that the claimant is the sole beneficial owner of the property described as 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour, St. Catherine registered at Volume 1410 Folio 362;
- (iii) A declaration that the defendant's legal interest in the property is held by the claimant as Trustee for the sole benefit of the claimant;
- (iv) An order that the defendant executes a Transfer of the property to the claimant;
- (v) An order that further and in the alternative the property be sold and the claimant be entitled to the proceeds of the sale;
- (vi) An order that in the event that the defendant refuses to sign the said required documents that the Registrar of the Supreme Court be empowered to sign the documents for and on behalf of the defendant;
- (vii) An order that H.S. Rose, Attorney-at-Law of 6 Nugent Street, Spanish Town in the parish of St. Catherine shall have carriage of sale in respect of the sale of the property;
- (viii) Liberty to apply.

[2] It is pertinent to note, that this is an undefended claim, as up to the time of trial, the defendant, who has been present throughout the proceedings but unrepresented, had failed to file an acknowledgement of service or a defence to the claim, despite several orders requiring him to file affidavits in response. Nonetheless, the claimant must be in a position to prove her case. She has made several allegations in her evidence, and as it is, it is he who asserts, who must prove. Her evidence is and has remained unchallenged but this court is not obliged to accept her evidence. The issue of credibility remains extant and

is within the sole purview of this court. This court therefore, does not have to accept the uncontradicted evidence of the claimant in part, or in its entirety.

- [3] The statutory rule stands in aid of the defendant, so the onus is on the claimant to show, that in the circumstances, on a balance of probabilities, it would be unreasonable or unjust for the defendant to be entitled to one-half of the property and as such, the court should grant the orders sought herein.
- [4] The defendant was served with the claimant's statement of case on September 13, 2014. An affidavit of service was filed by the claimant on September 24, 2014, wherein evidence is given by Mr. Raymond Gauntlett that on September 13, 2014, he served the defendant, Mr. Lenroy Simms personally, a certified copy of the fixed date claim form and affidavit in support with notice to the defendant, prescribed notes and acknowledgment of service of fixed date claim form at 164 Whitewing Circle, Lot 499 Aviary Housing Scheme, Old Harbour in the parish of St. Catherine. He further deponed that he was accompanied by the claimant, Denise Harriott-Simms, who pointed out the defendant to him, who in turn acknowledged that he was Lenroy Simms and accepted service of the aforementioned documents.
- [5] The matter was first heard on November 6, 2014, whereupon, Rattray J. ordered that the matter be set for trial in chambers on January 13, 2015 and a supplemental affidavit exhibiting copies of utility bills paid by the claimant, be filed and served by the claimant, on the defendant. The record reflects that the claimant and her counsel and the defendant, who appeared in person, were present.
- [6] The claimant filed the order made by Rattray J. on November 6, 2014 and a supplemental affidavit on January 12, 2015, exhibiting copies of utility bills allegedly paid by her.
- [7] On January 13, 2015, the matter came on for trial before Shelly Williams J. (Ag.), who ordered, inter alia, the following:

- (i) The claimant's affidavit filed on January 12, 2015 be served on the defendant by January 16, 2015.
- (ii) The defendant to obtain legal representation within four (4) weeks of the date hereof.
- (iii) The defendant to file affidavit in response by February 27, 2015.
- (iv) Matter adjourned to July 21, 2015.

The claimant and her counsel along with the defendant, were present at the hearing.

- [8] Affidavits of service were filed on February 05, 2015, proving service of the claimant's supplemental affidavit and the order made by Rattray J. on November 06, 2014, on the defendant, on January 13 and 16, 2015, respectively, at his mother's house situated at Bois Content, Kitson Town, in the parish of St. Catherine and not at his place of abode at the Aviary, Old Harbour in the parish of St. Catherine, as that was where the defendant could be found at the time of service herein.
- [9] On July 21, 2015, Sykes J. adjourned the matter to November 16, 2015 and ordered that the defendant retain counsel and if not, then he would represent himself at the hearing and he was to file and serve an affidavit not later than October 30, 2015. The claimant filed an affidavit of service on November 06, 2015, proving service of the aforementioned order on the defendant on November 04, 2015, at Bois Content, Kitson Town in the parish of St. Catherine and not at his place of abode at the Aviary, Old Harbour in the parish of St. Catherine, as that was where the defendant could be found at the time of service herein.
- [10] The claimant filed a supplemental affidavit on November 16, 2015, containing several exhibits including her affidavit filed on January 12, 2015.

[11] On November 16, 2015, the matter came for hearing before Sykes J. who further adjourned the matter to May 11, 2016 and made, inter alia, the following orders:

- (i) The defendant to file and serve affidavit in response to all affidavits filed to date by the claimant, not later than February 1, 2016.
- (ii) The claimant to file affidavit in response not later than February 29, 2016.
- (iii) After February 29, 2016, no further affidavits to be filed without the permission of the court.
- (iv) Skeleton submissions and list of authorities to be exchanged not later than March 31, 2016.
- (v) Parties to file bundle with skeleton submissions and authorities not later than April 11, 2016.
- (vi) Deponents to attend for cross examination.

The claimant and her counsel along with the defendant, were present.

[12] An affidavit of service was filed on April 26, 2016, proving service of the claimant's supplemental affidavit filed on November 16, 2015, on the defendant, Lenroy Simms on December 20, 2015, at 164 Whitewing Circle, Lot 499 Aviary Housing Scheme, Old Harbour, in the parish of St. Catherine.

[13] The matter came on for first hearing of the fixed date claim form on May 11, 2016, before me, at which time the claimant's counsel requested that the court treat with the hearing as a trial of the undefended claim. This is pursuant to **rule 27.2(8)** of the **Civil Procedure Rules** (hereinafter referred to as the **CPR**). The claim was tried and judgment reserved. The defendant was present and appeared in person. The claimant was also present. This document constitutes the reasons for judgment and judgment, in respect of this claim.

## **NATURE OF THE CLAIMANT'S CASE**

[14] The claimant essentially alleges that she is beneficially and legally entitled to all the interest in the property and the defendant as joint owner, holds her interest on trust for her. She contends that the defendant only co-signed for the loan because, although she qualified for the full loan, the rules of the Trust did not permit her to get that amount. Further, she has solely paid the mortgage, the utility bills from her earnings and the entire portion of the defendant's loan to the National Housing Trust (hereinafter referred to as 'the N.H.T') for the property. Therefore, having regards to all the monies she has expended and will expend from her earnings, re deposit, mortgage payments, maintenance of children, cost of transferring one half share of the property and legal fees, in addition to the standard rental for the said property, the sum for which the defendant is indebted, exceeds the value of his one half share, and such sum should be deducted from the defendant's one half share and the claimant be granted the entire share of the property.

## **CLAIMANT'S SUBMISSIONS**

[15] The claimant made both written and oral submissions. On July 21, 2015, the claimant filed an index to judge's bundle, containing her skeleton submissions on pages 50-54 and on May 11, 2016, further oral submissions were made. In summary, the claimant submits, that:

(i) She is entitled to make an application to the court under s. 13 of the **Property (Rights of Spouses) Act**, hereinafter referred to as **PROSA**, for a division of the property

(ii) The parties were married on December 26, 2000 and divorced on January 7, 2015. That having acquired the property on January 23, 2008, as joint tenants, both parties, along with their children, lived together at the property until 2012 and said property was their principal home and family home and there is no other property. The defendant has lived there since

2012 when the claimant was forced to vacate the said property. The children should live in a stable home. Rented premises cannot be stable premises for the children.

(iii) The court has the power to vary the equal share rule. **S. 6 of PROSA** is subject to **s. 7** of the said act which provides for the variation of the equal share rule where the court is of the opinion that its application would be unreasonable and unjust.

(iv) The factors which the court may take into consideration are not limited to those listed in **s. 7(1) of PROSA**. Therefore, the court in making its determination on the matters now before the court, may take into consideration, the factors contained in **s. 14(2) of PROSA**, which includes the following:

a) The contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has since the making of the financial contribution, ceased to be the property of the spouses or either of them.

(v) The defendant made no contribution towards the purchase or upkeep of the property. The property was acquired through a mortgage amounting to three million, seven hundred and fifty-six thousand, eight hundred and seventy-eight dollars (\$3,756,878.00), which the claimant has been solely paying. The claimant has thus far paid towards the mortgage, one million, one hundred and sixty-four thousand, five hundred and forty-two dollars and eighteen cents (\$1,164,542.18) and the deposit of three hundred and eighty-nine thousand, four hundred and thirteen dollars (\$389,413.00). Each month she pays approximately \$15,000.00 towards the mortgage. The claimant is therefore entitled to a 100% of the interest in the property as she solely paid for the property by paying the N.H.T contributions for years to qualify for a mortgage.

(vi) She also maintained the household by payment for food, personal expenses and general upkeep of the home and has solely paid the property taxes.

(vii) The claimant has paid for the maintenance of the children and the defendant did not contribute towards the maintenance of the children. The claimant is therefore seeking half the costs of the maintenance of the children

(viii) The claimant earned a gross monthly salary of \$96,134.00, during the course of the marriage as a Teacher. Her gross monthly salary including allowances was approximately \$161,000.00 and her net monthly pay including allowances was approximately \$89,000.00.

(ix) There are utility bills owed in the name of the claimant and she has paid over \$19,000.00 owed in arrears to the National Water Commission (hereinafter referred to as N.W.C).

(x) The claimant is prepared to purchase the defendant's share in the property, if the court concludes that the defendant is entitled to a share of the property.

(xi) The place can be rented for between \$25-\$30,000.00 and since the defendant has been living on the premises exclusively since July 2012, he should have been paying \$12,500.00 per month to the claimant.

(xii) The defendant merely lent his name to the transaction and in doing so he is not entitled to a share in the beneficial interest of the house.

## **CLAIMANT'S EVIDENCE**

[16] The claimant essentially avers in her affidavit in support of the fixed date claim form filed on March 13, 2014, that:



(i) She and the defendant were married on December 26, 2000 and have lived as man and wife at the property since 2007, until they separated in July, 2012. They have two children, who have resided with her at 42 Claremont Drive, Old Harbour, in the parish of St. Catherine, the place to which she relocated, after her separation from the defendant;

(ii) She purchased the property under the N.H.T, after solely paying contributions for years in order to qualify for the mortgage. Sometime in 2007, she visited the N.H.T and was advised that although she qualified for the full loan, the rules of the Trust did not permit her to get that amount and so in order to get a loan, she agreed to the defendant joining the trust and he agreed to co-sign for a loan and that they did. From her earnings, she solely paid all the arrears owed by the defendant for a period of seven years. This was necessary in order for the defendant to qualify for a loan. The mortgage loan was disbursed to each party separately. She paid a deposit of three hundred and seventy thousand dollars (\$370,000.00) by cheque to West Indies Home Contractors Limited plus cost of nineteen thousand, four hundred and thirteen dollars (\$19,413.00) from monies she saved from her salary over a 10 year period and by way of a loan from National Commercial Bank (N.C.B) in her name for the said property. She subsequently discovered that the defendant was not paying his loan and in an effort to secure the home which they had purchased, she made the payments solely from her earnings. She has been doing so, since the defendant who promised to pay it, refused to do so.

(iii) Before they purchased the house, she bought the defendant a Toyota Corolla motor car, which he operated as a taxi. Thereafter, when they decided to purchase the home, the defendant informed her that he did not have any money to contribute accordingly, as the taxi business was not earning enough money.

(iv) The utility bills for the said property are registered in her name and have always been paid by her from her earnings.

(v) The defendant is an alcoholic and had constantly verbally and physically abused her and as a consequence, has had several motor vehicle accidents while driving. In 2008, their daughter and her mother were in a motor vehicle driven by the defendant, which collided into another vehicle and resulted in them having broken bones and facial scars. Their daughter has had major surgeries and her leg was in cast for 8 months and to date has not fully recovered from these injuries and is being treated. Following this accident, the defendant was at home for over a year and she had to maintain the household, the children and take care of all the expenses of the household and family.

(vi) Sometime in 2010, she bought a 2006 Honda Fit which was totalled by the defendant while he was heavily intoxicated and driving the said motor car, consequently causing a collision with another motor vehicle. Her husband contributed nothing towards the repair and she had to pay all the attendant costs. Further, the driver of the other motor vehicle is currently suing her for damages. As a result of the breach in contract, their insured did not cover the cost of the damage and she had to bear the financial burden of the expenses resulting from these accidents.

(vii) The defendant presently lives at the property and pays nothing at all, as all expenses, inclusive of utility bills, are paid by her.

[17] Exhibited to this affidavit is her marriage certificate, copy certificate of title, copy pay advice, copy N.H.T payment voucher.

[18] In her second affidavit filed on January 12, 2015, she further avers that:

(i) She is a Teacher and all the expenses for the property inclusive of electricity and water expenses, was paid by her up until July 2012 when she left the said property. Exhibited are copies of two monthly electricity bills

bearing statement dates of October 22 and August 24, 2010 and copies of two water rate bills bearing the bill dates of November 12 and October 08, 2010.

(ii) When she visited the N.W.C, she was advised that no utility payments were being made for the property after 2012 and she undertook and on December 01, 2014, paid in full the sum of \$19,330.00 as back monies owed to the N.W.C for water consumption by the said defendant, Lenroy Simms. Exhibited is a water rate bill bearing a bill date of January 13, 2014, with an accompanying receipt displaying payment of the sum of \$19,330.00 on December 01, 2014.

(iii) The contract with the Jamaica Public Service is in her name and from July, 2012, when she made the last payment, having thereafter moved from the property, no further payments have been made and the property has been without electricity since February 2013. Further, in the said month, the meter for the said property was removed from the premises by Jamaica Public Service, thereafter generating no further cost. Exhibited is a copy of a Statement of Account.

[19] In her supplemental affidavit filed on November 16, 2015, she states that:

(i) The defendant, who is a taxi operator and her, are joint tenants of the property.

(ii) She refers to her affidavit filed on January 12, 2015 and further avers that she solely paid the mortgage for the property which totalled the sum of \$389,413.00. Exhibited are copies of her salary slips.

(iii) The defendant has not maintained his children since she left the property and she verily believes that her children should be allowed to live in the house that she has paid for, comfortably, instead of the tight quarters her current living situation has placed them in.

(iv) To date she has paid the entire portion of the defendant's loan to the N.H.T for the said property in dispute totalling the sum of nine hundred and sixty-nine and eight hundred and thirty-five dollars and sixty-eight cents (\$969,835.68). Exhibited is a copy of the Loan Statement from the N.H.T for herself and the defendant;

(v) The defendant, before the acquisition of the property had never paid N.H.T and she solely paid up his N.H.T contribution so that they were able to receive N.H.T benefits.

(vi) She is of the view that the court should grant her 100% of the value of the property and she takes that view for the following reasons:

a. That the market value of the house as shown by the Valuation report dated October 16, 2015, exhibited hereto is seven million dollars (\$7,000,000.00);

b. Her prima facie entitlement is 50%, this being three million five hundred thousand dollars (\$3,500,000.00), with the defendant entitled to a similar sum;

c. The determination of her entitlement is subject to the following deductions:

i. The full deposit that was paid by her totalled three hundred and eighty-nine thousand, four hundred and thirteen dollars (\$389,413.00), a copy of the receipt for the deposit is exhibited and marked "DHS-5".

ii. The full mortgage payment paid by her total the sum of one Million, one hundred and sixty-four thousand, five hundred and forty-two dollars and eighteen cents (\$1,164,542.18);

- iii. The interest on one million, one hundred and sixty-four thousand, five hundred and forty-two dollars and eighteen cents (\$1,164,542.18) at 10 % on monies paid by her total one million, forty-eight thousand and eighty-seven dollars and ninety-six cents (\$1,048,087.96). This bears in mind that the Respondent is getting the full benefits of the capital accretion on the property over the years.
  
- iv. Pursuant to **s. 14 (3)(b)** of **PROSA** his one share of the sums expended for maintenance on behalf of the children which said sum he has not contributed during the period over the last 7 years are in total, for food, clothing, school fees, transportation, medical expenses and utilities, the sum of two million, four hundred and fifty-three thousand and five hundred dollars (\$2,453,500.00)

The one half cost being one million, two hundred and twenty-six thousand, seven hundred and fifty dollars (\$1,226,750.00) for maintenance of the said relevant children of the marriage.

That one half share valuing three million and five hundred thousand dollars (\$3,500,000.00) and cost of transferring the one half share of the property to the applicant being (for half transfer tax, half stamp duty, half registration, and half miscellaneous fees and attorney fee)

three hundred and thirteen thousand and two hundred and forty dollars (\$313,240.00)

(vii) She is advised and verily believes that the standard rental for the property owned by them is approximately \$25,000.00 to \$30,000.00 per month and the defendant has been living at the property solely from July 2012 and that the reasonable share of the rental due is \$12,500.00 per month for 3 ½ years making the sums owed by the defendant five hundred thousand dollars (\$500,000.00).

(viii) The defendant should be condemned with the cost of these proceedings for which she has contracted and paid the sum of five hundred thousand dollars (\$500,000.00).

(ix) The above sums- five million, one hundred and forty-two thousand and thirty-three dollars and fourteen cents (\$5,142,033.14) owed by the defendant exceeds the value of his one half share and as such the court should declare that these sums be deducted from the defendant's half share and thus, she is entitled to the full value of the property.

## RELEVANT LAW

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

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

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

[21] **Subsection (2)** provides essentially, that where a marriage or cohabitation is terminated by death, the surviving spouse is entitled to one-half share of the family home, except where the spouses were joint tenants.

[22] In **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47, Brooks J.A. in his interpretation and application of **PROSA**, stated at para. 15 that:

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

[23] *'For the purposes of this matter, the words "family home" and "spouse" in the interpretation of the Act (section 2) are relevant. "Family home" is a new concept in our law and this Act embraces an entirely new approach to the entitlement of the parties to share in the ownership of the same....'* - per Phillips J.A. in **Annette Brown v Orphiel Brown**, [2010] JMCA Civ 12, para 114

[24] Brooks J.A. at para. 19 referred with approval to the judgment of McDonald-Bishop J. (Ag.) (as she then was), in **Graham v Graham**, Claim no. 2006 HCV 03158 (delivered April 8, 2008) wherein she said at para. 15 that:

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

[25] The authorities are clear. The statutory rule provides for equal entitlement of the ownership of the family home. That is the general rule and the norm.

[26] **S. 2** of **PROSA** defines “family home” as the ‘*dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the 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.*’

[27] In the instant matter, there is no dispute as to whether or not the property is the family home. It is a dwelling-house that is wholly owned by both spouses as evidenced by the Certificate of Title. It was used habitually by the parties as the only family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly for the purposes of the household and it certainly was not a gift by someone to one spouse for that spouse’s benefit.

[28] Therefore, in light of the above finding, **s. 6** of **PROSA** is applicable and both spouses are presumptively, statutorily entitled to an equal interest in the property. Indeed, as counsel submitted, it is the only property owned by the parties, who having married on December 26, 2000, acquired the property during their marriage as a couple in a partnership. So now that the partnership has ended, such an asset, acquired during the marriage, ought to be equally shared.

[29] The claimant however contends that the general rule as laid out in **s. 6** of **PROSA**, ought not to be applied, as in the circumstances it would be unreasonable or unjust for the defendant to be entitled to one-half share of the property. Instead, the equal share rule ought to be varied pursuant to **s. 7** of **PROSA** and the claimant ought to be granted the entire interest in the property.

[30] **S. 7** treats with the power of the court to vary the equal share rule. **S. 7(1)** provides that: *where in the circumstances of any particular case the court is of*



*the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following:-*

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

[31] It becomes apparent from **s. 7** that the triggering events which could cause the court to find that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home is not exhaustive; the court is entitled to consider other factors. Further, the section requires the party who disputes its applicability, to apply for its displacement and such a party must show that the equal share rule is unreasonable or unjust, as equality is the norm. The three factors stated therein, from the evidence given in the case at bar, does not obtain, neither did counsel for the claimant seek to argue that any of the considerations as stated in **s. 7(1)** applied to his case. The claimant has to therefore, now prove that a **s. 7** factor exists, an exception to the equal- share rule into which her case comes and the rule ought to be displaced.

[32] At this juncture, the judgment of Brooks J.A. proves instructive. At para. 31-32 and 34 he enunciates that:

*'If the door is opened, by the existence of a s. 7 factor, for the consideration of displacement of the statutory rule, then very*

*cogent evidence would be required to satisfy the court that the rule should be displaced.*

*Another aspect of s. 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in s. 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that theme may be considered.*

*The existence of one of those factors listed in s. 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration.'*

[33] He continues at para. 41 and 50-51 by stating that:

*'Since s. 7 does not allow for contribution and "other fact(s) and circumstance(s)" to entitle the court to consider a departure from the equal share rule, what else, since the section uses the word "include", may be considered as factors that may lead to such a departure? Perhaps only time and experience will bring about an answer to that question. One possible scenario, however, could be where spouses, on deciding to separate, agree that a house, in which the legal interest is vested solely in spouse A, be transferred to spouse B, who is leaving the family home, in order for it to be a residence for spouse B. If the entire legal interest in the family home were vested in A, certainly, in those circumstances, it would be open to the court to consider whether it would be unreasonable or unjust to apportion equal interests in the family home. That is just an example, but it will be sufficient to observe, at this time, that the list of factors contemplated by section 7 is not closed.'*

*"...The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists. If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be*

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

[34] His lordship enunciated the following principles at paras. 76-78:

- (a) *'In order to displace the statutory rule for equal interests in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act, or a similar factor, exists. Contribution to the acquisition or maintenance of the family home, by itself, is not such a factor, it not having been included in section 7. This is in contrast to its inclusion, as a relevant factor, in section 14, which deals with property other than the family home.*
- (b) *If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule. The degree of cogency of that evidence is greater than that required for other property. In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution*
- (c) *The court should also bear in mind that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. Post-separation contributions cannot disturb the entitlement at separation.'*

[35] It becomes very clear from his lordship's judgment, that the statutory rule of equal-share ought not to be lightly interfered with and very cogent evidence is required for the displacement of this rule. There is no common theme in the **s. 7** factors and the existence of such a factor, does not automatically entitle the spouse in whose favour the exception exists, to the entire interest in the property. Instead it is at that point, when a **s. 7** factor is found to exist, that the court will then go on to examine other elements such as contribution and others, in an effort to ascertain whether it is unreasonable or unjust for each

spouse to be entitled to one-half share of the family home and adjust the statutory rule accordingly.

[36] It is then, the law, that the court must be satisfied, first and foremost, that a **s. 7** factor exists. Once that gateway is created, then the court will move on to examine other elements. However, if there are no **s. 7** factors, the court is not at liberty to further consider any other circumstances; the equal- share rule, must be applied. Contribution in and of itself is not a **s. 7** factor, it is one of the elements to be considered after a **s. 7** factor is found to be extant.

[37] Finally, it may be distilled from his lordship's dictum that even where a **s. 7** factor is shown to exist, a court must be reluctant to depart from the statutory rule. Further, the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. Post-separation contributions cannot disturb the entitlement at separation.

*'S. 12 is also of much significance as it stipulates the relevant dates for determination of the value of shares in property falling under PROSA. The section does not expressly use the term "family home", but in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47, this court held that the use of "property" in that section extends to "family home". The section provides that a spouse's share in property shall be determined as at the date on which the spouses cease to live together as man and wife. Therefore, an important consideration in the division of family home is the date of separation....'- per Phillips J.A. in **Dalfel Weir v Beverly Tree**, [2014] JMCA Civ 12 at para. 36*

[38] It is these principles and the aforementioned guidance of Brooks J.A. which must guide a careful consideration and determination of the claimant's application.

[39] The claimant gave evidence that since vacating the property, she has had to pay a substantial sum for water and she has contended that the sum total of the maintenance for the last 7 years of their children, the standard rental for the premises, her legal fees and cost of transferring one half share exceeds the value of the defendant's one half share in the property and therefore should be deducted from his share and the claimant be given the full interest therein.

[40] It is clear from **s. 12(2) of PROSA** that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation and post-separation contributions cannot disturb the entitlement at separation. **S. 12(2) provides that 'a spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the court.'** The parties separated in July 2012, thus, all the circumstances which arose thereafter, do not and cannot affect the defendant's statutory entitlement to 50% share in the property and will not be regarded in determining whether the rule ought to be displaced.

[41] Furthermore, the claimant had the property valued in 2015 and it is worth \$7,000,000.00. In light of the foregoing, the defendant would be entitled to 50% of the value of the property in 2012.

## **THE ACQUISITION OF THE FAMILY HOME**

### **I. CLAIMANT'S FINANCIAL CONTRIBUTION**

[42] The evidence as proffered by the claimant is that she paid the deposit and the cost of acquiring the mortgage. She also paid the defendant's arrears to N.H.T. for 7 years from her earnings so that he could qualify for a loan. The mortgage loan granted to them was at a value of \$3,756,878.10. Her contention is basically that the defendant co-signed and joined the Trust as the rules of the Trust did not permit her to get that amount. Further, she has solely been paying the mortgage.

[43] Her salary slips, the earliest of which bears the date September 2010, reveals that between September 2010 to May 2011 (excepting the month of March for which no salary slip was exhibited), she paid \$9,322.24 per month towards the mortgage. Her loan statement DHS-3 exhibited to her supplemental affidavit shows that her regular monthly payment amount was \$8,725.55 and the defendant's was \$8,979.96. From June 2011 to October 2015 (subject to the months for which no slips were exhibited), her regular payments were \$23,900.00 per month from her salary. From the loan statements exhibited,

payments commenced for the mortgage in 2008 and except for a N.H.T. voucher exhibited to her first affidavit showing payment of \$10,500.00 and \$9,500.00, by the claimant and defendant respectively, in September and apparently October 2008, there is no evidence, other than the claimant's averment that she has solely paid the mortgage, accounting for the payment of the mortgage in 2008 and 2009.

## **II. DEFENDANT'S FINANCIAL CONTRIBUTION**

- [44] The claimant did aver that she had bought a car which the defendant operated as a taxi prior to the purchase of the house. The defendant however, had informed her that he did not have any money to contribute to the purchase of the home, as the taxi business was not earning enough money. This does not mean that the defendant was not earning any money at all. He may not have been earning a substantial amount or had any savings, but may have been able to contribute to the mortgage payments. Further, it seems that up to the acquiring of the mortgage, the parties were on good terms. They enjoyed a partnership of equals. They had been married for over 7 years prior to the acquisition of the home.
- [45] Further, it is also her contention that after the accident in 2008, she had to maintain the entire household and take care of all the expenses as the defendant was at home for over a year. She then bought him another car in 2010 which was also involved in a collision. As aforementioned there is no evidence accounting for 2008/2009, but the claimant's salary for 2010 was decent enough and it is very possible for her to have been maintaining the household from it, in light of the defendant allegedly having been involved in another accident in 2010. In 2011 and 2012 however, her salary decreased, in some instances significantly, where for some months, her net monthly pay ranged between \$37,000.00-\$53,000.00. During most of this time, she was still living with the defendant and was still paying \$23,900.00 for the mortgage and maintaining two children, one ten and the other four. From her salary, it does not appear that she would have been able to maintain the household solely, between 2011- 2012. The claimant

is no doubt an independent woman, but it is this court's considered view of the evidence given by her, that at some point during the marriage she was assisted financially by her husband. Specifically, this court finds that between the years of 2008 and 2012, before the parties separated, the defendant did make some contribution to the maintenance of the household, but minimal, if any, direct contribution to the repayment of the mortgage.

### **THE LENGTH OF TIME FOR WHICH THE PARTIES WERE MARRIED**

[46] The parties had been married for over 7 years prior to the acquisition of the property and for over 13 years prior to the filing of this claim. Counsel has submitted that the claimant obtained a decree nisi in June 2014. This court however, was not given any evidence during these proceedings, as to whether or not, the claimant had obtained a decree absolute. What is clear is that, up to July 2015, the marriage had not yet been entirely, legally dissolved. So the parties were married for, at the very least, almost 15 years. What is even more pertinent is that, it has been the claimant's evidence that she moved from the property in July, 2012. Therefore, at the very least the parties shared the said property for almost four years, as a couple, prior to separation. Certainly then, this marriage could not be said to have been of a short duration nor a partnership of unequals. This is an ideal **s. 6** matter. Perhaps if the marriage was of a very short duration, then that would give rise to a triggering factor pursuant to **s. 7** of **PROSA**, enabling the application of the variation rule. Where the marriage is of a long duration, as in the instant case, it indicates all the more reason why the property should be considered as subject to the equal share rule. The property in this matter, which is the only property owned by the parties, embodies in the truest sense, the matrimonial property. For over a decade, the parties collaborated in a partnership of equals and utilized the property for a fairly significant period of their marriage.

## **MAINTENANCE**

[47] The claimant has averred in her evidence that the defendant has not maintained his children since she has left the property. This court is of the considered view that if the claimant is seeking maintenance for her children, she ought to pursue such a claim pursuant to the **Maintenance Act**. The proper course is to apply for a maintenance order as distinct from saying that, on an accumulation of all the sums (including the defendant's one half share for maintenance) for which the defendant is indebted, the claimant is entitled to the entire interest, as those said sums for which he is indebted, are in excess of the value of his one half share in the property.

[48] It is important to note, that pursuant to the said act, both parents have an obligation to maintain the children, who from the evidence presented are minors, to the extent that, that parent is able to do so. **See s.8**. Further, a court is empowered pursuant to s. **15(1)(e)**, to make an interim or final order requiring payment to be made in respect of any period before the date of the order. The claimant is therefore permitted by law to ask for an order reimbursing her a portion of the money she has expended in the care of the children as part of an application for maintenance. That is the appropriate course that she ought to have undertaken.

## **REPAIR OF MOTOR VEHICLE**

[49] As regards the repair of the motor vehicle, the claimant's counsel submitted that the money paid for repairs to her vehicle and the other party's vehicle is not part of the claim. Even if it was though, evidence of those payments would, for the reasons mentioned above, not have been sufficient to displace the equal share rule.



## APPLICATION OF LAW TO FACTS

[50] The important question is whether, in all the circumstances, a **s. 7** factor exists.

[51] In the words of Phillips J.A. in **Dalfel Weir v Beverly Tree** [2014] JMCA Civ 12 at para. 61

*'It is clear that no such triggering factor existed in this case. The family home did not exist prior to the marriage. The financial contribution per se to the creation of the family home is not considered a section 7 factor, and so in this case there would have been no basis for the judge to have embarked on the exercise to consider a departure from the equal share rule.'*

[52] In the instant case, there is much that has been made of the claimant's contribution to the acquisition and upkeep of the property. In light however, of the principle that marriage is a partnership of equals and the dictum of Brooks J.A., contribution in and of itself is insufficient to displace the statutory rule and in any event is not of any greater weight than non- financial contribution.

In **Graham v Graham**, McDonald Bishop J.A. at para 31 stated that *"under the new statutory regime, there can be no discrimination against the claimant merely on the basis of financial inequality. Monetary contribution cannot be presumed to be of higher value than non-monetary contribution. This, is said, to be a rule of almost universal application*

[53] In the final analysis, there is no question that the claimant has made significant financial contributions to the acquisition and upkeep of the property, and the defendant, at best, in view of the claimant's undefended evidence, has made minimal contribution. From her loan statement, the amount that she has repaid towards the mortgage thus far, no doubt exceeds the portion of the defendant's loan. Nevertheless, the authorities remain very clear, contribution is not a **s.7** factor and the claimant has not proved that a s. 7 factor exists or provided, any evidence of such cogency, to displace the equal share rule. The rule will thus apply.

## FINAL ORDERS

[54] This court orders as follows:

- (i) The property situated at 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour, in the parish of St. Catherine as registered at Volume 1410 Folio 362 of the Register Book of Titles and known as all that parcel of land part of Rodons Pen and Rest Pen, now called the Aviary, Old Harbour, in the parish of St. Catherine is the family home.
- (ii) The parties are equally entitled to a 50% share of the property situated at 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour, in the parish of St. Catherine as registered at Volume 1410 Folio 362 of the Register Book of Titles and known as all that parcel of land part of Rodons Pen and Rest Pen, now called the Aviary, Old Harbour, in the parish of St. Catherine.
- (iii) The said property at 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour in the parish of St. Catherine registered at Volume 1410 Folio 362 shall be sold and the parties are equally entitled to the net proceeds of the sale.
- (iv) In the event that either party refuses to sign the said required documents, the Registrar of the Supreme Court is empowered to sign the documents for and on behalf of that party.
- (v) Mr. H.S. Rose, Attorney-at-Law of 6 Nugent Street, Spanish Town in the parish of St. Catherine shall have carriage of sale in respect of the sale of property known as 164 Whitewing Circle, Lot 499, The Aviary, Old Harbour, St. Catherine.
- (vi) In the alternative to orders nos. 3-5, the claimant is entitled to purchase the defendant's share in the property.

- (vii) That until the property is sold, the parties shall be entitled to remain in and use the property.
- (viii) Liberty to apply is granted.
- (ix) Each party shall bear his or her own costs.
- (x) The claimant shall file and serve this order.

.....

**Hon. K. Anderson, J.**