



[2017] JMSC Civ. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 06993

BETWEEN	ANDREA THERESA KNIGHT-DALEY	CLAIMANT
AND	RAYMOND LEANORD DALEY	DEFENDANT

IN CHAMBERS

Ms. Vivienne Washington, Attorney at Law for the Claimant

Mr. Cecil Mitchell instructed by Messrs. Cecil J. Mitchell & Co for the Defendant

Heard: 8th July, 2016, Delivered: 17th February, 2017

Family Law – Division of Family Home - Property (Rights of Spouses) Act – Equal share Rule -Variation of the equal share rule- Property registered in the name of one spouse-Property owned by one spouse prior to marriage.

BERTRAM LINTON, J

BACKGROUND

[1] The Claimant, Andrea Knight-Daley and the Defendant, Raymond Daley were married on the 27th August, 2005. Prior to their marriage, Mr. and Mrs. Daley were involved in an on again and off again common law union between the years 1988 - 2005. They have one child who, at the time of this claim was 22 years of age .

[2] In 1988, the couple resided with Mrs. Daley's father and thereafter they moved to a rented premises located in Richmond Park after their daughter was born. While

they resided with Mrs Daley's father, Mr. Daley's daughter from another union was brought by Mr. Daley to live with the family. In 1992, the family with the exception of Shannon, the daughter moved to live with Mr. Daley's sister in Widcombe Hill. This arrangement soon became unworkable and so some time between 1992 to 1995, Mrs. Daley moved and began to reside with her mother. In 1996 she was able to rent premises located in Patrick City where she resided with her daughter.

- [3] The property located at 3 University Grove, Kingston 7 in the parish of Saint Andrew registered at Volume 1102 and Folio 264 of the Register Book of Titles (hereinafter called University Grove) was bought sometime in 1992 and is registered in the sole name of Mr. Daley. It was agreed that this premises would be developed to provide a home for his family which at the time consisted of Mrs. Daley, their daughter, Marshalee Daley and Mr. Daley's daughter, Shannon Daley.
- [4] In 1997, Mrs. Daley travelled to the United States of America and during this time her daughter lived with Mr. Daley at University Grove. In 1998, she returned from the United States of America to reside at University Grove but left sometime in 1999. Mrs. Daley returned to the United States and received her citizenship in 2001. In the same year, her daughter also became a citizen of the United States of America.
- [5] In 2003, Mrs. Daley returned to Jamaica and rekindled a relationship with Mr. Daley and as a result in 2004, she moved into University Grove and brought with her several household items. Thereafter, the couple married in 2005. The marriage broke down in 2012.
- [6] In October 2012, Mr and Mrs. Daley separated even though they continued to reside at University Grove.

THE CLAIM

- [7] The Claim was brought by Mrs. Daley who has asked to court to determine that both parties have an equal interest in University Grove. Her claim requests a finding that:

The Claimant and the Defendant are each entitled to fifty percent (50%) interest in property located at 3 University Grove, Kingston 7 in the parish of Saint Andrew registered at Volume 1102 Folio 264 of the Register Book of Titles which is the Family Home.

- [8] Mrs. Daley claims that she is entitled to one half share of the property pursuant to the Property (Rights of Spouses) Act (hereinafter called PROSA) since the property in question is the Family Home. Notwithstanding this, she claims that she has been in a common law relationship with Mr. Daley prior to their marriage and has contributed both financially and non-financially towards the acquisition and development of the property.

- [9] Mr. Daley, in his affidavit in response to Mrs. Daley, claims that she is not entitled to any interest in University Crescent since:

(a) She made no contribution to the purchase of the property even though she was earning in the United States of America;

(b) She provided no rent free accommodation for him;

(c) She only contributed to the instalment of bathroom fixtures.

(d) Her claim is only brought on the basis that she wants University Grove to be sold in order to realize her share of the proceeds so that she can purchase a house in the United States of America.

- [10] Counsel for the Claimant and Defendant were instructed and had agreed that the parties were to file submissions *“on or before the 23rd September, 2016 and thereafter the Claimant is permitted to file a response on or before the 30th September 2016.”* To date no submissions were filed even after the court granted

an extension of time within which to do so. The court was constrained to come to its findings without the benefit of those submissions.

THE LAW

[11] This Claim is brought under the Property (Rights Of Spouses Act. In particular section 2 defines the Family Home as:

Section 2

In this Act...

'Family Home means 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, building or improvements appurtenant to such dwelling-house and use wholly or mainly for the purposes of 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.

[12] Section 6 deals with the division of the Family Home. This section provides that:

6.-(1) 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 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;

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

[13] The statutory basis for the equal share rule as explained by McDonald- Bishop J (Ag) (as she then was) in **Graham v. Graham** unreported 2006HCV03158 delivered April 8, 2008 and was endorsed by Brooks JA in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47. He says:

*"15. By virtue of the statutory rule, the claimant [applying under section 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. (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. (**Emphasis mine**)*

16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation...."

- [14] After reviewing a number of authorities Brooks JA identified the philosophy behind the statutory concept of the Family Home stating that:

"The philosophy is that the contribution that a spouse makes to the marriage entitles that spouse to an equal interest in the family home"

- [15] Section 7 stipulates the factors the court ought to take into consideration when varying the equal share rule. The section provides that:

7.-(1) 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.

- [16] The approach that the court should take when displacing the equal share rule was suggested by Brooks JA when he stated in **Stewart** that:

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.** *Emphasis mine**

[17] Section 14 looks at how other matrimonial property is to be divided. It says that:

14.--(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-

- (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
- (b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2), or*
- (c) where the circumstances so warrant, take action under both paragraphs (a) and (b).*

(2) The factors referred to in subsection (1) are-

- (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 property of the spouses or either of them;*
- (b) that there is no family home;*
- (c) the duration of the marriage or the period of co-habitation;*
- (d) that there is an agreement with respect to the ownership and division of property;*
- (e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

(3) In subsection(2)(a), "contribution" means-

- (a) the acquisition or creation of property including the payment of money for that purpose;*
- (b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;*

- (c) *the giving up of a higher standard of living than would otherwise have been available;*
- (d) *the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-*
 - i. *enables the other spouse to acquire qualifications; or*
 - ii. *aids the other spouse in the carrying on of that spouse's occupation or business;*
- (e) *the management of the household and the performance of household duties;*
- (f) *the payment of money to maintain or increase the value of the property or any part thereof;*
- (g) *the performance of work or services in respect of the property or part thereof;*
- (h) *the provision of money, including the earning of in- come for the purposes of the marriage or cohabitation;*
- (i) *the effect of any proposed order upon the earning capacity of either spouse.*

(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.

ISSUES

[18] The issues to be determined are:

- (a) Whether University Grove can be considered as the Family Home;
- (b) If University Grove is the Family Home, whether any section 7 factors exist to vary the equal share rule;
- (c) If University Grove is not the Family Home, would it fall into the category of '*other matrimonial property*'; and
- (d) What share if any would the Claimant be entitled to.

ANALYSIS

A. *The Family Home*

[19] It is not disputed that the relationship between the Daleys has been a difficult one. Notwithstanding this, I have noted that both parties are adamant that University Grove is the Family Home. Though they have both conceded on this point, I need to consider whether this is so in light of the fact that the evidence of both parties point to the fact that Mrs. Daley was constantly abroad during the relationship and even through out the marriage. The real question which then arises is if University Grove was indeed her home. This discussion springs from the definition of the Family Home as expressed in the act, particularly the part emphasised below:

*'Family Home means 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, building or improvements appurtenant to such dwelling-house and use wholly or mainly for the purposes of 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*

[20] The main consideration is whether University Grove was the principal family residence for the Daleys. In order to do this, I must break down Mrs. Daley's travel history in order to pin point whether University Grove was indeed her home. In doing so, it would be relevant to know her state of mind at the time.

[21] In 1997 she travelled to the United States and from her evidence returned sometime in 1998. Upon her return she resided at University Grove until sometime in 1999 when she returned to the United States. She received her citizenship sometime in 2001 and only returned to Jamaica for a vacation period of one (1) month which she says she spent at University Grove. Sometime in 2004, Mrs. Daley moved into University Grove, what appears to be, permanently. Her evidence is that she shipped her belongings from the US to Jamaica to be put in the home. Later the couple married in 2005 and both concede that the relationship existed until separation in 2012.

[22] I have noted that Mrs. Daley always stayed at University Grove when she visited Jamaica before the marriage. I have accepted that her move in 2004 to the property was in preparation for marriage to Mr. Daley and for them to finally have a steady relationship. There is no evidence that between 2005 – 2012 Mrs. Daley

travelled. Therefore, I accept that after the marriage University Grove became the principal residence of the family and is indeed the Family Home.

[23] By this logic, section 6 of PROSA would operate to convey the property entitlement in equal shares to each spouse where no section 7 factors exist.

B. *Section 7 Applicability*

[24] Based on the evidence presented it appears to the court that section 7 factors do exist. Section 7 provides that the equal share rule can be varied where *“the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation.”*

[25] Both parties agree that the property was in Mr Daley’s possession and ownership before he married Mrs. Daley, albeit that it was always intended as a home for the family. That intention was set aside for some time. In fact the parties had terminated their relationship and were living separate lives. Mrs Daley was in USA and Mr Daley in the subject property all prior to their marriage. Therefore, though I agree with Brooks JA that the equal share rule should not be lightly displaced, this factor is in clear and express conformity with the act and therefore the 50/50 rule ought to be varied.

[26] The Court is of the opinion that it would be unreasonable and unjust for each spouse to be entitled to one-half the family home in the circumstances as described in this case.

[27] Having found that section 7 is applicable and that the equal share rule ought to be displaced, my next consideration is what percentage of entitlement each party would receive to reflect what the law would consider as fair and just in the circumstances.

[28] I have considered that :

- (a) At the time the property was bought, the couple was in the process of moving between homes and it was understood that in purchasing this property, Mr. Daley wanted to build a comfortable home for his family. This intention I find to be crucial to the ultimate decision. Though there was no conversation between the two that the property would be developed as a joint cause, I believe they both had the intention for the property to be their home and organised their lives and finances based on that understanding.
- (b) Mr. Daley developed the property without direct financial help from Mrs. Daley but as I have already said, assistance would have been indirect based on her assuming responsibility for other areas of their life. When the property was bought, it was clear that Mrs. Daley was earning an income overseas and there was no indication that she consistently contributed to the development of the property in its early stages. There is no correspondence to show that there was constant contact between the couple during this period. As a matter of fact, based on the tumultuous nature of their relationship, it is not clear whether they were really in a relationship at the time the house was being built. There is insufficient evidence for me to hold on a balance of probabilities that Mrs. Daley made any significant contribution to the property at this time.
- (c) In 2004 when Mrs. Daley moved back to Jamaica to prepare for marriage, I accept that most of her contribution was seen when she furnished the home. In her evidence she tells the court how she shipped all of her belongings, which I have noted were furnishings, from the US to Jamaica to be placed in the home. I find that her contribution to the home was its furnishing and fixtures and cash contribution at this stage and adding the final aesthetic touches to make the house into a home. This must have been with the intention to make this the family home and the centre for their marriage I have noted that this was never denied by Mr. Daley. He agrees that she contributed to bathroom fixtures. However, I believe that she contributed a

whole lot more than he is letting on. This is contribution which I have also taken into account and which has assisted with the ultimate outcome of this case.

(d) I must make it clear that I have taken into account all acts of contribution which took place before the couples marriage as they are relevant to the couples intention to build a life together. Though marriage is a significant trigger of an intention to create and build a family, based on the trajectory of the relationship, there was always some understanding that they had a future together. In particular, I have noted that:

- i. Mrs. Daley provided Mr. Daley with accommodation allowing him to acquire University Grove. I find that the rent free accommodation to which she refers can be counted as contribution to Mr. Daley on her part. At the time they were living at her father's house, Mr. Daley was able to save towards the acquisition of the property. It is noted that he was only permitted to stay at Mrs. Daley's father's house at her behest and it must have been because of this why he was able to make the necessary arrangements to acquire University Grove.
- ii. Mrs. Daley took care of Mr. Daley's daughter Shannon. This assistance with his daughter and her later living in the home which was built for the family shows the intention by the couple to build a life together at University Grove. I view this as contribution to the relationship in which they both vested their time, money and effort even though it was clear that Mr. Daley invested more cash than Mrs. Daley.

[29] In light of the nature of this discussion, it has become apparent that there is no need to consider the applicability to section 14 of PROSA as tis property qualifies as the Family Home .

CONCLUSION

[30] In concluding, I find that it would be fair that the Claimant has a 30% interest in the Family Home.

[31] This Honourable Court makes the following orders:

- (a) The property located at 3 University Grove, Kingston 7 in the parish of Saint Andrew registered at Volume 1102 and Folio 264 of the Register Book of Titles is the Family Home;
- (b) The Claimant, Andrea Knight-Daley is entitled to a 30% interest and the Defendant, Raymond Daley is entitled to 70% interest in the Family Home;
- (c) The Defendant is at liberty to purchase the Claimant's interest in the property at the proportionate market value. The Defendant shall exercise this option by notice in writing from his Attorney at Law to the Claimant's Attorney at Law within 120 days failing which the property is to be sold on the open market and proceeds shared in keeping with the parties' interest in the property;
- (d) A reputable valuator is to be agreed and a valuation of the property done;
- (e) The cost of the valuation is to be borne equally by the Claimant and the Defendant;
- (f) All taxes and cost associated with the sale and transfer of the property shall be shared equally by the Claimant and Defendant;
- (g) The Claimant's Attorney at Law is to have carriage of Sale of the Property;
- (h) The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of this Honourable Court if either party is unable or unwilling to do so within 30 days of being given a request in writing;

- (i) Liberty to apply; and
- (j) Each party to bear their own cost.