



[2018] JMSC Civ. 54

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 02286

BETWEEN	PHILLIP GEORGE MYERS	CLAIMANT
AND	JANET PALMER-MYERS	1ST DEFENDANT
AND	KEVIN PALMER	2ND DEFENDANT
AND	KENTON PALMER	3RD DEFENDANT

Mr. Mikhail Williams instructed by Mesdames Taylor Deacon and James for the Claimant.

Mr. Leon Palmer & Ms. Aprille Lawson instructed by Williams Mckoy & Palmer for the Defendants.

Heard: 7th and 8th November, 2017 and 29th March, 2018

Division of matrimonial property - The family home - Property other than the family home - Spouse's interest in property inherited by other spouse - Inherited property not transferred to spouse - Property registered in name of one spouse and another person

ANDREA PETTIGREW-COLLINS, J (AG.)

BACKGROUND

[1] The Claimant Mr. Phillip George Myers and the 1st defendant Mrs. Janet Palmer-Myers are former husband and wife. The parties were married on the 29th of

December 1973. They resided in New York in the United States of America from the 1970s until 2010, when they return to permanently reside in St. Elizabeth, Jamaica. Following an unfortunate incident which led to the claimant being seriously injured and hospitalized, the parties separated. The claimant filed a petition for dissolution of marriage and the decree nisi was granted on the 13th of August 2013. The decree absolute was granted on the 3rd of December 2013, bringing to an end a marriage days short of 40 years duration.

- [2] The claimant and the 1st defendant seek declarations in relation to various parcels of real property including the former matrimonial home. These properties are registered in the joint names of the parties. Both also seek declarations for an equal division of certain items of household furniture, appliances tools and equipment in the former matrimonial home as well as declarations in the relation to a Mitsubishi Outlander motor truck which was purchased from the nephew and brother of the 1st defendant. The nephew and brother are also the 2nd and 3rd defendant's respectively, in this matter. The 1st defendant also seeks a number of declarations in relation to properties, both real and personal not mentioned by the claimant in his fixed date claim form. She also seeks declarations in relation to a loan which she said is owed to the 3rd defendant by both herself and the claimant as a consequence of the 3rd defendant advancing monies towards the completion of the matrimonial home.

THE CLAIMANTS' CASE

- [3] It is the claimant's evidence that he always intended to retire in Jamaica, while his wife wanted to retire in Florida, and to that end, she had purchased a lot of land in Florida but he did not know what had become of that lot of land. He said further that it was with a view to securing a place to retire in Jamaica that he started acquiring property in the island. It is his evidence that the 1st defendant did not contribute to the purchase of any of the properties, except the matrimonial home, and that he purchased the properties from his own funds. Further, that the 1st defendant's name was included as co-owner of the properties because of their

relationship of husband and wife. The claimant's evidence is that he received bonuses when he left his job as a Security Officer and that he kept the bonuses. He had not given those monies to the claimant because he anticipated that she would not want to give him access to the monies. He said that he opened a direct deposit account because he was having problems getting monies from the defendant who was the one who managed their joint account. It was these monies that he used to purchase the properties in Jamaica, he said.

[4] During the cross-examination of the claimant, much of the details given by the 1st defendant were put to him, some of which he admitted. The claimant added that he would earn not just bonuses as he had said in his affidavit, but tips as well and that these sums were never put in the joint account belonging to himself and the claimant. He said that he would make up to \$70,000 for the year in tips and that he would receive those monies in cash. Asked if he did not open an account to deposit those sums to, his response was that he did not, and that he brought those sums to Jamaica in cash. According to him, some of the properties were purchased with monies from tips and with his bonuses. He denied the suggestion that the properties were purchased with monies from the joint account held by the parties. He also denied that the farm on the inherited property was developed with monies from the joint funds. He however admitted that the New York properties were purchased with the monies from their joint funds and that a dwelling house as well as a poultry house and a goat pen were erected on the property inherited from his father. It is his evidence that it was his idea that the inherited land would be operated as an income generating farming business and disagreed that himself and his wife had come to an agreement in that regard. The claimant initially denied that he held stocks and bonds but after intense cross-examination on the matter, he admitted that he did but stated that by the time of the separation he no longer held them. Further cross-examination revealed that he did in fact own them after the separation.

THE 1st DEFENDANT'S CASE

- [5] It is the 1st defendant's account that she migrated in 1972 while the claimant migrated in 1976. The union produced two children who are now adults in their 30s and 40s. During the period of her residence in the United States, she was employed to a bank for over 17 years and ascended to the position of Assistant Branch Manager. Thereafter, she worked at another financial institution for 3 years then at her last place of employment for some 15 years. Whereas the Claimant asserts that the parties returned to Jamaica upon their retirement, the Defendant's account is that it was the Claimant who retired from his job and that she in fact resigned at age 58 from her position as a Customer Service Manager.
- [6] She said that after the claimant arrived in the United States, they opened a joint account at what is now Chase Bank and that over the years, both their salaries and rental income from properties owned jointly by them were lodged to that account. All of their domestic and personal expenses as well as expenses related to their rental properties were paid from that account. She said all the funds used to purchase the properties in New York, Jamaica and Florida were purchased using funds from the joint account. She gave details of three properties in New York which were jointly purchased by the parties.
- [7] She said in the mid 1990s, herself and the claimant had discussed the matter and agreed that they would return to live in Jamaica in 2014, at which time she would have become eligible for Social Security benefits. She said herself and the Claimant had invested in a farming venture in St. Elizabeth over a number of years. She said that they agreed on the purchase of the property registered at Volume 1178 Folio 683 on which the former matrimonial home is located. She was employed in the financial sector and earned significantly more money than the Claimant who was a security guard. It is her evidence that for a prolonged period she earned as much as two and a half times the amount of money that the Claimant earned and that for the last four years prior to their return to Jamaica, her income was twice that of the Claimant. She exhibited copies of annual

returns to the Internal Revenue Service in the United States for the period 2006 – 2009. These documents which were together admitted in evidence as exhibit 9, showed that during that period, the Defendant earned wages of between US\$57,466.13 and US \$66,252.60 annually whereas the Claimant earned between US \$27,614.00 and US \$41,820.00 annually.

- [8] The 1st Defendant asserted that the joint account for which the purchase of all this properties was funded was financed two thirds by her and one third by the Claimant and therefore she is entitled to two thirds interest in the properties except the matrimonial home. In relation to the land purchased in Florida she said it was sold by the local authorities in order to cover outstanding property taxes and that the Claimant is well aware of what transpired because he was part of the process of acquiring the land and he was as much involved in the process of its disposal. She said that insufficient attention was being paid to the property because the focus had been shifted from retiring in Florida to retiring in Jamaica.
- [9] The 1st defendant denied that any funds came from the sale of property belonging to their daughter which was used towards the construction of the matrimonial home and said the funds came from their joint account. She explained in relation to the sale of the second house in New York that the net proceeds was \$141,356.39 and that those funds were paid into the parties joint account and were subsequently used to undertake extensive works on their farming complex in Vineyard. This work included installing irrigation systems, buying livestock and employing persons to work on the farm.
- [10] The 1st Defendant's evidence is that on each occasion a property was purchased in Jamaica, she was aware of the purchase and that she approved of the transaction. Further, that she would withdraw cash or purchase cashier's cheques from their joint account and present the monies to the Claimant who would complete the transaction. She accepted that it was the claimant who visited the island frequently and spent vacations and attended to much of their business affairs before they returned to reside permanently.

[11] In cross-examination, the 1st defendant accepted that the sums reflected in the claimant's income tax returns that were exhibited did not truly reflect his total income. She stated that his tips were not included in the returns but he would give her monies received as tips and those monies were lodged to their joint account. She also stated that after 2005 the claimant received his pay through a direct deposit which was a different account from their joint account. It is her evidence that although she had no control over that account, all mails in respect of his personal account came to their address and that they did not hide documents from each other, they were open with each other and they were both privy to the contents of all documents coming to the house. She admitted that she could only be aware of tips that the claimant disclosed to her. In relation to the conduct of their joint affairs, she also said that it was not a case that if the claimant wished to withdraw money from the joint account it had to be done through her but that in fact that is how it usually happened.

THE 2ND AND 3RD DEFENDANTS' CASE

[12] The 2nd and 3rd defendants were made parties to this claim because of the orders sought by the claimant in relation to the Mitsubishi Outlander motor vehicle. The 2nd defendant provided an affidavit in this case but he did not participate in the proceedings. His affidavit evidence was therefore not considered. The 3rd defendant's affidavit evidence is in relation to the sale of the Mitsubishi motor vehicle and the loan to the claimant and 1st defendant and will therefore be referred to when addressing those matters.

VARIOUS MATTERS

[13] The various declarations sought by the parties will be dealt with under a number of different headings which are listed below and the necessary evidence, and the law applicable to the particular subject matter will be referred to when dealing with the subject matters under the various heading:

Property registered at volume 1178, Folio 683 - the matrimonial home;

Land registered at Volume 1053 Folio 788, Volume 1334 Folio 482, Volume 1830 Folio 697;

Household furniture and other items in the matrimonial home;

Mitsubishi Outlander;

3rd defendant's loan towards the construction of the matrimonial home;

Inherited property;

Items of personal property located on inherited property;

Land registered at Volume 1333 Folio 576 Lot 55;

Land registered at Volume 1414 Folio 250- Jointly owned with 3rd defendant.

THE LAW – GENERALLY

[14] In considering the orders sought by both sides, the Court must have regard to the relevant provisions of the Property Rights of Spouses Act. The main provisions in relation to the present application are Sections 13, 2, 6, 12 and 14. These provisions are set out in full though not necessarily in order. Reference will also be made to Section 17(2) of the Act.

[15] Section 13 provides as follows:

(1) A spouse shall be entitled to apply to the Court for a division of property-

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) on the grant of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

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

(3) *For the purposes of subsection (1) (a) and (b) and section 14 the definition of "spouse" shall include a former spouse.*

[16] Section 6 of the Property Rights of Spouses Act (PROSA) provides that:

(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.*

[17] Section 2 defines the 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."

[18] Section 7 provides for a variation of the equal share rule. There is no request in this particular instance for a variation of the rule as the parties are agreed to an equal division of the family home.

[19] Section 12 provides as follows:

(1) *Subject to sections 10 and 17 (2), the value of the property to which an application under this Act relates shall be its value at the date the Order is made, unless the Court otherwise decides.*

(2) *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.*

(3) *In determining the value of property the spouses shall agree as to the*

valuator who shall value the property, or if there is no agreement, the Court shall appoint a valuator who shall determine the value of the property for the purposes of this subsection.

[20] Section 14 provides that:

(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, 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;

(a) that there is no family home;

(b) the duration of the marriage or the period of cohabitation;

(c) that there is an agreement with respect to the ownership and division of property;

(d) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken in 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-

Enables the other spouse to acquire qualifications; or

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 income 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.

[21] Section 17 (2) provides that:

(2) The value of property that may be divided between the spouses shall be ascertained by deducting from the value of property owned by each spouse –

(a) Any secured or unsecured debts (other than personal debts or debts secured wholly by property) owned by one spouse and

(b) ...

[22] The claim was filed on the 13th of May 2014. As was said before, the decree absolute bringing the marriage between the parties to an end was granted on the 3rd of December 2013. The claim was therefore brought within the twelve months of the grant of a decree of dissolution of marriage which is the precipitating event in this case, based on the provisions of Section 13. The declarations and orders sought by the parties must be considered having regard to the relevant statutory provisions.

PROPERTY REGISTERED AT VOLUME 1178, FOLIO 683- THE MATRIMONIAL HOME

[23] Both parties seek a declaration that each is entitled to an equal share of the former matrimonial home. It is agreed by both that the property located in Round Hill in the parish of St. Elizabeth registered at Volume 1178 Folio 683 of the Register Book of Titles is the matrimonial home within the meaning of Section 2 of **Property Rights of Spouses Act (PROSA)**. The parties are also agreed that each is entitled to a fifty percent interest in this property. They are also agreed that the defendant should have the first option to purchase the property.

[24] Although it is not necessary to resolve issues regarding each party's entitlement in the matrimonial home, I will nevertheless mention some of the evidence as to its acquisition as it will be necessary in order to determine whether there is an outstanding debt in relation to the property and it is also relevant in shedding light on how the parties organized and conducted their affairs. The claimant said that the monies used to purchase the land came from a joint account held by the parties in the USA. The claimant said he deposited three quarters of the funds placed in this account. The construction of the house started five years after the land on which it was constructed was purchased. The claimant said that the parties both owned three houses in New York and that they sold two of those houses and utilized the proceeds from the first of the two sold to start construction of the matrimonial home. The rest of the funds for the completion of the house came from the proceeds of sale of a lot of land in Jamaica which was owned by the claimant's daughter. The defendant's evidence differs from that of the claimant but the matter will be addressed in more detail when dealing with the matter of the loan by the third defendant.

LANDS REGISTERED AT VOLUME 1053 FOLIO 788, VOLUME 1334 FOLIO 482, VOLUME 1830 FOLIO 697

[25] The Claimant is asking the court to say that he is entitled to a 75 percent interest and the Defendant to a 25 percent interest in three separate pieces of property

located in the parish of St. Elizabeth, namely; Lot 47 on the plan of Vineyard, registered at Volume 1334 Folio 482, land registered at Volume 1053 Folio 788 and land registered at Volume 1380 Folio 697 of the Register Book of Titles.

[26] The Claimant said the three parcels of land in relation to which he is claiming a 75 percent interest were purchased by him between 2001 and 2005. He said that he had an interest in rearing cattle and on visits to the island he would be alerted to the availability of suitable parcels of land by friends who knew of his interest in rearing cattle. He said that he did not use any of his wife's money towards the purchase; he would purchase the properties and then advise her after the fact. His evidence is that he would cause the properties to be transferred to both of them as he felt that she would be the best person to see to the division of his property in the event he were to pass away.

[27] Brief written submissions were filed on behalf of the claimant in this matter on the 1st of March 2018. To the credit of counsel for the claimant, it was conceded that the evidence was such that it very clearly showed that the various properties were acquired whether directly or indirectly, through the joint efforts of the claimant and 1st defendant who had pooled their funds and conducted their affairs jointly over an extended period of time and thus the inevitable conclusion is that the 1st defendant and the claimant ought to be entitled to a 50% interest in the properties jointly acquired by them. I would observe at this point that the evidence was so stacked against the claimant and it demonstrated that in the unlikely event there were to be an unequal distribution, it would have had to be made in favour of the 1st defendant. The fact is that their affairs were so interwoven for a period of almost 40 years that having regard to the provisions of section 14(1), a court would be hard pressed to make an order for an unequal distribution.

[28] The claimant has requested that he be granted the first option to purchase these properties. The 1st defendant has been silent in that regard, which causes this

court to take the view that she has no opposition to that position. I will therefore make the order accordingly.

LAND REGISTERED AT VOLUME 1333 FOLIO 576 LOT 55

[29] The 1st defendant said there is a fifth piece of real property held in the joint names of the parties and that the circumstances of the purchase do not differ from the circumstances of the purchase of lands registered at Volume 1053 Folio 788, Volume 1334 Folio 482 and Volume 1380 Folio 697. This land is identified as Lot 55 Lower Works Pen, Mahoe Drive, Black River in the parish of St. Elizabeth and bears valuation numbers 1610101013054. The defendant seeks a 50% portion of this parcel of land. As with the three above mentioned parcels, counsel for the claimant concedes that the defendant is entitled to a 50% interest in this property.

[30] The defendant has requested that she be given the first option to purchase the property registered at volume 1333 folio 576. As far as this court can discern, the claimant has voiced no opposition to this request, again I will make the order accordingly.

HOUSEHOLD FURNITURE AND OTHER ITEMS IN THE MATRIMONIAL HOME

[31] Both the claimant and the 1st defendant have sought orders in relation to these household items furniture and equipment. The claimant said that most of the items were shipped from overseas but that the bedroom furniture were locally made. He said that the items were paid for by the parties jointly and that he is entitled to half of these items. He said he was locked out of the matrimonial home after the separation. In paragraph 11 of his first affidavit, the claimant itemized various pieces of furniture and household items that he said remained in the matrimonial home after he left.

[32] The Claimant is also seeking to retrieve tools and other equipment used in the maintenance of the property. He is also asking the Court to award him a 50%

interest in unused building material initially purchased to carry out improvements to the family home.

[33] In relation to the furniture, the 1st Defendant said that the claimant returned to the matrimonial home several times between January 2012 and July 2014 and retrieved items of furniture, appliances, tools and farm produce from the property. She denied that farm equipment was being kept at the matrimonial home. She said that she cannot speak to the existence or location of any material left over from purchase to utilize towards the improvement of the property as mentioned in paragraph 13 of the claimant's first affidavit, and she said that in any event, the claimant's evidence as to the contents of items of furniture, equipment and appliances in the matrimonial home is grossly inflated. For reasons that will be explained elsewhere in this judgment, the court accepts the 1st defendant's evidence that the claimant returned to the matrimonial home on several occasions to remove items of furniture and that he has grossly overstated the quantity of such items in the matrimonial home. Whereas, the claimant has listed items said to have been in the home, the 1st defendant has not stated specifically what items were there. She however, agreed that the claimant is entitled to half of the contents that were in the home as at the date of their separation. Therefore in making an order for an equal division of such property the court cannot make a definite finding as to what items were present in the home at the time of separation.

MITSUBISHI OUTLANDER

[34] In relation to the Mitsubishi Outlander motor vehicle, the claimant said that the purchase money came from the proceeds of sale of the second New York property. In fact, he said that it was his wife who told him that she purchased the vehicle from those funds for \$1,500,000.00 JMD from her brother. He said the property in New York was sold for \$400,000.00 US and he cannot say what his wife did with the rest of that money. He said the vehicle was not transferred to

himself and the 1st Defendant. He claims 50% of the market value of this motor vehicle.

[35] The 1st defendant said that she and the claimant agreed to purchase a motor vehicle from her brother, the 3rd defendant. He was paid \$800,000 JMD on the vehicle, leaving a balance of \$700,000 JMD, which is owed to him to date. She said the vehicle was never transferred and her brother continued to pay the insurance on same. He has paid a total of \$426,000 JMD for insurance to date and is to be reimbursed those sums.

[36] The claimant's evidence in relation to the 1st and 3rd defendant's assertion that a balance of \$700,000.00 is still owed on the Mitsubishi Outlander is that he is not aware of that fact. He said the 1st defendant had put herself in charge of everything related to the car. He said that he was in the hospital in 2011 at the time the transfer was done.

[37] In cross-examination of the 3rd defendant Mr. Kenton Palmer, there was no serious challenge to the 1st and 3rd defendants' assertion that the 3rd defendant did in fact pay the money to insure the vehicle. The only issues raised in that regard were, whether the claimant had complained to Mr. Palmer that the sums he was paying to insure the vehicle was too high, that the claimant wanted to transfer the insurance to a different insurance company and that the title to the vehicle was given back to the 3rd defendant in order that the switch could be made to a different insurance company. Mr. Palmer denied that any such discussion ever took place and stated emphatically that the title to the vehicle was never returned to him. The evidence of the 1st and 3rd defendant's is preferred to that of the plaintiff on this matter.

3RD DEFENDANT'S LOAN TOWARDS THE CONSTRUCTION OF THE MATRIMONIAL HOME

[38] The 1st defendant also seeks a declaration that the 3rd defendant is entitled to recover from the claimant half of the loan of US \$39,500.00 together with interest

which was loaned to herself and the claimant for the purpose of constructing the matrimonial home. She also seeks a declaration that the 3rd defendant is entitled to recover the other half from her.

[39] The evidence in relation to this transaction is that the construction of the matrimonial home commenced in 2006 and that during the process of building, the parties' funds were depleted and so the 3rd defendant agreed to lend the sum of US \$40,000.00 to the parties in order to complete the construction. The 1st and 3rd defendants' evidence is that the 3rd defendant agreed to lend the money subject to being paid interest at the rate of 6%, which was 2% below what he had been earning on his investments. The 1st defendant said that both herself and the claimant agreed to the terms of the loan. The loan she said was disbursed by way of payment for building supplies to various hardware entities as well as through transfer of funds through one Mrs. Lucille Barnett who was a witness for the defendants. The 1st defendant said that the total amount advanced by the 3rd defendant was US \$39,500.00 and that as the date she sworn to her affidavit which was the 22nd October 2015, the principal amount and interest remained unpaid. There is no evidence that that position has since changed.

[40] In cross-examination, the claimant denied that the parties received a loan from the 3rd defendant towards the completion of the matrimonial home. He was asked the following question "Do you know of Mr. Kenton Palmer making any loan at all to you?" His response was "No, anything go like that, it would be between she and her sister." Although the claimant admitted that Mrs. Barnett would pay bills in relation to the construction on his and the 1st defendant's behalf, he said he could not recall if monies came from Mrs. Barnett to an account he operated at the PC Bank. When pressed in cross-examination about the loan, the claimant said that he recalled his wife saying to him on one occasion that she had gotten some money from her brother, but what that money was for, he did not know. Indeed, throughout his cross-examination, the claimant denied knowledge of certain financial transactions and matters regarding the parties' financial affairs. He repeatedly said that it was the 1st defendant who had primary responsibility

for conducting their financial affairs. In his affidavit evidence (paragraph 16 of his affidavit filed on the 28th of January 2016), the claimant had said that the property at Round Hill (the matrimonial home) was funded from the proceeds of sale of the property at Wyona Street in New York. In cross-examination he also said that he received a loan of US \$400,000.00 from his daughter Verona. He also said that he had sold a lot of land that his daughter owned and that the proceeds were used to complete the matrimonial home. At the end of the cross-examination, I was not in doubt that the claimant was not being truthful as to the source of the money that was used to complete the house.

[41] The 3rd defendant's evidence regarding the loan does not differ significantly from that of the 1st defendant. In his affidavit evidence, he spoke to a sum of US \$40,000.00 as the loan amount but in cross-examination, he said it was US \$39,500.00. The 1st defendant has exhibited a number of documents in relation to this claim in proof of certain transactions. There were no documents exhibited in relation to this particular transaction which involved a significant sum of money. Based on the evidence as to how the events unfolded, it is understandable that the 1st defendant would not necessarily have possessed any documents in relation to this transaction. The money was never transmitted by or through her. It is of some concern to me however that the 3rd defendant did not see it prudent to provide some documentary evidence of the transaction/s. It is not however uncommon for persons providing loans to family members with whom they have a close relationship not to bother to retain a trail of documents in proof of the arrangement.

[42] Ms. Lucille Barnett swore to an affidavit in this matter on the 2nd of June 2016. In that affidavit she stated that she was advised by Mrs Myers (the 1st defendant) that her brother Kenton Myers (the 3rd defendant) would be sending funds to her account at RBTT Bank. She said that she received two separate sums, each of \$1,000,000.00 JMD to her account which were transferred by Mr. Kenton Myers. She was cross-examined concerning the source of those funds transferred to her account and was asked if she was assuming that the monies were coming from

Mr. Kenton Palmer. She responded "Yes". Notwithstanding that response, I accept her evidence that the funds were indeed transferred to her account by Mr. Kenton Palmer. Mrs. Barnett was a sincere and very credible witness.

- [43]** The claimant has stated that the 1st defendant was the more educated of the two of them. If the manner in which the parties articulated whilst giving evidence is anything to judge by, then it is obvious that the claimant is correct in this regard. I clearly did not form the view however that the claimant was in any way disadvantaged because of this disparity. If anything, I believe he benefited immensely from the fact that the 1st defendant in the main managed their financial affairs. Further, I have not formed the impression that the 1st defendant, without consulting or discussing with the claimant entered into the agreement regarding the loan without the consent or the knowledge of the claimant. I accept the 1st defendant's evidence that the claimant was fully privy to this transaction.
- [44]** On a balance of probabilities, I accept that Mr. Kenton Palmer did provide a loan to the parties. I am mindful that in 2006, the exchange rate was not what it is today. Without doing precise calculations, the sum of \$2,000,000.00 JMD would convert to roughly US \$30,000.00 at an exchange rate of between \$ 65.00 – 66.00 JMD to US \$1.00 which would have been the going rate round about 2006. I am mindful of the evidence that a part of the loan was disbursed via payment to various hardware businesses. I feel a slight degree of reticence in making an order for repayment in US currency on account of Mrs. Barnett's evidence that she received the money in Jamaican currency, but it seems to me that the parties came to an agreement for an amount in US currency. I will therefore make an order accordingly.
- [45]** It appears to me that the provision in section 17(2)(a) of the PROSA stated above permits this Court to make an order deducting the claimant's share of the sums owed to the 3rd defendant from the amount due to him in respect of his half share of the family home and to direct that such sums be paid to the 3rd defendant.

INHERITED PROPERTY

[46] The 1st defendant stated that the claimant is the owner of a parcel of land consisting of 2.5 acres which he inherited from his father. His 2.5 acres is a portion of a larger plot of land which is registered at Volume 1118 Folio 539 of the Register Book of Titles. The claimant did not mention this property in his Fixed Date Claim Form but he said in cross-examination that the funds used to develop this property came from various sources including his direct deposit account and his bonuses. He also said that he had received a settlement from an insurance company and that he had borrowed US \$7,000.00 from his wife's mother, which sum he later repaid. He said it was those funds that were used towards the construction of the house which is situated on the plot of land which he inherited. In submissions filed on behalf of the claimant, it was submitted that the defendant is not entitled to an interest in this property. He asserted that claimant does not possess an interest in this property which is transmissible. The claimant observed that there is no dispute that subdivision has not been granted in relation to the property. Counsel cited the cases of **Winston O'Brian Smith & Anor v Constantine Scott & Others** [2012] JMSC Civ. 152 and **George Mobray v Andrew Joel Williams** [2012] JMCA Civ. 26 as authorities for taking the position that the claimant does not hold an interest which is transmissible. Further reference will be made to these cases.

[47] It is unclear whether counsel for the claimant is mistaken as to the nature of the interest being claimed by the 1st defendant in this property or whether he took the view that there is no difference in principle between a claim to an interest in the property per se or a claim to a percentage of the value added to the property. The claimant's position is simply that the 1st defendant is not entitled to any interest in this property.

[48] The 1st defendant said that subdivision has not yet been approved for the property but that probate has been granted in the claimant's father's estate and that the claimant and each of his siblings has distinctly identified and fenced

their respective allotment. From the claimant's account, it would appear that the subdivision approval was in fact refused because the land was zoned for agricultural use.

[49] Counsel for the defendants has postulated that the 1st defendant is entitled to claim the interest she seeks on the basis that it was the joint effort of the parties, utilizing joint funds which resulted in the development of the farming complex on the land in question. He stated that it was accepted by the claimant in cross-examination that the property was initially intended to be the family home. This assertion is however inaccurate. The evidence shows that the claimant disagreed when the suggestion was put to him.

[50] In **Mobray**, the disputed land was initially owned by one Rachel Mobray deceased. Emmanuel Mobray was the son of Rachel Mobray. Emmanuel died without leaving spouse or issue, and his nephew the appellant, George Mobray applied for and was apparently granted letters of administration for his estate. The land owned by Rachel was the land said to comprise Emmanuel's estate. The appellant and another secured registered titles to the property. The respondent had purportedly purchased a part of the land from Emmanuel and was in occupation of that portion of land which formed part of the lands in one of the registered titles. The appellant brought a claim for recovery of possession of the portion of land. The magistrate gave judgment in favour of the respondent. On appeal, it was argued that Emmanuel was a tenant in common of the undivided share in Rachel's estate and could not have passed fee simple interest to the respondent.

[51] In giving judgment, Harris JA had this to say in paragraph 24

*"In the Australian case of the **Commissioner of Stamp Duties (Queensland) v Livingston** the Privy Council, although dealing with a case of testate succession, firmly established the principle that, in unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in any matter related to the due administration of the estate...."*

Ultimately the Court of Appeal found that at the time of the sale of the land, the respondent Emmanuel's interest in the land was a chose in action which was unassignable and was therefore not transmissible to the respondent. (Paragraph 32 of the judgment).

[52] In **Sonia Edwards et al v Stephanie Powell** [2016] JMCA Civ. 33 Sinclair-Haynes JA observed in paragraph 24 of the judgement that

“The legal ownership of the property passes to the beneficiary when the personal representative assents in favour of the beneficiary”.

[53] It is to be noted however, that the 1st defendant, no doubt recognizing the legal position regarding this property, did not seek an interest in the land per se but instead sought a 50% interest in the **value added** to the claimant's portion of the property. Counsel for the defendant did not point the court to any authority in support of this aspect of the claim, however I believe the case of **Hyacinth Gordon v Sidney Gordon** [2015] JMCA Civ. 39 may be helpful in this regard. In that case, one of the issues which had to be determined was, to use Brooks JA formulation, “what is the jurisdiction or entitlement of the court where it accepts that other persons have an interest in the property to make an order concerning entitlement to the property if those persons are not made parties to the action.” In **Hyacinth Gordon**, the parties were married in the year 2000. They resided together in Mrs. Gordon's house which was a board structure. There was an incomplete concrete structure on the property. Mr. Gordon said that over the next 12 years, a large concrete structure was built. He claimed that he contributed towards the development of the property. Mrs. Gordon's evidence was that the house was built on land belonging to her great grandparents and that other members of her family had helped with the construction of the house. The Resident Magistrate awarded Mr. Gordon an interest in the property. It was recognized by the magistrate that his financial contribution to the construction of the house was minimal but she relied on the provisions of section 14(3) of the PROSA, particularly paragraphs (d),(e),(f) and (g). The Court of Appeal determined that

“a court that is made aware of a person’s interest in property should, therefore, make no order concerning that property unless that person is given an opportunity to appear and make representation” (Paragraph 20 of the judgment).

Of greater relevance to this case was what was said in paragraph 25. Brooks JA cited Williams J in **Greaves v Barnett** (1978) 31 WIR 88 page 91j

“The general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed.”

At paragraph 27 Brooks JA

“Mr. Gordon’s contribution to the construction as found by the learned trial judge, becomes part of the interest vested in the owners of the land. It does not entitle him to any interest in the property.”

Having determined that Mr. Gordon had no interest in the property, the Court of Appeal raised the query whether Mr. Gordon had a claim against Mrs. Gordon for a refund of his expenditure. It seems from the brief discussion that followed that if Mr. Gordon could have proven financial contribution, he would in a proper claim be entitled to a refund.

[54] Neither the claimant nor the 1st defendant in this case spoke in detail to the state of the administration of the claimant’s father’s estate. However the fact that subdivision approval has not been granted means that the process of administration is incomplete. Therefore, even though the court accepts the 1st defendant’s affidavit evidence that the claimant has distinctly identified and fenced a portion of the inherited land, and that each sibling entitled to a share in the property has adopted a similar approach as to what each regards as his/her respective portion of the land, I am still of the view that legally the claimant does not own a distinctive share in the estate. The law does not in my view support any other conclusion, notwithstanding the fact that all the beneficiaries apparently agreed to the apportionment.

[55] The position of the 1st defendant in the instant claim is somewhat different from that of Mr. Gordon in **Hyacinth Gordon**. It is abundantly clear on the evidence

which is accepted by this court that the 1st defendant has made significant input in the development of the farming complex. The house, the other buildings and all improvements to the property is the product of the joint effort of the claimant and the 1st defendant. It is not in any way suggested that anyone else has made any input in the construction of any of the buildings or otherwise invested in the development of the farming complex.

[56] In circumstances where the claimant and the 1st defendant have, to the exclusion of the claimant's siblings occupied the portion of land distinctly identified and surveyed, I do not take the view that it would have been necessary to join the claimant's siblings in this claim in order to be able to make the order propose.

[57] I believe in all the circumstances, a valuation can be undertaken to determine the value added to the property. It seems to me that any valuation exercise would have to include a valuation of the land as if it were unimproved as well as a valuation of the property in its present state. By virtue of the provisions of section 23 (1 (i) of the PROSA, I believe that an appropriate order is for the claimant to pay a sum of money to the 1st defendant which represents the value of her input into the property having regard to the provisions of section 14 (2) of the PROSA. It is on the basis of her contribution that the 1st defendant is entitled to be paid the money.

ITEMS OF PERSONAL PROPERTY LOCATED ON INHERITED PROPERTY

[58] The defendant is seeking a declaration that all the furniture, appliances, tools, equipment, livestock, farm produce, supplies and plants to be found on the claimant's portion of land bequeathed under Probate Number 909/82 on January 12, 2012 be divided equally between the claimant and 1st defendant.

[59] As Counsel for the defendants observed in his submissions, there is a significant disparity between the evidence of the claimant and that of the 1st defendant as it

relates to the quantity of livestock on the farm at the time of separation. The 1st defendant's evidence is that there were over 200 mature goats, over 50 goat kids, 10 cow, 200 chickens and 12 acres planted with various crops and there was 8 acres of land grassed for grazing the cows and goats. This she said, was what existed on the farm when the claimant was hospitalized. This of course, was in December- January 2012. The claimant's evidence relating to the matter was that there were about 25 goats. He however said in cross-examination that 32 goat kids and 2 cows had died during his hospitalization. While I accept the 1st defendant's evidence over and above what the claimant said in relation to the stock of animals, I also accept the claimant's evidence that some of the animals had died during his hospitalization. This aspect of his evidence was uncontested. This evidence must be borne in mind when considering the order sought by the 1st defendant.

[60] Counsel for the claimant seems in principle to accept that the 1st defendant is entitled to an equal share of the items sought. He has observed however that the Court does not act in vain and that clarity would be required as to how as a practical matter, the plants (which presumably are growing plants, are to be divided equally between the parties. I will further observe that the entitlement of the claimant in relation to property, whether real or personal would have crystallized as at the date of separation, which was sometime either in December 2011 or January 2012. I will accept the date of January 12, 2012 which is the date given by the 1st defendant. The only way to determine the parties' entitlement in relation to plants or crops would be by way of a valuation. It would be impossible at this point to determine the value of the crops and/or plants which would have been growing on the land as at January 12, 2012. However, based on the provisions of section 12(1) of the PROSA, the relevant date for the determination of the value of property is the date of the court order dividing the property. One may take the view that such provision is not ideal as it relates to crops and produce but in my understanding, that is what the law permits.

LAND REGISTERED AT VOLUME 1414 FOLIO 250 - JOINTLY OWNED WITH 3RD DEFENDANT

[61] The 1st defendant gave evidence in relation to yet another parcel of land which was not mentioned in the claimant's Fixed Date Claim Form. She seeks three declarations in relation to this property. Firstly, that herself and the claimant are each entitled to a 25% interest in that land. Secondly, she seeks a declaration that she is entitled to 25% of the rental from the lease of the land. Thirdly, a declaration is sought that the claimant be given a first option to purchase the 1st defendant's 25% interest in the property.

[62] Her evidence regarding the purchase of this parcel of land is contained in paragraph 25 of her affidavit filed on the 27th October 2015. She said "by the end of 2010, business at the farming complex was doing very well. The claimant and I were supplying a number of businesses with mutton, chicken, beef, eggs, farm produces, lumber, coal and livestock etc, employing as many as twenty persons at peak period. In an effort to take advantage of some opportunities, the claimant and I decided to expand the business by purchasing an additional plot of land measuring 8 acres for rearing cows..... Due to cash flow issues, the assistance of the 3rd defendant was sought and it was decided to purchase the property as tenants in common with the 3rd defendant and the claimant in equal shares. The full purchase amounted to \$2,972,375.00 JMD and was settled with the vendor by the 3rd defendant in full. The 3rd defendant was reimbursed with a cheque drawn by me in the mount of \$1,486,187.50 JMD....." Shortly after purchasing this land, the claimant rented a portion of it to a family member for \$10,000.00 JMD a month. In or about early 2013, the claimant started construction on the said land. The building is substantially complete and is now used as a restaurant operated by the claimant. The claimant initially disagreed in the cross-examination that this plot of land was purchased in order to extend the cattle farm. He also disagreed that any of the purchase money came from his and the 1st defendant's joint funds. He later agreed that a cheque was drawn by the 1st defendant from their joint account to pay for his half of the purchase money but

said he wanted to explain. He stated in essence that he and the 3rd defendant owns the land in equal shares and that it was not necessary for him to have mentioned that property in his fixed date claim form. The court accepts the 1st defendant 's evidence re this property without reservations.

[63] It is noteworthy that no order has been sought for a declaration as to the interest of the 3rd defendant in this property. The 3rd defendant is a party to these proceedings and there is no indication from him or from the 1st defendant for that matter, as to how his interest in same should be dealt with. It is also noteworthy that he has made no reference to this property in his affidavit. The 1st defendant is however seeking an order that the claimant be given first option to purchase her 25% interest in the property. There is an indication from the attorneys for both sides that the parties have agreed as to how the 3rd defendant's interest should be dealt with. This agreed position will be reflected in the order.

FINDINGS- OF GENERAL APPLICATION

[64] A wide range of issues were raised with the claimant in cross-examination. While it would be unnecessary and time consuming to detail them, what became clear was that the claimant resiled from his stance on a number of occasions when the cross-examination became intense. He was clearly revealed to be a far less than truthful individual. In some instances when he did not resile, cogent material establishing the contrary to evidence he had given was put forward. When information was put forward which established that matters he asserted or events he outlined were plainly not true, he would become belligerent. He denied every aspect of the involvement of Ms. Barnett in the building of their matrimonial home and particularly as it related to the role she played in the transfer of funds to facilitate the process. Having regard to my view taken of the claimant, to the extent that there are discrepancies between his evidence and that of the 1st defendant as well as the 3rd defendant, I accept the defendants' evidence and reject that of the claimant with very little if any exception. I found both the 1st and the 3rd defendants to be refreshingly honest in their narrative. To the extent that

there are inconsistencies in the 1st defendant's account, I firmly believe it was as a consequence of faulty recollection on her part.

[65] Whereas I accept that the 1st defendant took control of the parties' financial affairs and that she was the funds manager for all practical purposes, I find that she did so with the full concurrence of the claimant and that the claimant was privy to and agreed with all the financial transactions.

DECLARATIONS

[66] The parties have agreed to the Orders at 10, 12, 14, 20, 21, 25, 26, 28, 29, 30, 31, 32 and 33 below. Having regard to my findings and the matters to which the parties have agreed, the court makes the following declarations:

- 1) That the parcel of land part of **ROUND HILL** in the parish of **SAINT ELIZABETH** being lands registered at Volume 1178 Folio 683 of the Register Book of Titles is the family home.
- 2) That the claimant and 1st defendant are each entitled to a 50% share in the family home being **ALL THAT** parcel of land part of **ROUND HILL** in the parish of **SAINT ELIZABETH** being lands registered at Volume 1178 Folio 683 of the Register Book of Titles.
- 3) That the claimant and the 1st defendant are each entitled to a 50% share in property being Lot 47 part of Vineyard in the parish of St. Elizabeth registered at Volume 1053 Folio 788 of the Register Book of Titles.
- 4) That the claimant and the 1st defendant are each entitled to a 50% share in property being all that parcel of land part of Vineyard in the parish of St. Elizabeth registered at Volume 1334 Folio 482 of the Register Book of Titles.
- 5) That the claimant and the 1st defendant are each entitled to a 50% share in property being all that parcel of land part of Vineyard in the parish of St. Elizabeth registered at Volume 1380 Folio 697 of the Register Book of Titles.

- 6) That the claimant and the 1st defendant are each entitled to a 50% share in land being all that part of Lot 55 Lower Works Pen Mahoe Drive in Black River in the parish of St. Elizabeth registered at Volume 1333 Folio 576 of the Register Book of Titles.
- 7) That valuations of the properties registered at Volume 1178 Folio 683, Volume 1053 Folio 788, Volume 1334 Folio 482, Volume 1380 Folio 697, Volume 1333 Folio 576, and Volume 1414 Folio 250 are to be done by a reputable valuator to be agreed on by the parties, the cost of which are to be borne equally between the parties.
- 8) If the parties are unable to agree on a valuator within 21 days of the making of this order, a valuator is to be appointed by the Registrar of the Supreme Court.
- 9) The attorneys at law for the claimant and for the 1st defendant shall have joint carriage of sale in respect of the properties to be transferred except where otherwise stated.
- 10) The 1st defendant and or the 3rd defendant shall have the first option to purchase the claimant's 50% interest in the former matrimonial home at the value stated by the valuator and she/he must within 30 days of obtaining the valuation report, pay a 15% deposit towards the purchase of the claimant's interest in the property.
- 11) The 3rd defendant is entitled to recover the sum of \$39,500.00 USD from the claimant and the 3rd defendant.
- 12) If the 1st defendant fails to exercise her option to purchase the matrimonial home within the stipulated time, it is ordered that the said property be sold on the open market and the net proceeds of sale be divided equally between the parties.

- 13) The transfer of the former matrimonial home shall be exempt from transfer tax in accordance with the provisions of section 9 of the Property Rights of Spouses Act.
- 14) In the event that the said matrimonial home is sold on the open market, there shall be joint carriage of sale between Taylor Deacon and James, and Williams McKoy & Palmer, Attorneys-at-Law.
- 15) The claimant is given the 1st option to purchase the 1st defendant's 50% interest in land registered at Volume 1053 Folio 788, Volume 1334 Folio 482, Volume 1380 Folio 697 at the value stated by the valuation and he must within 60 days of obtaining the valuation report, exercise his option to purchase.
- 16) If the claimant fails to exercise his option to purchase any of the lots in relation to which he is given the first option to purchase within the time stipulated, it is ordered that any lot/s in relation to which he has not exercised an option be sold on the open market and the net proceeds of sale be divided equally between the parties.
- 17) The 1st defendant is given the first option to purchase the claimant's share in the land registered at volume 1333 folio 576 of the Register Book of Titles. If the 1st defendant fails to exercise her option to purchase the said lot within 60 days of receipt of the valuation report, the said lot may be sold on the open market and the net proceeds of sale be divided equally between the parties.
- 18) In the event that any party fails and/or refuses to sign the agreement for sale and/or instruments of transfer, the Registrar of the Supreme Court is authorized to sign for and on behalf of the defaulting party/parties.
- 19) The claimant and the 1st defendant are each entitled to a 25% share and the 3rd defendant is entitled to a 50% share in land being lot numbered 14 on the

- plan of Vineyard in the parish of St. Elizabeth and being land registered at volume 1414 folio 250 of the Register Book of Titles.
- 20) The 1st and 3rd defendants waive all claims to an account for rent from the real properties.
 - 21) The claimant shall have the option to purchase the 3rd defendant's 50% interest as well as the 1st defendant's 25% interest in the said property within 30 days of receipt of the report of the valuator so agreed or appointed and Messrs. Williams McKoy & Palmer shall have carriage of sale in such event.
 - 22) The 1st defendant is entitled to be compensated in a sum representing 50% of the value added to the portion of land occupied by the claimant which land is part of lands registered at volume 1118 Folio 539 of the Register Book of Titles.
 - 23) That the furniture, appliances, tools and equipment present in the matrimonial home on the 12th of January 2012 are to be divided equally between the claimant and the 1st defendant.
 - 24) That the furniture, appliances tools, equipment and livestock to be found on the portion of land occupied by the claimant which land is registered at volume 1118 Folio 539 of the Register Book of Titles as at the date of separation of the parties are to be divided equally between the claimant and the 1st defendant.
 - 25) That the claimant and the 1st defendant are the beneficial owners in equal shares of the 2004 Mitsubishi Outlander Motor truck bearing registration number 0210 EH.
 - 26) That the 2nd and 3rd defendants are entitled to recover the sum of \$700,000, being the outstanding balance owed in respect of the purchase of the Mitsubishi Outlander motor truck bearing registration number 0210 EH from the claimant and the 1st defendant.

- 27) The 3rd defendant is entitled to recover the sum of \$310,292.98 representing sums paid for the purpose of insuring the said motor vehicle registered 0210 EH, from the claimant and the 1st defendant.
- 28) The claimant and the 1st defendant are the beneficial owners of the motor vehicle bearing registration number 8715 BS.
- 29) The claimant and the 1st defendant shall agree on a valuator to determine the value of the 2004 Mitsubishi Outlander motor truck as well as the motor vehicle bearing registration number 8715 BS. If no valuator can be agreed within 21 days of the making of this order, the Registrar of the Supreme Court shall appoint a valuator for the purpose.
- 30) The 1st defendant shall be given the first option to purchase the claimant's 50% interest in the 2004 Mitsubishi Outlander within 30 days of receipt of the report of a valuator so agreed or appointed by the Registrar of the Supreme Court. In the event that the 1st defendant exercise such an option to purchase the said Mitsubishi Outlander, that she shall pay to the 3rd defendant the amount of \$700,000.00, plus \$310, 292.98 in full and said amount shall be deducted from the amount payable to the claimant for the purchase of his 50% share.
- 31) If the 1st defendant shall fail to exercise such option to purchase the claimant's 50% interest in the 2004 Mitsubishi Outlander, the said motor vehicle shall be sold on the open market and from the proceeds of sale, each party shall be equally liable to pay to the third defendant the sum of \$700,000.00, plus \$310,292.98 and the balance remaining after such deductions shall be divided equally between the claimant and the 1st defendant.
- 32) In the event the said Mitsubishi Outlander is sold on the open market, the proceeds of sale shall be deposited into an escrow account in the joint names

of the claimant's and the 1st defendant's Attorney-at-Law, from which escrow account the sums shall be disbursed to the respective parties.

33) The claimant is given the first option to purchase the 1st defendant's 50% interest in motor vehicle bearing registration number 8715 BS, within 30 days of the receipt of the report of the valuator so agreed or appointed. If the claimant shall fail to exercise the option to purchase the 1st defendant's 50% interest in the motor vehicle registered 8715 BS within 30 days of the valuation report being obtained, then same shall be sold on the open market and the net proceeds of sale be divided equally between the claimant and the 1st defendant.

34) In the event that the said Mitsubishi Outlander and the motor vehicle registered 8715 BS are sold on the open market, the proceeds of sale shall be deposited into an escrow account in the joint names of the claimant's and the 1st defendant's Attorneys-at-Law, from which escrow account the sums shall be disbursed to the respective parties.

35) There shall be liberty to apply.

36) Costs are awarded to the 1st and 3rd defendants to be taxed if not agreed.