



[2017] JMSC Civ 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 06032

IN THE MATTER of the Partition Act

A N D

IN THE MATTER of the Maintenance
Act 2005

A N D

IN THE MATTER of the Property
(Rights of Spouse Act) 2004

A N D

IN THE MATTER of all that parcel of
land known as Lot 130 Fern Road,
Eltham View, Spanish Town in the
parish of St. Catherine

BETWEEN

MYRA ROSE HOSANG

CLAIMANT

AND

DAVID ANTHONY HOSANG

DEFENDANT

IN CHAMBERS

Miss Judith Clarke for the Claimant

Miss Debra McDonald for the Defendant

HEARD: September 23; November 29, 2013 and October 6, 2017

Maintenance – children – wife – sections 4, 5, 9 and 14 of Maintenance Act, 2005. Property (Rights of Spouses) Act, 2004 Section 2, 6 and 13. – Lump-sum payment from asset of spouse – Payment mortgage arrears – Occupational rent.

DAYE J.

- [1] In November 2010 the claimant migrated to the United States of America with her only daughters of her marriage Kimberley HoSang and Antonette HoSang age 18 and 14 respectively.
- [2] She migrated with these children of the marriage without informing her husband, the defendant of her intention to migrate. Though he was aware that his wife parents had filed papers for the family to migrate to the USA.
- [3] The claimant along with her daughters went to live with her parents at Wishing Star Lane, Green Acres, Florida, USA.
- [4] She left her husband at the home they resided at Lot 130 Fern Road, Eltham View, Spanish Town, St. Catherine.
- [5] The Claimant worked with the National Library for up to 30 years as a Field Programmer when she left Jamaica. The defendant was employed as an Art teacher at co-educational High School in St. Andrew for 33 years. Both daughters were attending two traditional High School for girls in St. Andrew.
- [6] The claimant and defendant were married on the 20th July 1985. At the time she migrated the parties were married for 25 years. Their accounts in their affidavits described matrimonial differences between them intensified between 2003 and 2009. During this period they lived separate and apart though they lived under the same roof at Lot 134 Eltham View, Spanish Town, St. Catherine.
- [7] The Certificate of Title of this premises shows the claimant and defendant were registered as joint tenants. The property was transferred to them on the 21st November 1990. They purchased this home by means of a mortgage from Victoria Mutual Building Society. Other mortgage loans were obtained on the security of the home. Over time these mortgages were discharged.
- [8] The two daughters of the marriage were born at this home as their births were in the year 1992 and 1996 respectively. The family lived at this home together continuously until the claimant migrated.
- [9] This home was the “family home” within the meaning of the **Property (Rights of Spouses) Act 2004**. Under section 6 of this Act each spouse is entitled to one half share of the “family home”. At the hearing of this claim there was no

challenge to the equal share rule. The parties agreed the home was owned equally.

- [10]** What is in issue is maintenance for the claimant's children.
- [11]** After Mrs. Myra Hosang migrated with the children in December 2010 and left the defendant in the home he filed on the 17th June 2011 a petition for the dissolution of marriage. A copy of this petition was served on the claimant's brother at Eltham, St. Catherine with the permission of the Court.
- [12]** This claim was followed by Mrs. Hosang filing a Fix Date Claim Form dated 31st October 2012 filed November 5, 2012. She claimed the following orders:
- 1) An order for partition of the Property known as Lot 130 Eltham View, Spanish Town in the parish of St. Catherine and registered at Volume 1226 folio 240 of the Register Book of Titles in the names of the Claimant and the Defendant.
 - 2) An order that there be a valuation of the said property by a reputable valuator mutually agreed upon by the parties within thirty (30) days of the date of the date of the final Order herein or such sooner time as to this court seems just failing which the Registrar of the Supreme Court is hereby empowered to appoint a valuator.
 - 3) An order that the cost of the valuation shall be borne by the Defendant.
 - 4) An Order that the said property be sold pursuant to the said valuation and the net proceeds divided equally between the Claimant and the Defendant.
 - 5) An order that the Defendant accounts for all rental paid collected by him from the said property from and since 2010 to date.
 - 6) An order that the Defendant pays to the Claimant one half the proceeds of the said rental.
 - 7) An order that the Defendant pays to the Claimant the sum of \$284,601.50 being one half of the amount paid by the Claimant to GSB Cooperative

Credit Union Limited in or about November 2010 to settle the outstanding mortgage debt on the said property.

- 8) An order that the Defendant pays to the Claimant from the proceeds of his one half share a lump sum payment of one million two hundred thousand dollars towards the maintenance of the relevant children of the marriage between the parties, namely Davey-Ann Kimberly HoSang born on the 29th day of March, 1992 and Kelly-Jo Antoinette HoSang born on the 28th day of April, 1996.

[13] At the hearing a Consent Order was granted in terms of paragraph 1, 2, 4, 5 and 7 as amended of the Fix Date Claim Form.

[14] The substance of the dispute then to be settled by the Court are related to paragraph 8 and 9. They read as follows:

“8. An order that the Defendant pays to the Claimant from the proceeds of his one half share a lump sum payment of one million two hundred thousand dollars towards the maintenance of the relevant children of the marriage between the parties, namely Davey-Ann Kimberly HoSang born on the 29th day of March, 1992 and Kelly-Jo Antoinette HoSang born on the 28th day of April, 1996.

9. Additionally, an order that the Defendant pays to the Claimant the monthly sum equivalent to United States Eight Hundred Dollars (\$800.00) towards the maintenance of the said children.

Also she sought these orders:

3. An order that the cost of the valuation shall be borne by the Defendant.”

6. An Order that the Defendant pays to the Claimant one half of the proceeds of the said rental.

JURISDICTION

[15] This Application for maintenance is made in the Supreme Court on a Fix Date Claim Form and also claimed other reliefs. It is really an application for maintenance for the two daughters of the marriage by the mother of the children, the claimant, and wife of the defendant. Inevitable the court has to consider aspects of maintenance of the claimant/wife.

[16] Under section 3 (1) of the Maintenance Act¹, 2005 a person may apply for a maintenance order at the Resident Magistrate's Court² he or she resides or the Family Court in accordance with the provisions of the Act.

[17] The Act expressly permit an Application to be made in the Supreme Court where a person wishes also to apply for division of property. Section 3(2) provides as follows:

“(2) In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act.” (c/f sec. 5(2)(h))

[18] Section 2 provides “Court” means a Resident Magistrate, Judge or Court referred to in Section 3. The Supreme Court is the only, other Court that deals with division of property. Section 11 of the Maintenance Act (3) provides “A Court” may make a maintenance order upon an application by a dependant.

[19] These statutory provision addressed Rowe P's response in ³**Samuels v Samuels (1992) 29 J.L.R. 44 at p.45 para (e)** that the “... plea for generality of

¹ Repeal the Maintenance Act 1881 and the Affiliation Act 1926

² See Act change of name to Parish Court – Judicature -Resident Magistrate (Amendment and change of name) Act 2016, Sec 3 (4) and Sec 4 (a) to (e) – Judge of the Parish Court)

³Campbell J, applied Samuels v. Samuels, (Supra) and Jarrett v. Jarrett RM, CA 5/99 in Barr v. Meijerink v. Meijerink, Suit E 178/2001 del. August 29, 2002 pp. 8-11.

the law relating to Maintenance cannot be achieved without statutory basis". This case concerned an application for maintenance by a wife in the Supreme Court under the old section 12 of the Maintenance Act.

[20] In *Samuels*, supra *Rowe P* held that conduct of the parties that contributed to the breakdown of the marriage did not apply to applications for maintenance in the Supreme Court (eg adultery) under the Matrimonial Cause Act 1989 as it did to application for maintenance in the Resident Magistrate Court. Conduct affecting the breakdown of the marriage was only relevant in a few residual cases (eg financial recklessness, Denning M.R. in **Wachtel v Wachtel** 1973] 1 All ER 829 at 835 para (h) expressed this opinion, among others, in his decision on an appeal against a maintenance order by a husband.

[21] Section 5 of the Property (Rights of Spouses) Act 2004 expressly states:

5(1) ... in any proceedings relating to property instituted under this Act, the parties to the proceedings may apply-

(a) where the value of the property in dispute is within the monetary limits prescribed by or under the Judicature (Resident Magistrates) Act, to the Resident Magistrate of the parish in which the property is located or in which any of the parties reside, or as the case may be, to a Judge of the Family Court; or

(b) in any other case, to a Judge of the Supreme Court in Chambers."

[22] A spouse has a right to apply to the Court for a division of property where the marriage is ordered dissolved or annulled, the spouses have separated or one spouse conduct is affecting the property. (Sec 13(1)(a) – (d) of the Act. Sec 13(2) provides the application shall be made within 12 months of termination of the relationship or separation of the parties.

[23] The HoSang's application seeks relief for division of property and under the Property (Rights of Spouses) Act 2004. Therefore the Supreme Court, i.e, a

Judge of the Supreme Court in Chambers has jurisdiction to hear these applications.

PRACTICE AND PROCEDURES

[24] Section 3 of the Matrimonial Causes Acts, 1989 confer jurisdiction on the Supreme Court to hear Matrimonial Causes. ⁴ This involves matter of application for maintenance by a party to the marriage, maintenance for a relevant child, custody for children.

A person may apply for maintenance by way of Summons to a Resident Magistrate Court/Family Court (sec. 13(2) of Maintenance Act 2005)

Part 76 of the Civil Procedure Rules, 2002 as amended set out the process for the institution of Matrimonial proceedings.

Application for dissolution of marriage must be commenced by Petition (R. 76.4(1) of CPR 2002). A petition may include a claim for maintenance, custody and division of property [(R 76.4(5).]

A party is permitted to commencing proceedings for a matrimonial cause by a Fix Date Claim Form (R. 76.4(15). A petition must be accompanied by an Affidavit setting out the arrangements for the care, upbringing and maintenance of any relevant children R 76.4(7).

A party who is claiming maintenance custody or division of property as a part relief claimed in a petition or Fix Date Claim Form may file an application for court orders R 76.6(1).

⁴Definition of Matrimonial Causes Sec. 2 of MCA 1989 (a) to (f)

MAINTENANCE OF SPOUSE

[25] The law provides that each spouse has an obligation to maintain the other spouse to the extent that such maintenance is necessary to meet the needs of the other spouse. (Sec. 4 of **Maintenance Act 2005**). The principles and guidelines a Court ought to apply are stated and enumerated in the said Maintenance Act 2005. The Act also confere on the court a discretion to take into account other circumstances as the justice of the case requi

" 5.- (1) *A maintenance order for the support of a spouse shall –*

(a) *contain such provisions as will ensure that the economic burden of child support is shared equitably;*

(b) *make such provision as the Court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support."*

(2) *In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4) –*

(a) *the length of time of the marriage or cohabitation;*

(b) *the spouse's contribution to the relationship and the economic consequences of the relationship for the spouses;*

(c) *the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;*

(d) *the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;*

(e) *whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;*

(f) *any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in*

remunerative employment and were contributing the earnings to the family's support;

- (g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;***
- (h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;***
- (j) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.***

[26] A list of circumstances a court should consider as contained in section 14(4) of the Act which read as follows:

"14 (4) In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and –

- (a) the respondent's and the dependant's assets and means;***
- (b) the assets and means that the dependant and the respondent are likely to have in the future;***
- (c) the dependant's capacity to contribute to the dependant's own support;***
- (d) the capacity of the respondent to provide support;***
- (e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;***
- (f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;***
- (g) any legal obligation of the respondent or the dependant to provide support for another person;***

- (h) the desirability of the dependant or respondent staying at home to care for the child.**
- (i) any contribution made by the dependant to the realization of the respondent's career potential;**
- (j) any other legal right of the dependant to support other than out of public funds;**
- (k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;**
- (l) the quality of the relationship between the dependant and the respondent;**
- (m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.**

This list is not exhaustive as it further provided that the court can take into account any fact or circumstances that meets the justice of the case.

MAINTENANCE OF CHILD

[27] The same facts and circumstances enunciated in Section 14(4) above that must be taken into account in determine a wife's maintenance must also be taken into account in determining a child maintenance. (Section 9 (2) of Maintenance Act). This legislation specify other or additional consideration for child support. These are hereunder:

"9.-(1) A maintenance order for the support of a child

**shall apportion the obligation according to the capacities of the parents to provide support; and
may make an award for the payment of a sum of money for expenses in respect for the child's prenatal care and birth.**

(2) ...

(a) that each parent has an obligation to provide support for the child;

- (b) the child's aptitude for, and reasonable prospects of, obtaining an education; and**
- (c) the child's need for a stable environment."**

[28] Section 9(3) and 9(4) of the Act states the factors a court shall take into account before making a maintenance order for a child that is accepted by a party to a marriage or cohabitation as a child of the family. The factors are that such a party must firstly accept the child as a child of the family and secondly assumes responsibility for the child's maintenance. The court must also consider the liability of any other person to maintain the child.

[29] The broad principle that governs a court is stipulated in sections:

"5.-(1)A maintenance order for the support of a spouse shall –

- (a) contain such provisions as will ensure that the economic burden of child support is shared equitably,
- (b) make such provision as the Court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support."

[30] Then the court must take into account the following:

"5 –(2) In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4) –

(a) the length of time of the marriage or cohabitation;

(b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(c) the effect of the responsibilities assumed during the marriage or cohabitation on the earning capacity;

- (d) the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;***
- (e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;***
- (f) any housekeeping child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family' support;***
- (g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;***
- (h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;***
- (i) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate that pension, allowance or benefit.***

[31] Section 9(3) and (4) of the Act state the factors a court shall take into account before making a maintenance order for a child that is accepted by a party to a marriage or cohabitation as a child of the family. The factors are that such a party must firstly accept the child as a child of the family and secondly assumes responsibility for the child's maintenance. The court must also consider the liability of any other person to maintain the child.

MAINTENANCE AND PROPERTY RIGHTS

[32] The Maintenance Act 2005 expressly incorporate or links maintenance of a spouse with property rights of the spouse. The Act gives the court the power to

adjust financial position of the spouse based as a consideration of these two reliefs as also the justice of the circumstances. The Act extends the same consideration it applies to married couples to person cohabiting as man and wife by way of the definition of spouse. To all intent and purposes the Act could be described as a reform legislation and not merely codifying the common law.

- [33] The rationale for including division of property rights claim by spouses along with maintenance application is explained by Denning M.R. in a passage of his judgment in **Button v Button** [1968] 1 W.L.R. 457 at 463: -

“I think it would be an advantage if all financial questions between husband and wife could be settled at one and the same time. Maintenance is linked with the property. If the wife stays in the house, her maintenance may be reduced on that account. If she gets a substantial capital sum out of the house, it may affect her maintenance. So it would be a good thing if applications as to maintenance and property were heard together. Seeing that the wife and children here have reasonable maintenance in all the circumstances of the case I do not think it is a case where she has any interest in the house.”

- [34] On the facts the Registrar ordered that the wife was entitled to ½ share of the house. The wife did work (improving and decorating) on the husband's house and was economical in her spending. The Registrar was not right in the fact and in law. The wife's work was more than 'do it yourself work'.
- [35] At the time the case was decided the 1970 Matrimonial Causes Act, U.K. was not yet passed. Subsequent matrimonial cause legislations adopted the court's opinion. A share in the capital asset of the parties by the wife or a transfer of legal and equitable share of the capital asset (home) would reduce her maintenance. It was in the interest of an efficient settlement to deal with these claims in one proceeding.

ONE THIRD RULE

[36] Lord Denning MR in **Watchel v Watchel** (supra) at p. 839 para (h) followed the principles and his reasoning that an award for maintenance was related to division of property rights. Here he discussed maintenance of a wife and the use of the so called one third rule and a wife's share in its capital asset (home). He said at para (h) dealing with the Matrimonial Cause Act 1970:

“Under the old dispensation, the wife duty out of her own one third, had to provide for her own accommodation. If she was given the right to occupy the matrimonial home that went to reduce her one third. Under the new dispensation she will get a share of the capital assets; and with that share, she will be able to provide accommodation for herself, or at any rate, the money to go same way towards it”

[37] He then went on to say that the one third rule was a flexible starting point to consider the wife's application for maintenance.

CAPITAL ASSETS

[38] Lord Denning in this case traced the development of matrimonial causes and property legislations in the UK from the limitation of the common law. His **dicta** under the leading “family assets” in **Watchel** [p. 836 para (c)-(g)] is helpful in understanding the underlying principle of what he called the reform legislation and the new powers of the court in the UK.

[39] The **Property (Rights of Spouse) Act 2004** and its **Maintenance Act 2005** (J) reflects many similar provision, (though not extract, to the English Act of 1970.

[40] Denning MR stated:

“The phrase family assets is a convenient short way of expressing an important concept. It refers to these things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the

benefit of the family as a whole The family asset can be divided into two parts:

- (i) those which are of a capital nature, such as its matrimonial home and the furniture in it,
- (ii) those which are of a revenue producing nature, such as the earning power of the husband and wife. When the marriage come to an end the capital asset has to be divided. The earning power of each has to be allocated.”

[41] Until recently the court had limited powers in regard to the capital assets. They could determine property rights of the parties. They could vary ante nuptial and post nuptial settlements. But they could not order a transfer of property from one to the other. They could not even order a lump sum until 1963. The way in which the courts made financial provision was by way of maintenance to the wife. They often did this by way of “the one third rule”.

FAMILY HOME – CAPITAL ASSET

[42] He went on to explain that the matrimonial home was usually the most important capital asset and often the only one. Lord Denning MR prefer to apply the one third rule of maintenance as a starting point for maintenance as oppose to a one half rule (50/50) as a starting point for maintenance. At the time of his decision there was no statutory provisions, unlike now in Jamaica under the Property (Right of Spouse) and 2004 that establish the one-half rule for its division of the ‘family home’. It seems therefore that the one third rule would not be appropriate as a starting point in Jamaica but rather the one half rule should be preferred as a starting point for application for maintenance. This is naturally subject to the justice of each case.

LUMP SUM PAYMENT

- [43] It is again to helpful to consider Lord Denning MR's **dicta** on lump sum provision in Wachel (Supra), he said in at page 40 paragraph (e).

"Lump Sum Provision"

"... Before 1963 a wife or a divorcee could not get a lump sum paid to her. All that she could get is a weekly or monthly payments secured or unsecured [sec. 5(1) of the Matrimonial Causes Act [1963] and sec. 2(1)(c) of the 1970 Act. Sec. 15(1)(b) Maintenance Act J.]

... One thing is however obvious no order should be made for a lump sum unless the husband has capital asset out of which to pay it – without crippling his earning power. Another thing is this when the husband has available capital asset sufficient for the purpose the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments, or make them unnecessary. It will also help to remove the bitterness which is so often attendant on periodical payments. Once made, the parties can regard the book as closed. The third thing is that if a lump sum is awarded, it should be made outright. It should not be made subject to conditions except where they are children. Then it may be desirable to let it be the subject of a settlement in the case she remarries, the children will be assumed by some part of the family assets which was built up for them.

But the question of a lump sum needs special consideration in relation to the matrimonial home. The house is in most cases the principal capital asset. Sometimes the only asset. It will usually have increased greatly in value since it was acquired. It is to be regarded as belonging in equity to both of them jointly."

- [44] In addressing the matrimonial home as the principal capital asset of the parties Lord Dennings opinion is that a lump sum payment to a wife when the marriage breakdown will depend on who stay or occupy the home. If the wife leave the husband in the home and he pays the mortgage, maintenance, collects rental then the he ought to get the home sale and solely and absolutely. But as both

are jointly entitled to the home in equity the wife should receive a lump sum payment to compensate her the loss of her share. The amount of lump sum payment should be a sum that would enable her to make a deposit on a home for herself. It should be a sum that the husband can afford on a second mortgage. This may result in no award for periodic maintenance to the wife.

[45] If the wife remains and occupy the home what is the converse situation. The learned Judge's view was she should get the house absolutely. And if there are any children the home should be given to the wife with a settlement to the children. If there is a mortgage the husband should pay the mortgage or guarantee the mortgage. This most likely would result in there being no need to award a lump sum payment to the wife. Also it may reduce any or make any pending payment for maintenance unnecessary.

[46] As the law stand now under the **Property (Rights per Spouse) Act 2004**. There is no need for the transfer of any title in the home from one to the other when either remain in occupation. The reason is that the equal share rules entitles each spouse to one half share in the family house. There is skill the need however to compensate the spouse who it's not occupy the house for the value of their one half share in this capital asset. This is where the decision Wachtel or the payment of the lump sum from the home and its effect each payment of maintenance from the wife and ultimately the children is applicable.

[47] Sec. 15 of the Maintenance Act 2005 does provide for property to be transferred, held in trust or be vested in the dependant. The position in practice where an order is made to divide the home and allocate each party their one half share is to make an order to sell the home. There is a follow up order is that each spouse is directed to sign the transfer of title or the Registrar will sign the transfer if either party fail to try the transfer.

MAINTENANCE OF CHILDREN

- [48]** In the present case Mrs. HoSang, for reason best considered by her, left the family home at Lot 130 Eltham View, Spanish Town, St. Catherine with her two daughters in November 2010. Mr. HoSang remained in the family home. He did rent out a part of it. He did pay for the cost of some maintenance as well as outgoings. Mrs. HoSang discharge the last mortgage loan from her Credit Union which was endorsed on the title. She did this by a lump sum benefit she received on termination of her employment in Jamaica prior to migrating.
- [49]** Mrs. HoSang wishes to have \$1.2 million paid towards the maintenance of her two daughters. She wants that to be paid as a lump sum from Mr. HoSang one half share.
- [50]** In addition she wants the equivalent of US\$800.00 monthly towards the maintenance of the children. The lump sum claim arise because she has incurred costs (1.) for accommodation for herself and children who reside in the USA. (ii) Some of the costs are borne by her parent –the children grandparents (iii) High School and College tuition for her daughters respectively (iv) costs of retraining and obtaining a marketable skill in the U.S.A. with medical bills.

These issues arises in my view:

- (1) Should Mr. HoSang obligation to contribute to the maintenance of his children extend to their costs of living in a foreign country i.e. U.S.A. where he made provision from his means in Jamaica.
 - (2) Should Mr. HoSang pay maintenance for his children abroad in a foreign currency USA Dollars or the Jamaica equivalent?
 - (3) Should Mr. HoSang obligation to maintain by children, where Law in Jamaica and abroad, extend to payment of the cost of tertiary education?
- [51]** In my view these are special facts and circumstances that the court must take into consideration in determining the amount of maintenance in its case (sec.

14(4)(m). In Jamaica as also other Caribbean states there is steady flow of migration to North America and U.K. to a lesser extent. There is a growing body of Diaspora and families are sponsored by relatives to migrate to better their lives and obtaining higher education and certification in training. But the family or spouse who migrates leave other family members behind. They also leave a family home and financial responsibility. At the same time they are due and entitled to income, payments and other financial benefits from persons at home. If there is a payment in US currency by person at home to someone abroad this can be onerous due to the difference in exchange rate between the Jamaican dollars and the United States dollar. The Jamaica dollar is not always stable and is falling. The converse of a person abroad paying a cost or discharging an obligation by sending foreign currency is a gain. The inflow of remittance illustrates this reality.

SUBMISSION OF COUNSEL FOR THE DEFENDANT

[52] The submission of counsel for the defendant on the issue has merit. It is set out at page 12 of written submission November 29, 2003.

“Since becoming aware of the details regarding the children, the Defendant has made contribution as best he can afford. His contribution are however impacted in respect of quantum by:

- 1. His income*
- 2. The effect of percent inflation generally, and the disparity between the Jamaican and United States currencies.*

He earns Jamaican currency, and it is unreasonable to request that an order to be made against him in United States currency or that he is tied to the uncertainty of the fluctuation in the exchange rate”

She further submitted, at page 13 of her written submission (Re: lump sum payment)

“[It] ... should be rejected on the following grounds:

1. The Claimant has provided no basis for the calculation of the sum of \$1,200,000.00 as requested.

2. The Claimant has provided no evidence of the alleged loans and bills for the children to which the sum is to be applied.
3. There is no evidence that the defendant is likely to disobey the order of the court thereby placing any sum to be paid to the claimant at risk.
4. In all the circumstances, this is a proper case for periodical payments.
5. To order lump sum award to the claimant a larger portion of the proceeds of the matrimonial home than would be appropriate [**Griffiths v Griffiths [1974] 1 All ER 932**] would be given to the claimant.
6. A lump sum payment would greatly diminish the Defendant's, capacity to provide shelter for himself after the sale of the matrimonial home which is his residence."

SUBMISSION OF COUNSEL FOR THE CLAIMANT

[53] Miss Judith Clarke counsel for the claimant wife made certain concession in her written submission dated Nov. 29, 2013 on the issue of payment in US currency and lump sum. After an intense cross examination and submissions of the defendant's conduct that allegedly led to the breakdown of the marriage and his means Counsel for the claimant submitted at paras 35-40.

1. "The defendant has since remained in the house and collected rent there from. He claims to have paid money to repair a significant plumbing issues. Since her migration Mrs. HoSang has received no benefit from the property.

[54] Paragraphs 1, 2, 4 5 and 7 are not now in contest. These were essentially agreed at the commencement of the hearing with a slight modification to paragraph 7 – that the sum indicated therein be deducted from the Defendant share. The absence of submissions on these aspects of the claim is based on the position that these matters have been agreed.

[55] In the absence of a valuation, the claimant cannot properly urge an order in terms of paragraph 8. [\$1.2 m lump sum].

[56] As to paragraph 9, the foregoing submission urge a figure in keeping with the evidence as it has unfolded [US\$800.00 per month].

[57] The claimant is therefore seeking formal orders in terms of the matters agreed as well as an order that the defendant advances the cost to cover the valuation report and the claimant's one half share be deducted from her share of the proceeds of sale of the property. Not only is a request in keeping with a course of dealing indicated and agreed under paragraph 7 but it also has regard to the fact that the defendant is the only person that has derived income from the property since Mrs. HoSang migrated. Moreover Mrs. HoSang has advanced a significant lump sum in settling the mortgage debt prior to leaving Jamaica.

[58] The claimant would also be seeking orders in terms of paragraphs 10,11, and 12 by way of further relief, the claimant seeks an order that the defendant may cooperate fully in accommodating persons who may be desirous of viewing the property with a view of purchasing the same..."

[59] In light of these submissions based on the state of evidence agreed and the law examined above I hold that:

(a) A lump sum payment of J\$ 1,200,000.00 from the defendant's one half share of the family home for maintenance of the children is not appropriate or sustainable.

(b) Lump sum payment should be made out of the capital asset of the defendant.

(c) The family home is the only capital asset of the parties.

(d) A Lump sum payment of the quantum claimed would diminish the defendant present earning capacity and its future capacity to take care of his basic needs.

- (e) The defendant's one half share may attract lump sum payment for other post separation obligation and liability.
- (f) A periodic monthly payment of US \$800 for the maintenance for the two daughters is not appropriate or sustainable.
- (g) The payment of a periodic sum in US currency is not in keeping with the realities of the exchange rate and the value of the Jamaican dollar.
- (h) Nonetheless the defendant remains liable for a reasonable sum for maintenance of his daughters residing in the USA in Jamaican dollars.

QUANTUM OF MAINTENANCE FOR CHILDREN

[60] It now turns to the issue as to what is a reasonable sum in all the circumstance for maintenance for daughters by the parents – claimant and defendant. It is necessary to examine it affidavit evidence of the parties in accordance with the provisions of the Maintenance Act 2005 as to among other things: the means and expenses of the defendant/father and claimant/mother, its assets of the parties, the needs of the daughters. I repeat it is unnecessary to go into all given any opinion on the allegations Interpretation of Maintenance Act 2005 and contains allegation of misconduct once affidavit evidence.

[61] Before doing so it is necessary to determine a matter of the interpretation of the Maintenance Act about the Court's jurisdiction to make a maintenance order for children. The facts below are pertinent to issue of maintenance order.

- (a) In October/November 2010 Davey-Ann and Kelly Jo migrated to USA and were 18 and 14 years old respectively and mother was 51 years old and father 55 years old.

- (b) In June 2011 when defendant filed for divorce Davey-Ann was 19. Kelly Jo 15 years, mother 52 and father 56 years.
- (c) In November 2012 when the claimant/mother filed claim for maintenance Davey-Ann was 20 years old, Kelly JO 16 years old, mother 53 and father 57 years old.
- (d) In September 2013 (Divorced granted) and hearing of claim commenced Davey- Ann was 21 years old, Kelly Jo 17 years, mother 54 and father 58 years old.

[62] Counsel for the Defendant/father submitted that the court had no jurisdiction to make a maintenance order for Davey Ann in 2012 at Age 19. It could not, she contend, make an order for Kelly Jo only who was 15 years old. She relied on the judgment of Roy Anderson J in **Desmond Brooks v Deloris Brooks M 03652 of 2007**. In this case the wife claimed maintenance against her husband for herself and the daughter who was approaching her 20th birthday. The learned judge examined section 16 and 18 of the Maintenance Act 2005 and any decided on an interpretation of these sections upon a submission from the husband that the Court had no jurisdiction to order maintenance for a child already over 18 years unless there had previously been a maintenance order in force. He held that:

“It would seem clear that it is not contemplated that a maintenance order could be made after the child had attained majority, notwithstanding that the said child had commenced study at a tertiary institution.”

Section 16 of the Maintenance Act 2005 provides:

“16-(1) subject to the provision of this section and section 18, maintenance order shall remain in force –

- (a) In case of a child, until the child attain the age of eighteen years;
- (b) In the case of any other person, for such period as may be specified in the order,

(2) where a dependant is unable to maintain himself or herself by reason of old age or an illness or infirmity which is likely to be permanent, a maintenance order may be made to be in force for the rest of the natural life of that dependent.

(3) where the court is satisfied that

(a) a child in respect of whom a maintenance order has been made is or will be engaged in a course of education or training after attaining the age of 18 years; and

(b) for the purposes of such education and training it is expedient for training under the order to continue after the child has attained that age, the court may direct that the order remain in force for such period as may be specified in order, being a period not extending beyond the date on which the child attains the age of twenty-three years”

[63] The court has power under section 18 to vary maintenance order, or attachment order after it is made under the Act.

[64] Counsel Miss Judith Clarke at para. 24 of her written submission sharply criticized any interpretation of sec. 16 of the Maintenance Act that exclude a child over 18 years who has began a course of education, obtaining maintenance until 23 years. She contends such an interpretation would defeat the purpose of the Act to protect dependants who are engage is a course of study which is to help them to become independent;

[65] She submitted, further that in any event the defendant in his petition for divorce accepted the responsibility to maintain Davey-Ann who was 19 at the time of the Petition and was now 21 years old. So in her view the statutory provisions of section 16 of the Act would not be an impediment.

[66] It does not appear counsel or the court in **Brooks** (supra) attention was directed to sec. 15(1)(e) of the Act. It provides:

“15-(1) ... an application for a maintenance order; the court may make an interim or final order requiring –

(e) that payment be made in respect of any period before the date of the order,

[67] In my view that is an indicia of some retrospective application of the maintenance order. It is a factor that would be relevant in the overall interpretation of section 16 of the Act. As it is my view that the **Maintenance Act 2005 and the Property (Right of Spouse) Act 2004** are a series of reform legislation then the provision of the Act including section 16 ought to be given a generous and purposeful interpretation.

It appears that maintenance order in section 16 covers interim and final order.

[68] On the 10th June 2013 an interim order was made in Chambers that the defendant pays \$6,000.00 per month for each daughter Davey-Ann, then age 21 and Kelly Jo, age 17, Counsel for the defendant in her written submission at page 11 describe the interim order in these terms: “He is unable to commit to paying more than he agreed to do or embodied in the consent order to wit, J\$12,000.00 each month.” The defendant confirm compliance with these order which was accepted by the claimant in cross examination.

[69] This interim and or consent order would in my opinion, satisfy the requirement of a maintenance order. It reverts back to when Davey-Ann at the time of 18 years. There is an abundance of evidence that she was accepted as a pre medical student and then full time medical student at St. George’s University, Grenada, an off shore Medical School. It is open to the Court to direct that the maintenance order of \$6,000.00 per month for her continue in force until age 23. Also the court direct that all payment for this sum are due for the period age 18-23 years.

[70] There is no age impediment for Kelly Jo. This is also abundance of evidence that she was a student in High School at the time of the interim order. Her academic performance is supported by special certificates exhibited. The defendant is therefore liable to continue paying her maintenance of \$6,000.00 per month up to age 23.

[71] I am constrained to make any other different under about maintenance having due regard to the language of section 16 even with a generous and purposeful interpretation.

[72] This limitation does not prevent me from indicating, that had it not been for this interpretation of section 16 of the Act I would hold the defendant ought to have paid more than J\$6,000.00 per month for each daughter. He offered to pay J\$8,000.0 per month that sum to is insufficient. Counsel Miss Judith Clarke submitted that on looking globally after the present Maintenance Order of the defendant his contribution to his daughter represents 10 per cent of his earnings and should be 30 per cent. There is merit in this submission.

MEANS OF THE CLAIMANT

[73] The Claimant was retrained in the USA as a medical coding specialist. Her earnings is US\$900.00 to US\$1,400.00 per month:

Davey-Ann	US\$
Rental	500.00
Groceries	600.00
Travelling	150.00
Lab expenses (for school)	150.00
Miscellaneous expenses	<u>100.00</u>
Total	1,500.00

Kelly –Jo	
Lunch money	100.00

Groceries	160.00
Activity fees	50.00
Miscellaneous	<u>100.00</u>
Total	410.00

Myra Hosang and Kelly –Jo (Affidavit , 10th September 2013) para 23

Contribution towards up keep of house	140.00
Clothes	50.00
Petrol	130.00
Telephone	40.00
Food and toiletries	40.00
Student loan	<u>90.00</u>
Total	490.00

Kelly Jo (exclusively)	US\$
Phone	70.00
Clean heading	61.50
Lunch	80.00
Winter gears	50.00
Food	<u>60.00</u>
Total	321.50
Davey-Ann pocket money	60.00

Defendant Income	JA\$
Salary Net	\$79,400.00 (and \$80,000.00)
Retroactive payment – July 2013	42,243.00
One off payment	25,000.00
Scotia Mint	10,000.00
Transportation (Gas)	24,000.00
Food	18,000.00
Cooking Gas	600.00

Light	4,000.00
Water	3,000.00
Car Expenses	9,500.00
Davey-Ann	6,000.00
Medical Bills	4,000.00
Kelly-Jo	US\$50.00 per month
Net payment June 2013	\$105,559.26

[74] Apart from the family home the defendant does not have any other capital asset. Out of his increase of J\$23,000.00 each March he is offering the children J\$2,000.00 each an increase of J\$2,000.00 per month. It would be reasonable for the defendant to pay an increase of J\$3,500.00 per month for each child. But as I already explained I am constrained to order any adjustment to this order.

PAYMENT OF MORTGAGE ARREARS

[75] I return to the defendants one half share in the family home. I find it is subject to certain liabilities. I refer to the discharge of the mortgage by the claimant in 2010 before she migrated. Forte JA in **Forrest v Forrest SCCA 28/93** del. April 7,(See per Brooks J.A. **Stewart v. Stewart [2013]** explained how this relate to the family home. He said its principle is that a person who discharge another secured obligation is entitled to be repaid out of the security the amount of sum paid. Further he said the payment of arrears of its mortgage by the wife cannot entitle her to variation of her interest in the property, that interest having been clearly established in the evidence as one of 50 percent. She would, however, be entitled to be repaid by the Appellant one half of the amount she paid as this was money advance on her behalf. He said such a matter could appropriately be dealt with on order for account”

OCCUPATION RENT

- [76] **Re Pavlou** (A bankrupt) (1999) 3 All ER P55, Millet J. address this matter of occupation rent for a family home. The court decided among other things, two things about a husband and wife and a matrimonial home.
- [77] First it held that where the property was a matrimonial home and the marriage had broken down the party who left the property in most cases may be regarded as excluded from the family home, so that an occupation rent was payable by the co-owner who remained. The wife on the facts of the case who remained in the home was prima facie liable to pay occupation rent. (See Brooks J. in **Stewart v. Stewart**)
- [78] Secondly, the wife was to prima facie entitled to reimbursement for the interest element in the mortgage payment which she had paid since the date when her then husband left the property. These matters can only be settled on accounts and enquiry.
- [79] The facts of the case is that the husband and wife bought the matrimonial home in 1973. It was transferred to them as beneficial joint tenants. In 1983 they separated and the husband left the wife in sole occupation of the property. Therefore the wife paid the mortgage installments and also paid for repairs and improvement to the house. The beneficial joint tenancy in the property was severed and the home was therefore owned by the husband and wife as tenants in common in equal share. This was as a result of a bankruptcy order made against the husband in 1987. The trustee in bankruptcy applied for possession of the home and an enter for sale.
- [80] The relevant of this authority is that the HoSang is entitled to reimbursement of the interest element of the mortgage payment. This must be calculated and paid out of the husband one half share. This sum is to be added to sum calculated for occupation rent due her as a joint owner from 2010 when she left the home to the

date of judgment. This sum of money as rent is separate from the one half rent agreed when he rented of the premises when she migrated and left the home.

CONCLUSION

[81] For the reasons set out above the order granted are as follows:

1. By Consent, order for partition of the property known as lot 130 Eltham View, Spanish Town in the parish of St. Catherine and registered at Volume 1226 folio 240 of the Register Book of Titles in the names of the claimant and the defendant.
2. By Consent, that there be a valuation of the said property by a reputable valuator mutually agreed upon by the parties within **thirty (30) days** of the final order herein or such sooner time as to this court seem just, failing which the Registrar of the Supreme Court is hereby empowered to appoint a valuator.
3. That the cost of the valuation shall be borne equally by the claimant and the defendant. The defendant shall advance the cost to cover the valuation report and the claimant's one half share shall be deducted from her share of the proceeds of the sale of the property.
4. By consent, that the said property be sold pursuant to the said valuation and the net proceeds divided equally between the claimant and the defendant.
5. Should either party fail or refuse to sign any documents necessary to give effect to the orders herein, the Registrar of the Supreme Court is hereby empowered to sign same.
6. The defendant shall account for all rental (occupational) paid to or collected by him for the said property from and since November 2010 to the date of judgement.

7. That the defendant pays to the claimant one half the net proceeds of the said rental (occupational).
8. That the defendant shall reimburse the claimant the sum of J\$284,601.50 being one half the amount paid by the claimant to GSB Cooperative Credit Union Limited in or about November 2010 to settle the outstanding mortgage debt on the said property with interest thereon at the rate of 6% per annum from 23rd September, 2013 to the date of payment.
9. That the defendant pays to the claimant:
 - a) J\$ 6,000.00 per month for Davey-Ann Kimberly Hosang born 29th March, 1992 from November 30 2010 until her 23rd birthday.
 - (b) J\$ 6,000.00 per month for Kelly-Jo Antoinette Hosang born on the 28th day of April 1996 until she attains the age of 23.
10. Liberty to apply