



[2013] JMSC CIV. 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 4767

IN THE MATTER OF ALL THAT parcel of land
comprised in Certificate of Title registered at
Volume 843 Folio 17, Volume 995 Folio 605
and Volume 995 Folio 654 of the Register
Book of Titles

A N D

**IN THE MATTER of the Property (Rights of
Spouses) Act.**

Between Renville Colin Nicholson Claimant

And Beverlyn Nicholson Defendant

Tamara Francis instructed by Nelson-Brown Guy & Francis for Claimant

Gordon Steer instructed by Chambers Bunny & Steer for Defendant

**Property dispute – several properties – family home - whether claimant entitled to
an interest – whether property adjustment and maintenance relevant.**

Heard: 27th, 28th November, 20th December 2012 & 22nd March, 2013

CORAM: JUSTICE DAVID BATTS QC

[1] By Fixed Date Claim form filed on the 27th July 2011, the claimant Renville Colin Nicholson claims a 50% interest in various properties as well as orders that they be sold and the proceeds divided. The claim is supported by affidavits dated 25th July, 2012 and 2nd November, 2012.

[2] The respondent Beverlyn Nicholson opposes the claim and filed an affidavit in response dated 14 February 2012. At paragraph 43 thereof, she states “that I respectfully seek an order that the claimant has no interest in the premises the subject of the claim.” She is supported by an affidavit of Keith Hamilton dated 13 November, 2012.

[3] A Case Management Order on the 29th February 2012 in addition to setting deadlines for the filing of further affidavits also provided for disclosure of documents, inspection of documents and that the applicants attend for cross-examination. The parties were required to file and serve legal submissions and authorities.

[4] The trial commenced as scheduled in Chambers on the 27th November 2012. At commencement, the claimant’s attorney sought permission to lead evidence-in-chief from her client as to his present financial circumstances and to respond to allegations in the respondent’s affidavit. Mr. Gordon Stair for the respondent objected. After hearing submissions, I ruled that I would allow the evidence in response to the affidavit but would not allow evidence as to the claimant’s financial circumstances as its prejudicial effect would likely outweigh any relevant probative value.

[5] The claimant was therefore sworn and he identified his affidavits dated 25th July 2011 and 2nd November 2012. He stated orally that his last job was as bar manager for Sandals. He was now retired. He lives at his daughter’s house at Cornwall Court in Montego Bay, St. James a “one room house.” He said he knew Keith Hamilton (the respondent’s witness). He had worked for many years at the examination depot with the respondent. He had never seen Mr. Keith Hamilton visit his house whilst he was married to the respondent. The claimant’s affidavit evidence was to the following effect:

- a). He is 71 years of age, having been born on the 1st June 1940.
- b) He married the respondent on the 27th June 1992 and they were divorced on the 6th October 2010. He was the petitioner for the divorce.

- c) Prior to their marriage, the defendant purchased a parcel of land in Lincoln Place, Coral Garden (hereafter I will refer to it as the Lincoln Place property).
- d) When Lincoln Place was purchased there was only a small house on it.
- e) He met the defendant in or about 1980 and after they met he went to live with her at the Lincoln Place property. It remained the family home until they separated and divorced.
- f) The claimant was employed to the Sandals group and would often be assigned overseas. He was, on those occasions, paid in US Dollars and sent almost all he earned home to the defendant to form part of pooled savings.
- g) The defendant was his best friend, he trusted her completely and hence never kept records of the money he sent.
- h) They planned to expand the house at Lincoln Place by building apartments that could be rented.
- i) It took them six years but from their pooled resources they built an eight apartment building. Every unit was rented and all rent went back into savings.
- j) Eventually, they were able to buy land comprised in Certificate of Title registered at Volume 995 Folio 605 of the Register Book of Titles and both himself and the defendant are registered owners. They planned to build their dream house on it. (I will call this Lot 31 Torado Heights). It remains a vacant lot.
- k) The defendant continues to collect all the rent from the Lincoln Place property.
- l) The defendant and himself also purchased from their joint resources land comprised in Certificate of title registered at Volume 995 Folio 654 (I will call this lot 148 Torado Heights). It was he said, owned by a very good friend named Emeline Spence who was called Lena. The Bank of Nova Scotia (BNS) was threatening to sell her property at auction as she owed them \$300,000.00. The claimant stated he gave the defendant \$600,000.00 to give Lena to pay off the bank. They together accumulated a further \$900,000.00 to pay Lena for the land.

- m) The claimant says he had no idea his name was not on Lot 148 Torado Heights and by means unknown to him, the defendant had herself registered as the sole owner.
- n) He stated that he had spent the major part of his life saving to improve the Lincoln Road property and to acquire the other two. He sought a 50% interest in all the properties. He wished the properties sold and proceeds divided.

[6] The defendant responded to those allegations by affidavit dated 14th February 2012. Her response may be summarized thus:

- a) She resides at the Lincoln Place property.
- b) She borrowed \$22,000.00 from, the Montego Bay Credit Union to buy the land at Lincoln Place. She purchased it in order to build a seven bedroom, six bathroom house.
- c) Construction on Lincoln Place commenced in 1983. In May 1984, she borrowed a further \$19,750.65 from the credit union towards the construction. She moved into the Lincoln Place house in November 1986.
- d) She had a daughter who was born on the 17th February 1986. Her daughter's father is deceased.
- e) While living in the house at Lincoln Place, she met and fell in love with Edson Grey. He moved in to live with her and assisted her to complete the house at Lincoln Place.
- f) When completed it was a two storey house of 7,000 square feet with seven bedroom, six bathrooms, living room, family room dining room, kitchen, wash room and helper's quarters.
- g) Herself and Mr. Grey had a son who was born on the 10th February 1990.
- h) Herself and Mr. Grey decided that rather than live in such a big house they would convert it to apartments and rent them. This was done and three one bedroom and five two bedroom apartments were converted. Herself, Mr. Grey and the two children occupied one of the two bedroom apartments. The rest were rented.

- i) Eventually with the help of Mr. Grey, the defendant said she constructed another five bedroom house on the said land at Lincoln Place. When completed they moved into it with the children in August 1991
- j) She says at paragraph 3 that she met the claimant in January 1992 and they got married in June 1992.
- k) The defendant says at paragraph 22 of the affidavit that she met the claimant in February 1992 while she was living with Mr. Grey in the house at Lincoln Place. This resulted in a break-up of the relationship with Mr. Grey who moved out of the Lincoln Place home. The claimant moved into the five bedroom house with the defendant after they got married.
- l) The defendant denies that the claimant had any role in the construction of the apartments at Lincoln Place or in any construction at Lincoln Place whatsoever. She collected the rent as it was hers and as she has always done.
- m) When she met the claimant, he was employed to Sandals Ocho Rios. He spent three months in St. Lucia and lesser periods in the Turks and Caicos Islands. He never sent any money to her. Furthermore having been divorced in 1990, he had other obligations and always complained that he had no money. She alleges further that he was a compulsive gambler and from time to time people would call her about his debts.
- n) Approximately, two years after their marriage, the claimant's employment with Sandals ended and he has not been employed since. The land at 31 Torado Heights was purchased in their names and the purchase price of \$900,000.00 was borrowed by them from Jamaica National Building Society. The defendant says she alone serviced the debt until it was discharged in 2006.
- o) As regards Lot 148 Torado Heights it belonged to Emeline Spence who was the defendant's dressmaker. She went with Ms. Spence to Mr. Ho Lynn, an attorney-at-law, and an agreement was prepared for its purchase. She gave details of this transaction and stated that the claimant knew nothing about it, never contributed to it and never gave her \$600,000.00 towards it.

- p) The defendant maintained that the claimant never put any money into the acquisition or development of any of the three properties.

[7] By affidavit dated 2nd November 2012 and somewhat misleadingly entitled "Affidavit in Support of Fixed Date Claim Form," the claimant responded to the defendant's affidavit. He explains in paragraph 3 that:

"It is my first time being involved in a matter for court and some memories aren't as sharp as others. So it is indeed true that the defendant and I did not meet in the 1980's. We met in January 1992 and within six months we were married."

[8] That affidavit goes on to state:

- a) The defendant told him that her daughter's father had left her for the United States where he was shot and killed.
- b) That Edison Gray her son's father got another woman pregnant and that is why their relationship ended.
- c) He had never seen Edison Gray visit her home during the courtships and therefore was of the view that that relationship had already ended when he met her.
- d) Both himself and the defendant were interested in a permanent relationship and he embraced her children as his own. They called him "daddy".
- e) In the course of the marriage he cared for the children and dropped them off and picked them up at school. He also assisted them with studies.
- f) He assisted with household responsibilities and managed the apartments.
- g) It was true the defendant bought the Lincoln Place Property prior to the marriage. It is also true that a four bedroom four bathroom house existed on the property.
- h) The claimant however maintains that it was during the marriage with his financial assistance that the building on Lincoln Place was

expanded. He was instrumental in designing and furnishing the grand master bedroom on the main house.

- i) While he was working in Jamaica he gave the defendant “practically my entire pay”.
- j) He never asked what the money was used for as the house was always stocked with food.
- k) He was assigned by Sandals to work in the Turks & Caicos Islands and earned US\$400.00 per month sending home most of it to the defendant. After a few months she asked him to come home as she thought he was cheating on her. He therefore took early retirement.
- l) With the money he received he bought a F150 pickup truck in Miami and imported it to Jamaica. He used it for haulage to earn an income. The rest of the money went to his savings account.
- m) In August 2005, the defendant’s daughter (Toniesha) went to live in the United States and her son Greg left a year or two earlier. They had an empty nest and so started travelling more.
- n) On the 15th March 2008, he was baptised in the Adventist Church and since that time the defendant became increasingly irritable. After a trip to the United States to visit his daughter he returned to find that the defendant had locked him out of the house. She informed him that after 18 years of marriage she no longer loved him.
- o) He admitted that he gambled but says it was part of his history long before his marriage ended.
- p) The loan repayment for the property at 31 Torado Heights was made from their joint savings that he always contributed to.
- q) He did attend lawyer Ho Lyn’s office along with the defendant and Ms. Spence and signed documents. He does not know what he signed but was told it was to register his name as co-owner.

[9] The other affidavit in this matter was Mr. Keith Hamilton. He deponed that he has known the defendant for 38 years. They became friends and he often visited her at home. He also knew Edson Gray who lived with her at Lincoln Place. He knew when Lincoln Place was converted to apartments. A house separate from the apartments was constructed on the premises and he knew the defendant and Edson Gray lived

there. When the claimant came on the property at Lincoln Place everything that is presently there was already there. He attended the wedding of the claimant and the defendant.

[10] All deponents attended for cross-examination. The claimant when cross-examined admitted he did not read very well. He admitted he did not know when Lincoln Place was purchased. He was unable to say when construction of the apartments started. He insisted that himself and the defendant built a “lovely” five bedroom house on the Lincoln Place property. He was unable to say the purchase price for 148 Torado Heights or how much money he gave the defendant. He said he supervised construction at Lincoln Place as he was not working at the time. He worked in Turks and Caicos in 1995 and 1996. He also worked in St. Lucia 1992 – 1994. He had no evidence to prove he sent the money to the defendant because she came to the Islands to collect it. She went once to the Turks and Caicos. He also would come to Jamaica and give her the money. The following exchange occurred:

“Q. How much money you send home from Turks

A. I did not send a dollar home she come

Q. You said that during the employment with Sandals you were often assigned to other properties you say Turks 1995-1996 and St. Lucia 1992-1994. When in St. Lucia how much you send home

A. Never got pay in St. Lucia. Get payment at S.P. Head Office and Mrs Nicholson collected it every month there.

Q. This was for what

A. I did not ask her what she do with it”

[11] He was later asked:

Q. Was it your evidence that whilst assigned overseas you sent all your earnings home to her

A. I did not say I sent it

Later the relevant passage having been read to him from his affidavit, he stated:

“That is not true”

[12] He admitted that the defendant always collected the rent from the apartments at Lincoln Place. The cross-examiner then revealed further discrepancies as the claimant stated he received US\$4,000.00 whereas his affidavit said US\$400.00. He also denied taking early retirement as stated in his affidavit. At this juncture on the first day of hearing the claimant’s attorney applied for an adjournment given the admission by the claimant that he could not read. Half a day’s cost was awarded to the defendant to be taxed if not agreed.

[13] The matter resumed on the following day. The claimant then admitted mistakes in the amount he earned, whether he had taken early retirement and whether he sent money home.

[14] The claimant in cross-examination also stated that he had stopped gambling before being baptised. He stopped gambling on 1st January 2008. He no longer had the pickup and does not remember when he disposed of it. He had no personal savings for himself. He admitted that he did not give his wife \$600,000.00 towards the purchase of 148 Torado Heights but she took it from their joint savings. He also admitted knowing Mr. Hamilton who gave a speech at their wedding.

[15] In contrast to the claimant who was unsure of dates and details and contradicted his affidavits in several respects, the defendant in cross-examination was consistent and certain. The defendant admitted that the claimant assisted her to raise the two children. She denied he made any financial contributions. He never bought food or paid light bills. She admitted that in the purchase of 31 Torado Heights the claimant was a joint owner and a job letter of his was used to assist in getting the mortgage. In answer to the suggestion the claimant assisted in rent collection, the defendant responded:

*“He doesn’t have money to give. Once he give me rent.
Next time he collect \$45,000.00 and gamble it and I had to*

tell tenants not to give him rent. He also borrowed from the tenants.”

[16] The following exchange occurred:

Q. You were married for 18 years

A. Sixteen years up to 2008 when he left the matrimonial home for one year and one month

Q. Why

A. I don't know. He left and told me the day before he was going. We had frequent quarrels. He was under pressure from me to go and work and concerning the gambling.

[17] In re-examination the defendant was asked to explain the joint purchase of 31 Torado Heights. She stated:

“At that time he was not working with Sandals. I said let us do something together. You not working. I am going to get this property and you will work to pay this loan. So got property.”

[18] Mr. Keith Hamilton's evidence in cross-examination was equally impressive. He refuted the suggestion that he had never been to the Nicholsons' home. In answer to the court, he admitted that he had never seen the claimant there on any of his visits. He admitted he was a friend of Mr. Gray.

[19] Upon the close of the evidence, the parties were directed to file written submissions and to attend before me at 9:00 a.m. on the 20th December 2012 for 1 hour to make oral submissions.

[20] I have read and digested the submissions and have considered the documentary evidence as limited as it is, consisting of exhibits to the affidavits. In the interest of keeping this judgment to a tolerable length I will not repeat in detail the submissions made. Save to say that much time was spent on the question whether the apartments

located on the Lincoln Place premises formed part of the family home within the definition section of the relevant legislation. Had it been necessary I would have found as a fact that the apartments were not part of the family home, were not appurtenant thereto nor used wholly or mainly for the purposes of the household. I make this observation out of deference to the detailed submissions made on the question; however my decision makes a determination of that issue unnecessary.

[21] In the result, and as perhaps became apparent from comments made whilst summarizing the evidence of the parties, I accept the defendant and her witness, Mr. Hamilton as witnesses of truth. Where their evidence differs from that given by the claimant theirs is preferred. The claimant it seems was intent on giving evidence that was most convenient for his case. I observed his demeanour and he gave evidence with a smile which suggested he was here to try to get something, anything. It is clear that in many important respects he had forgotten the instructions he gave for the preparation of his affidavit by the time he came to be cross examined. I did not regard him as a truthful witness.

[22] This claim is filed under the Property (Rights of Spouses) Act hereinafter referred to as the Act. Its passage in 2006 marked a significant shift in the approach to the division of property between spouses. As at that date the court was not limited to considerations of declared trusts or agreements or financial contributions towards the purchase of property. It is, however, Mr. Steer's submission that the Act has not gone the route of statutes elsewhere and does not allow for property adjustment. In other words, the court must only consider the factors outlined in the Act and there is no scope for "maintenance" in its provisions. The Defendant in her affidavit has asked this court to dismiss the claimants claim to an interest in all the properties.

[23] The provisions relevant to this application are as follows:

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

Section 7

- (1) Where in the circumstances of any particular case the Court is of 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.

[**Section 10**, it should be noted relates to prenuptial agreements and is not applicable to this case]

Section 13

- (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 willful 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.

Section 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, 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 cohabitation;
 - (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 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.

[24] It is to be noted that Section 23 gives the court among other things power to order a sale and division of proceeds of property. Section 2 defines "family home" as –

"the dwelling-house that is wholly owned by either or both of 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."

[25] This court has considered and applied these provisions in cases such as **Leader v. Leader** 2007 HCV03094, **Sterling v. Sterling** 2007 HCV00069, **Boswell v Boswell** 2006 HCV02453. The cases support the submissions of Mr. Steer referred to at paragraph 22 above.

[26] It is the decision of this court that there are special circumstances in this case which militate against the application of the 50:50 rule for the family home. Indeed it would be unreasonable and unjust to allow the claimant any interest in the premises at Lincoln Place where the family home was located. The circumstances are:

- a) The fact that the construction of the house and the apartments, as I have found, were completed prior to the marriage

- b) The fact that claimant made no contribution direct or indirect to the acquisition or improvement of the Lincoln Place premises.
- c) The fact that the claimant left the matrimonial home two years prior to the dissolution of the marriage.
- d) The fact of the claimant's gambling and lack of a positive contribution to the finances of the household generally.

[27] As regards the other properties it is the decision of this court that number 31 Torado Heights is to be divided equally between the parties. This is because on the defendant's own admission this was purchased jointly with the common intention that the claimant should have a proprietary interest. I bear in mind the evidence which I accept, that he failed to honour his commitment to pay the mortgage. Nevertheless, it was his "job letter" which assisted in its acquisition and he is registered on the title as a joint owner. I will therefore make an order for sale and division of this property.

[28] Lot 148 Torado Heights, however is the property of the defendant. I see no basis to disturb the content of the registered title which accurately reflects the legal and beneficial ownership. There is no factor or circumstance mentioned in section 14 of the Act which applies or which would cause this court to declare an interest in favour of the claimant. He did not participate in its acquisition and, as the defendant stated, he attempted to discourage her from acquiring it.

[29] Finally, this court observes that more than twenty years ago when the debate about what eventually became the Property (Rights of Spouses) Act was in full sway, a learned Queens Counsel, Mr. David Muirhead, cautioned attendees at a seminar, that those calling for an automatic 50:50 split should be cautious lest women give up more than they might gain. This because, in his experience, women were proving to be far more industrious than men. The facts of this case threatened to prove his words prophetic.

[30] In the result however it is hereby ordered and declared as follows:

- a. that the claimant is entitled to half share in all that parcel of land comprised in Certificate of Title registered at Volume 995 Folio 605 of the Register Book of Titles and being land known as Lot 31 Torado Heights.

[31] The Claimant is entitled to 1/3 costs of this application. The Defendant is entitled to receive 2/3 of her costs. Such costs to be taxed if not agreed.

[32] I invite Counsel for the parties to settle the detailed minute of Order for my consideration and signature within 14 days of today's date.

David Batts Q.C.
Puisne Judge