[2018] JMSC Civ. 62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 04518

BETWEEN	**FAY VERONICA WINT- SMITH**	**CLAIMANT**
AND	**DONALD ANTHONY SMITH**	**DEFENDANT**

IN CHAMBERS

Ms. Marjorie Shaw and Mrs. Terry Joy Golaub instructed by Brown and Shaw Attorneys-at-Law for the Claimant.

Mrs. Vivienne Washington Attorney-at-Law for the Defendant.

Heard: 20th, 21st and 24th of November 2017, 15th of December 2017 and 16th of April 2018

Division of matrimonial property - The family home - Whether equal share rule to be varied - Whether limitation has run against husband's interest in property - Whether property transferred by spouse prior to filing of claim can be the subject matter of claim - Whether 3rd party with interest in property should have been joined as party to claim or whether being called as witness is sufficient to allow court to make order adverse to third party's interest.

ANDREA PETTIGREW-COLLINS, J (AG.)

THE CLAIM

[1] The claimant filed her Fixed Date Claim Form (FDCF) in this matter seeking the following declarations as well as certain consequential orders:

1. A declaration that the property situated at 71 St. Theresa Road, Green Acres in the parish of Saint Catherine registered at Volume 1123 Folio 45 of the Register Book of Titles is the family home.
2. A declaration that the claimant has an equitable half interest in the property situated at 71 St. Theresa Road, Green Acres in the parish of Saint Catherine registered at Volume 1123 Folio 45 of the Register Book of Titles (hereinafter called "the family home").
3. A declaration that the claimant is the equitable owner of all of the property situated at Lot 295 part of Bellevue known a Smokey Vale Estate, Kingston 8 in the parish of Saint Andrew registered at Volume 1103 Folio 895 of the Register Book of Titles.
4. A declaration that the claimant has an equitable half interest in property situated at Coopers Hill in the parish of Saint Andrew registered at Volume 1046 Folio 59 of the Register Book of Titles.
5. A declaration that the claimant has a beneficial in he land situated at Hillrun in the parish of Saint Catherine registered at Volume 1310 Folio 364 of the Register Book of Titles.

BACKGROUND

[2] The claimant is an Interior Designer. The defendant is a Civil Engineer. It is not disputed that the parties were married on the 23rd of July 1994 and that they are parents to three children; Nia Shante Smith born in 1994, Zana Makeda Smith born in 1995 and Malik Ajani Smith born in 1999. Except for the first year of the marriage, the parties resided at 71 St. Theresa Road, Green Acres in the parish of St. Catherine until April 2011. The claimant avers that the marriage has broken down and she has filed a petition for dissolution of marriage. It would appear that a decree of dissolution of marriage has not yet been granted.

It is the claimant's evidence that after a family meeting in July 2010 during which the defendant advised that he had given a lien to his brother over property on which construction of what she said was intended to be the family home was taking place, she formed the view that the defendant had no interest in the welfare of the family. She said that the defendant refused to assist with domestic responsibilities and to contribute to household expenses. In April 2011, the defendant asked her to leave the residence at St. Theresa Road. She moved to the house at which she presently resides with the children at El Prado Verde in Saint Catherine.

[3] The defendant's account is that the marriage between himself and the claimant broke down because he had reached his limits in allowing himself to be used and abused by the claimant who came to the marriage finding him with his profession and his resources and she utilised all of those resources to her selfish advantage. Further, that she had an insatiable thirst for money. He said that he would always provide her with financial support for her personal and business purposes and he got nothing from her in return. She did not even prepare his meals. He contends that even subsequent to the breakdown of the marriage, he continued to play his part in maintaining the claimant and the children as well as the household. He said he facilitated her so that she was able to acquire several pieces of real estate, none of which he has benefited from and he has not sought to make any claim in relation to any of them.

[4] The evidence in this matter was quite voluminous, both by way of affidavit as well as in cross-examination. The claimant called three witnesses, one of whom is the eldest daughter of the parties, Nia Smith and the other two, Albert Smith, the brother and Claudette Shaw, sister of the defendant. The latter two were subpoenaed and who gave viva voce evidence. Because of the copious nature of the evidence, I shall make reference only to the evidence that I view to be necessary to come to a resolution of the issues raised in this case. The evidence of Ms. Claudette Shaw and Mr. Albert Smith will be addressed mainly when

dealing with the Coopers Hill property. Nia's evidence will be addressed in looking at the family home as well as the Coopers Hill property.

THE LAW- PROVISIONS OF GENERAL APPLICATION

[5] The legal regime governing a claim for division of property between spouses is the Property Rights of Spouses Act 2004 (the PROSA). The starting point in a claim where the court is asked to make declarations and orders to determine a spouse's or former spouse's entitlement to property, whether real or personal is section 13 of the Act.

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.*

[6] The precipitating event giving rise to this claim is the separation of the parties. In this particular case, the undisputed evidence is that the parties were separated in or around April 2011. The claim was filed on the 22nd of September 2015. There is in fact no evidence as to whether a decree of dissolution of marriage has been granted in relation to the parties. No issue has been taken with the timing of the filing of the claim. Given that the limitation defence has not been pleaded, the

court has not concerned itself with that matter. I came to the conclusion that the court did not need to address that issue because a limitation defence is procedural in nature and is to be raised by a defendant in his/her defence. If a defendant chooses not to or fails to plead such a defence, what would otherwise be a claim which is statute barred, could proceed to trial. I do not think that a court should of its own motion, raise the issue of a claim being statute barred. It is a point for a defendant to raise.

[7] The provisions of section 12 are relevant in terms of making orders that will in a practical way facilitate the implementation of the declarations to be made.

Section 12 states:

> *(1) Subject to sections 10 and 17(2), the value of 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.*

THE FAMILY HOME

THE CLAIMANT'S EVIDENCE

[8] It is the claimant's evidence that the property at which the parties resided as husband and wife with the three children of the marriage is registered in the sole name of the defendant. She said that they all resided together at St. Theresa Road from 1995 to 2011. This property is registered at volume 1123 folio 45 of the Register Book of Titles. None of those matters is disputed by the defendant. The claimant's evidence is that she helped to pay for painting of the house, landscaping of the grounds, and to carry out maintenance and repairs to the property. The household bills she said were shared by the parties. In the later

years, she paid the telephone and cable bills. The claimant said she was responsible for groceries. She was also responsible for most of the children's expenses including lunch money. She transported the children to and from school and activities. For some years she was responsible for paying the helper but in the last 7 years of the marriage the defendant took responsibility for paying the helper. He also paid the electricity and water bills and he was also responsible for the mortgage for the property which she said was under $9000.00 JMD in 1995.

NIA SMITH'S EVIDENCE

[9] Nia's affidavit evidence is that she grew up at St. Theresa Road with her parents and two siblings. It was her mother she said who took her to and from school and extra-curricular activities as well as extra lessons during their prep school years. After she commenced high school her father transported her to and from school whilst her mother continued to transport her siblings. It was also her evidence that her mother did most of the meal preparations, including the preparation of vegetarian dishes for her father. She spoke of her mother shopping for groceries including vegetarian products for her father. She said that her father was usually at home in the evenings but that he spent the time in his office. She said further, that he assisted herself and her siblings with home work when her mother asked him to do so.

THE DEFENDANT'S EVIDENCE

[10] In his Affidavit sworn to and filed on the 25th of November 2016, the defendant, while admitting that the parties and their children resided at 71 St. Theresa Road, asserted that during the course of the marriage, the claimant also resided at her brother's residence at Oakland Apartments in the parish of St. Andrew. He said that for more than a year during the course of the marriage, the claimant carried out much of her domestic activities at her brother's residence, including preparing her meals and the children's meals there.

[11] The defendant said he acquired the St Theresa Road property in 1985, more than five years before he met the claimant. He stated that neither before nor after the marriage did the claimant expend any monies towards the construction or expansion of the property. His account is that the construction of the home was complete before he met the claimant. He denied that the claimant bore any of the expenses for utility bills and said that he paid all the bills. He also asserted that he was responsible for paying the helper throughout the life of the marriage. According to the defendant, the claimant only bore the cost of food for herself and their children. He said that he is a vegetarian and that he purchased and prepared his own food as the claimant did not support his diet.

WHETHER THE PROPERTY IS THE FAMILY HOME- LAW AND ANALYSIS

[12] By virtue of the provisions of section 6 of the PROSA, the court is required to make a declaration as to whether a particular property is the family home. Section 6 of the PROSA provides as follows:

> *(1) Subject to subsection (2) of this section, and sections 7 and 10, each spouse shall be entitled to one-half share of the family home.*
>
> > *(a) On the grant of a decree of dissolution of marriage or the termination of cohabitation;*
> >
> > *(b) On the grant of a decree of nullity of marriage;*
> >
> > *(c) Where a husband and wife have separated and there is no likelihood of reconciliation.*
>
> *(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.*

[13] Section 2 of the Act defines the family home as

> *(1) In this Act—*
>
> *"family home" means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, building or improvements appurtenant to such a 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;

[14] Based on the evidence adduced on both sides in the matter, ignoring the areas of departure and considering only the areas in which the evidence of the claimant and the defendant converge, it can hardly be denied that 71 St Theresa Road is the family home. In fact, the defendant does not dispute this. It is consequently declared that the property at St. Theresa Road (also referred to as the Green Acres property) is the family home for the purposes of the PROSA. The debateable issue regarding the St. Theresa Road property is whether the equal share rule should be varied.

VARIATION OF EQUAL SHARE RULE

CLAIMANT'S SUBMISSIONS

[15] Counsel for the claimant submitted that in order for there to be a variation, based on the provision of section 7, there must exist simultaneously;

I. an application made by an interested party;

II. a relevant factor for consideration and;

III. cogent evidence to displace the application of the rule.

[16] The claimant pointed to the Court of Appeal decision of **Weir v Tree** [2014] JMCA Civ 12 and quoted paragraphs 60 and 61 of the judgment. Counsel posited that the mere land by itself does not fall under the definition of the family home. She said therefore that although the land was owned by the defendant prior to the marriage of the parties, the triggering factor that the family home was already owned by one spouse at the time of marriage does not exist in the circumstances of this case. Counsel's alternative submission is that there is presently no application or evidence before the court to warrant the court giving consideration to varying the rule. Counsel recognised that there need not be a formal Notice of Application for Court Orders and acknowledged that in the case of **Graham v Graham** Claim no. 2006 HCV 03158**,** an application for a variation

of the rule was inferred from the notation in the acknowledgement of service that the husband intended to defend the claim and his denial of any part of the claim, this coupled with the inclusion of a request that the court “make such orders as it think fit and just”.

[17] Counsel for the claimant undertook an examination of the contents of the acknowledgement of service filed in this matter by the defendant, the FDCF, the claimant’s affidavit in support of the FDCF filed on the 22nd of September 2015, four affidavits filed by the defendant in the claim in support of his case, as well as the defendant’s oral evidence on cross-examination, and concluded that there is nothing contained in any of these documents from which it could be inferred that the defendant is seeking a variation of the equal share rule.

[18] The claimant further submitted that in the event the court is of the view that such an application may be inferred from the pleadings or the evidence, then the law is clear that he who asserts must prove. She again cited the case of **Graham v Graham** and said that the defendant cannot prove the existence of any factor stated or contemplated by section 7 of the PROSA. Counsel further contends that even if any such factor exists, the mere existence does not mean that the equal share rule should be varied. She cited the decision of **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47 and made reference to the dicta of Brooks JA in paragraph 40 of the judgment which makes manifestly clear that the rule should not be lightly varied, and in essence that the factors referred to in section 14(2) of the PROSA are not considerations relevant to a division of the family home. She also directed the court to the dicta of Cooke JA in the case of **Deidrick v Deidrick** [2008] SCCA Civ 4 and to Brooks’ JA reference to that case in **Carol Stewart** as well as to his conclusion at paragraph 75 that:

> *“Mrs. Stewart’s contribution to the family in the instant case although not involving as much financial input, cannot be said to be so small as to cause an equal division to be unreasonable or unfair”.*

[19] Counsel further observed that the basis of the defendant’s opposition to the claimant being awarded an interest in the family home is that she did not

contribute towards its construction or expansion and she did not share in the payment of the household bills or obligations, a testament to his focus on financial contribution. In any event she said, the claimant strenuously denied such assertions. Finally in this regard, it is counsel's submission that even if the court finds that the defendant was the main financial provider of the marital obligations, as in **Deidrick** and **Carol Stewart**, this fact is insufficient to displace the equal share rule, given the intention of the PROSA.

DEFENDANT'S SUBMISSIONS

[20] Counsel for the defendant in her submissions did not give consideration to the question of whether or not the court is in a position to consider a variation of the equal share rule. She submitted on the assumption that there was such an application before the court. She cited cases in which the court had varied the equal share rule. She cited the case of **Margaret Gardener v Rivington Gardener** [2012] JMSC Civ 54, **Corrine Griffith Brown v Conrad James Brown** HCV 00192/2013, **Judith Plummer Andrew Plummer** HCV 00864/2006 and **Richard Elliot v Sharon Brown Elliot** Claim no. 2006 HCV 03415

[21] She has asked the court to find that it would be unreasonable or unjust for the claimant to be awarded any interest in the family home mainly because according to her, the property was acquired before the marriage of the parties and without the joint effort of the parties. She also cited the following reasons;

I. Because of the defendant's age, he will not be able to access loans from any financial institution in order to satisfy the claimant's claim.

II. The claimant who operates a business has already reaped significant indirect benefits from the property, it being her evidence in cross-examination that she has benefitted from the financial expenditures of the defendant at the property and the fact that she was able to purchase the El Prado Verde property during the period of her residence at the family home.

III. The claimant has not put any evidence before the court to substantiate her claim that she contributed to the expansion, maintenance or conservation of the family home and whatever contribution she made (if any) was not substantial and cannot give her any interest in the property.

IV. The claimant was preoccupied with her business and her contribution to the household was negligible.

V. During the course of the marriage the claimant acquired properties inside and outside of Jamaica with third parties being co-owners.

VI. The defendant contributed directly to the claimant being able to make those acquisitions because of numerous loans given to her on various occasions as well as by giving his professional skill and expertise in the running of her business, by assisting with the care and maintenance of the children and paying for household related 'activities', both while the claimant was at home and overseas on vacation or otherwise.

[22] Counsel further recognized that the standard set by virtue of the provisions of section 7 of the PROSA is very high, and the evidence required to displace the equal share rule must be cogent. Further, counsel acknowledged that a court should have regard to all the circumstances of the case in deciding whether an unreasonable or unjust situation existed so that the equal share rule should be departed from. It is her further submission, that the circumstances of this case are such that an application of the equal share rule would be unreasonable and unjust and the rule should be displaced. She concluded that cogent evidence has been presented and that as in **Gardener v Gardener,** the claimant should be denied a 50% or any interest at all in the family home.

[23] Counsel has also asked that Nia not be considered a witness of truth and that her evidence be rejected. This submission was not just in relation to Nia's evidence regarding the family home but in relation to her evidence generally. Counsel took the same view regarding the claimant. The reasons put forward for

this position is that although Nia had said that she chose to give evidence so that the court could learn the truth, aspects of her evidence have been shown to be totally biased. The basis for this submission is that Nia said that she had read the affidavits of both of her parents and that the things her mother said were more true than false, yet when she was asked to indicate the aspects of her mother's affidavit that were not true, she said that all of it was true. She also said that she could not recall all of her mother's statements or all of her father's statement but that all of her mother's statements were true. Counsel also asked the court to consider that aspects of Nia's evidence contradicted that of the claimant.

[24] In relation to the claimant, counsel pointed out that the claimant had said that when she travelled overseas, she never travelled with the defendant and that the children were left in the care of a full time helper and that transportation to school would not have been necessary because she would travel in the summer. Nia's evidence in this regard, was that the claimant and the defendant sometimes travelled together on vacations and that when her mother went alone on vacations, her father would transport herself and her siblings to and from school and the helper would prepare their meals. Counsel also pointed to Nia's evidence that they would eat meals two or three times per week at the claimant's brother's house at Oaklands, whereas the claimant had said that this would happen once weekly.

VARIATION OF EQUAL SHARE RULE- LAW AND ANALYSIS

[25] Section 7(1) of the PROSA states :

> *"Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application of an interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following-"*
>
> *(a) The family home was inherited by one spouse;*
>
> *(b) 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.

[26] In giving consideration to the claimant's submission that there is no application before the court for a variation of the equal share rule, I am mindful of the guidance of McDonald Bishop J (as she then was) in **Graham v Graham** which was cited by the claimant' Attorney-at-Law. McDonald Bishop J took the view that an express request to grant an order other than one giving effect to the equal share rule is sufficient to ground an application to vary the rule. I disagree with the claimant's contention that there is nothing in the pleadings from which the application may be inferred. Counsel cited the statement "that I humbly pray that this honourable court will deny the claimant's claim" which is contained in one of the defendant's affidavits and took the view that this statement was insufficient to ground the application. This statement in my view represents a request that the court should among other things not grant the claimant's request for a 50% interest in the matrimonial home. This is one of the declarations expressly sought by the claimant in her FDCF. Therefore any prayer that the court should deny the claimant's claim must be construed as referring to the claim in its entirety or any part of it. Further, in the cross-examination of the defendant, the following question was put to him "you have indicated your position re the numerous contributions you have made to the household and to your wife in relation to Green Acres, are you saying Mrs. Smith is to be given nothing out of Green Acres?" His answer was "That is correct." The follow up question was "You are not applying to the court to reduce any percentage that she may be entitled to?" His answer was "She is not entitled to any part of Green Acres. Can I elaborate?" Those questions and responses clearly indicate that the defendant was asking the court to vary the equal share rule. A request for a variation from a presumed 50% entitlement to 0% entitlement is a request for a variation.

[27] The evidence which is accepted by this court is that the claimant fully participated in the running of the family home and she assisted in the ways that she explained in her evidence with regard to the payment of bills. I accept her evidence that she took on a major role in the maintenance, care and upbringing of their

children. Her contribution towards the children went well beyond providing food for them as the defendant contends. She provided for them financially and otherwise. That in no way discounts the defendant's contribution towards their maintenance, care and upbringing. Although the claimant has sought to understate the defendant's contribution after the separation of the parties, that has no bearing on what transpired during the period of the cohabitation.. She denied that it was the defendant who took care of all of the household expenses. This court accepts that the defendant and the claimant were integrally involved in the children's care, maintenance and upbringing. Both were responsible for assisting with homework, picking up and dropping off at school and extra lessons. The fact that the claimant on occasions travelled overseas, does not in my view detract from that fact. Counsel for the defendant sought to make heavy weather of the fact that Nia's evidence differed from that of the claimant in that the claimant said she always took overseas trips in summer, whereas Nia's evidence would suggest that there were times when the claimant took overseas trips during school time.

[28] I accept the claimant's evidence as to her input in the creation of the family home. She was clear as to her limited role. Further, contrary to what counsel for the defendant has said, the claimant need not have substantiated that she contributed towards the creation, expansion and maintenance of the family home in order to be entitled to a share of it. The basis on which a spouse is awarded an interest in the family home is not dictated purely on the basis of financial input. This claim involves a case where the parties were married in 1993 and separated in 2011. The marriage would have lasted some 18 years during which the parties resided together and procreated 3 children.

[29] Counsel for the defendant has sought to grossly exaggerate the consequence that should flow from certain aspects of the evidence. The suggestion that the claimant should not share in the family home partly on the basis that she acquired property with other parties during the course of the marriage must be looked at in its proper context. Firstly, the only person/s with whom the evidence

disclosed that she acquired property is a sister or sisters. It is not clear whether both properties were acquired jointly with the same sister or different sisters. The property in Florida is unimproved land. The undisputed evidence is that the cost of the property was $5,000.00 USD. Counsel says that $5,000.00 USD was a large sum of money at the time of the acquisition. There is absolutely no direct evidence and no evidence from which an inference can be drawn that the claimant provided the $5,000.00 USD for the purchase price, given that it was jointly acquired property. Her undisputed evidence is that she used the moneys which was left over from the sale of her Lancaster property towards the purchase of the Florida property. The other property, the El Prado Verde property was acquired at a cost of approximately $10,000,000.00 JMD. The uncontroverted evidence of the claimant is that that sum included the closing costs and that it was acquired by both herself and her sister utilizing their National Housing Trust benefits to the tune of $4,500,000.00 JMD each.

[30] The court is cognizant of the fact that matters not mentioned in section 7 of the Act may be taken into consideration. As Brooks JA pointed out in the case of **Carol Stewart,** all the circumstances of the case must be taken into consideration. He was however clear in pointing out that the legislators had pointedly enumerated separate factors in section 14 of the PROSA that a court should have regard to when addressing the division of assets other than the family home as distinct from the matters referred to in section 7 when dealing with a division of the family home.

[31] I now turn to a consideration of the cases cited by counsel for the defendant. The case of **Brown v Brown** is very clearly distinguishable from the facts of the instant case. The court in that case found that the house in question was not the family home. In **Elliot v Elliot** also, none of the properties in question was considered to be the family home. They were both jointly owned by the defendant and a third party. The case of **Judith Plummer v Andrew Plummer** was decided on the basis of the principles of trust and not under the PROSA. The case of **Gardener v Gardener** merits closer examination.

[32] The parties were married in January 2006 and separated in April 2010. The claimant sought a declaration that the property known as 19 Hill Road, Norbrook Heights in the parish of St. Andrew was the family home and that she was entitled to a one half interest in the said property pursuant to the PROSA. The house had been acquired by the defendant prior to marriage, and he had lived in it since 1988. He had also been married twice before and the house was never a factor in those previous separation proceedings. The claimant claimed that while the house had been acquired prior to their union, it would be unfair or unjust to vary the equal share rule as she managed the household and the household staff and made financial contributions to the running of the household. The defendant submitted that the property in question was not acquired by the joint efforts of the parties and that the marriage was one of short duration and therefore the rule should be varied under section 7 of the Act. The defendant was twenty three years older than the claimant, was close to retirement and had made substantial financial contributions to the claimant using the disputed home as security.

[33] The learned trial judge Edwards J made a number of observations in that case. She pointed out that the claimant had made no "material contribution to the operation of the household" and later that "she assumed no responsibility during the marriage which could be said to impact the defendant's earning capacity. She stated the following at paragraphs 118, 119 and 122 of her judgment.

> *(118) "The claimant came into this marriage with three children, a motor car, two beds and a crib plus a few pieces of furniture belonging to her mother. The two helpers was an arrangement she also brought to the marriage.... She has secured as part of a settlement all the furniture acquired before and during the marriage."*
>
> *(119) "The defendant is six months from the age of retirement. He has medical ailments. The claimant is not now prepared to maintain him in his retirement. She is aware that he sometimes has cash flow problems. There are five mortgages on the home. The claimant is not prepared to discharge any of the mortgages on the property."*
>
> *(122) "The husband brought considerably more to the marriage than the wife and gave considerably more.... His wealth did not increase during the marriage..... He made considerable outlay in making his wife and children comfortable and setting up the wife in business...."*

[34] In the instant case, it is the defendant's evidence that he is approaching retirement. He did not say how close. It is also true that he gave some degree of assistance to the claimant in the development of her business. He did not however set her up in business; she was an established businesswoman. The main area of assistance was with regard to her being able to use his property as collateral to access loans. With regard to the Lancaster property, the defendant insisted that he gave her loans. He in fact took what I would regard as an extraordinary route given that the marriage between the parties was a subsisting one,(that is to say they had not separated) in order to recover the loan amount with interest. He went the route of lodging a caveat against her property in order to ensure that he was repaid. It is the claimant's evidence which I accept that they from time to time, gave loans to each other which were always repaid. Therefore the help was not one-sided. On the occasion that the parties decided to do business together (the cosmetology business in Portmore), it is the evidence of both parties that each accessed individual loans in order to finance the same business venture. From all indications, the parties were on equal footing as independent business persons. The defendant also gave the claimant assistance of a non-financial nature during the period of the renovation of the Lancaster property and with hosting her expositions. That assistance is of the kind that a partner would be expected to give to another partner. There is no evidence that the defendant's assets have dwindled or have dissipated as a consequence of him helping the claimant in the ways it is accepted that he did in order to facilitate the growth and expansion of her business.

[35] One of the bases on which the defendant says that the claimant is not entitled to a share in the family home is the defendant's assertion that the property was owned prior to the claimant's entry into the picture. There was never any dispute that the defendant owned the land prior to the parties being married or even became involved in a relationship. The court however rejects the defendant's evidence that the house was completed prior to his meeting the claimant. I do not accept the defendant's evidence as to the timing of the construction of the family home. In fact, Ms. Shaw's evidence (which will be referred to in more detail later),

does not support the defendant’s evidence as it relates to the timing of the construction of the matrimonial home. She was asked the following question in cross-examination: “Do you know where the parties lived after Bridgeview?” She responded “They moved to Green Acres.” The next question asked of her was whether Green Acres was in existence at the time of the marriage. Her response was “the land and he was building a house there”. This evidence could only be understood to mean that the construction of the house had not been completed at the time of the marriage of the parties. I fully accept the claimant’s evidence as it relates to the timing of the construction and her involvement in the construction, maintenance and upkeep of the property.

[36] In cross-examination the claimant said that the building of the house commenced during the time the parties were dating and that most of the building took place during the same year the parties were married. It was her evidence that after they got married, they both resided at her home in Bridgeview for about a year before they relocated to St. Theresa Road and that most of the building took place while they were living at Bridgeview and the construction continued even after they had moved into the property. She said that she would frequently visit the building site during construction and she gave advise in terms of the design choices and finishes for example in relation to tiles, paint colour and kitchen cupboards. She admitted that she had nothing to do with the architectural design of the house. She strongly denied suggestions that the house was completed long before she met the defendant. She was asked whether she had retained any bills in relation to payments she had made towards landscaping, maintenance and repair of the property. The claimant’s response was that she has retained no bills or invoices. Asked whether she had any recollection of the amount of her expenditure in that regard, she responded that the expenditure was made overtime and that she was spending money in a family home where her three children were residing and that she saw no need to retain any bills because she was doing it for the family.

[37] The claimant has asked the court to make a distinction between owning the land as distinct from owning the family home. I agree that such distinction ought to be made in fact. As counsel for the claimant has rightly pointed out, even if the court were to take the view that the family home was already owned prior to the marriage, this fact in and of itself, would not have justified a variation of the rule. Case law and in particular, the case of **Carol Stewart** makes clear that the equal share rule should not lightly be varied. In paragraphs 50 and 51 of the judgment, Brooks JA gave clarity to the relevant law. He said:

> *50. "Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is beyond the ordinary imponderables of the trial process. The court should not embark on an exercise to consider the dis placement of the statutory rule unless it is satisfied that a section 7 factor exists."*
>
> *51. "If a section 7 factor is credibly sown to exist, a court considering the issue of whether the statutory rule should be displaced, should none the less, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure (the principles mentioned in **Graham v Graham** and **Jones v Kernott** mentioned above). Before the court makes any orders that displace the equal entitlement rule, it should be careful to be satisfied that an application of that rule would be unjust or unreasonable."*

[38] I have considered all the matters mentioned by counsel for the defendant as to why she says that neither the claimant nor Nia should be accepted as witnesses of truth. On a balance of probabilities I accept the claimant's evidence over that of the defendant as it relates to the arrangement and running of the family home. I also accept that Nia spoke the truth even considering that she didn't point to any aspect of her mother's evidence that she considered to be 'false' based on her indication that her mother's affidavit evidence was more true than false. Accepting as I do, the claimant's input into the creation, upkeep and maintenance and in the general operation of the family home and her role in nurturing and caring for the children the length of the marriage, and all the circumstances of

this case mentioned by counsel for the defendant, I see no basis for varying the equal share rule. I do not consider that it would be unjust or unreasonable for the claimant to be awarded a 50% interest in the property. The fact that the defendant is the sole registered proprietor makes no difference whatsoever.

PROPERTY OTHER THAN THE MATRIMONIAL HOME

[39] The division of property other than the family home is governed by the provisions of section 14 of the PROSA. The section is set out below in its entirety.

Section 14 provides

(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.

THE PROPERTY AT HILLRUN

[40] The claimant also states that the defendant owns property at Hillrun in the parish of St. Catherine. That property is registered at volume 1310 folio 364 of the Register Book of Titles. This property houses fish ponds and a building. In relation to this property, the defendant's evidence is that the claimant came to the marriage finding him with the property and that she has not in any way contributed towards its expansion or improvement and that she has only used the property to her benefit. The benefit he is apparently referring to is that the claimant was permitted to secure a loan for her own purposes, using the property

as security. In final submissions, the claimant's position was that she was not pursuing a claim to an interest in this property. There is therefore no need to refer to the defendant's extensive submissions on the matter.

THE PROPERTY AT COOPER'S HILL

THE CLAIMANT'S EVIDENCE

[41] The claimant's affidavit evidence is that the defendant also purchased property at Coopers Hill in the parish of St. Andrew during the marriage. This property was purchased without her knowledge and in the defendant's sole name. She said that almost two years after the property was purchased, the defendant told her that it was his intention that the family home would be built on that property. The property was vacant land. After consultation with her the claimant said, the defendant commenced building on the property. She said she did almost all of the landscaping and that she was closely involved in the design, monitoring and managing the progress of the construction. She did all this she said based on their agreement and the defendant's promise. The house that was constructed on the properly is now substantially completed and consists of approximately 5000 square feet. Her initial evidence was that although she believes she is entitled to a half interest in that property she is willing to forego such interest if she is granted the other reliefs and orders sought in the claim. As was was mentioned earlier, she said in July of 2010 the defendant advised the family at a meeting that he had given his brother a lien over the property. At that time the house was almost completed but she decided then that she would not move into the property and she would not insist that the family move there.

NIA SMITH'S EVIDENCE

[42] Nia's evidence in relation to this property is that sometime round about her first form year she learnt from her parents that they were building a house in Coopers Hill and that they would move there to live. She said that over a four year period, they would go to the Cooper's Hill property on a regular basis. I understood her

to mean that the family would go together. She said that her mother would spend a lot of time, especially on Saturdays supervising the design and landscaping of the property. She spoke of her mother planting ivy on the gate house and of her accompanying her mother to a garden store in Liguanea where her mother purchased river stones which were laid on the drive way, in front of the garage to the house. She said that the house was built with window seats and closets on either side in her room as well as in her sister's room. She also spoke of her disappointment when she learnt that they were no longer going to move into the house.

THE DEFENDANT'S EVIDENCE

[43] In relation to the Cooper's Hill property the defendant's affidavit evidence is that he does not own it. His brother Alfred Smith who had owned the property transferred it to him in 1988. It was intended that he would hold the property on trust for his sister Claudette Shaw but that it was transferred to him in order to facilitate design work, approval of designs from local authorities, obtaining credit from financial institutions and project management during construction. In other words, he was merely a facilitator. The property has since been transferred to Miss Shaw. In both instances of transfer of the property, the consideration was love and affection. He said that he was compensated for his professional work done in respect of the property. However, his evidence in this regard differed in cross-examination in that he said his work was voluntary.

THE CLAIMANT'S SUBMISSIONS

[44] The claimant through counsel has asked the court to reject the defendant's position that there was no discussion regarding the building of a future family home on this property and that the claimant was not in any way involved in the preparation of the establishment of the intended family home. She has also asked the court to note that the defendant has not produced the title to the Cooper's Hill property and that evidence regarding the transfer of the property came from Claudette Shaw and Alfred Smith. Counsel has also asked the court

to consider Alfred Smith's evidence to the effect that he did not care what the defendant did with the land after he transferred it to him, as well as his evidence that at the time the land was transferred to the defendant on behalf of Claudette Shaw, it was contemplated that Claudette's husband and children could benefit from the land as well. Counsel's take on this evidence is that Alfred had no intention of making a gift exclusively to either the defendant or to Claudette Shaw, but that in relation to either of them, their family members would benefit.

[45] The claimant has further asked the court to say that the accounts given by the defendant, Alfred Smith and Claudette Shaw regarding the intention of the gift is unreliable and fraught with discrepancies. The court was directed to the defendant's affidavit evidence to the effect that he was compensated for his expertise in relation to the work he did on that property,(paragraph 16 of his affidavit filed on 25th November 2016) yet in cross-examination his evidence was that his expertise was voluntary, that he was given no real compensation but on occasions would get "maybe a gas money". The court was also asked to note Claudette Shaw's absence of knowledge and/or recall of pertinent matters regarding the building which she was saying belonged to her. Although it was her evidence that the house was to be her guest house, she could not recall the number of rooms of any kind or the dimensions or floor plan of the building. On the basis of the evidence that was put forward, the claimant asked the court to make a number of findings as follows in relation to the Cooper's Hill property:

a) That it was given to Donald Smith by Alfred Smith, without any condition or restriction on its usage, and not on trust for Claudette Shaw.

b) That it was agreed upon and intended by the parties to be used as their future family home.

c) That the parties agreed that the property would enure to their equal beneficial interest and enjoyment.

d) That both parties spent, contributed and provided their respective expertise to the construction of the house.

e) That it was transferred by Donald Smith to the recipient Claudette Shaw subsequent to the breakdown of the parties' marriage so as to avoid the

claimant from making any claim on the said property and/or to defeat her interest in the said place.

DEFENDANT'S SUBMISSIONS

[46] The defendant's submission is that the property in question does not belong to the defendant and is not registered in the defendant's name and a third party's interest will be affected by any order made by the court. Further, the third party whose interest will be adversely affected has not been made a party to this claim and the court should therefore decline to make any order relating to this property. The argument is also made that the property was transferred prior to the claim being brought and the claimant was aware of this fact. Counsel said that because of this prior transfer, the provisions of section 20 of the PROSA cannot be invoked. She also stated that the court should be guided by the decision of **Pearline Gibbs v Vincent Stewart** [2016] JMCA Civ 14 and **Hyacinth Gordon v Sidney Gordon** [2015] JMCA Civ 39 as it relates to the procedure to be followed when the interest of a third party in property, the subject of litigation is at stake. Counsel contended that since neither the claimant nor the defendant in this matter has a legal interest in the property, the claimant cannot maintain a claim for a beneficial interest in the said property. She observed that the Court of Appeal found that there must be either single legal ownership or joint legal ownership of the property by the parties, before the question of an entitlement to any beneficial interest can arise. She cited passages from the two above mentioned cases to support the position that the third party whose interest is affected ought to have been joined as a party to the claim.

[47] Counsel further argued that the copy Certificate of Title to the property exhibited by the claimant clearly names Alfred Smith as the owner of the property in question. Thus even if as the claimant stated in her affidavit filed on the 25th of November 2016 (the date of the affidavit is in fact incorrect, the information is contained in paragraph 20 of her affidavit filed on the 9th of December 2016), she was learning for the first time that Claudette Shaw was the registered owner of the subject property, that did not prevent her from joining Miss Shaw in the

matter. According to counsel, the claimant breached the pre-trial review order by calling two additional witnesses, one of whom is in fact the registered proprietor named in the copy Certificate of Title exhibited by the claimant and the other is Claudette Shaw who was named by the defendant as owner. Counsel further contended that to insert these persons as witnesses is not the correct procedure. She pointed to rule 19.2(3) of the CPR which allows the court to add a new party to proceedings without an application being made. Counsel posited that the issuance of witness summons on Ms. Shaw cannot substitute for what the law requires, which is that she should have been made a party to the claim given her legal interest in the property. It is counsel's submission that whatever evidence the court may have gleaned through the examination of Ms. Claudette Shaw and Mr. Albert Smith should be disregarded.

COOPER'S HILL - THE LAW AND ANALYSIS

[48] The claimant's contention is that based on the provisions of sections 4, 21 and 22 of the PROSA, the court is empowered to make declarations in relation to Cooper's Hill. I believe reference to section 20 is also necessary. Section 4 states that :

> *"The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions are made by this Act, between spouses and each of them, and third parties."*

[49] Section 20 states the following:

> *(1)No person shall, where proceedings are instituted pursuant to this Act, sell, charge or otherwise dispose of any property to which the proceedings relate without the leave of the Court or the consent in writing of the spouse by whom the proceedings are brought.*

Subsection (2) of section 20 stipulates the penalty for breaching subsection (1).

[50] Section 21 states the following

> *(1) Where the Court is satisfied that a disposition of property referred to in subsection (4) is about to be made in order to defeat the claim or rights of any other person under this Act, then, on the application of that other person and on such notice being given as the Court may direct, the Court may act in accordance with subsection (2)."*
>
> *(2) The Court may ----*
>
> > *a) By order restrain the making of the disposition; or*
> >
> > *b) Order that any proceeds, which, at the time of the hearing of the application may have been paid in respect of the disposition, be paid into Court to be dealt with as the Court directs.*
>
> *(3) Any disposition of property to which subsection (1) refers which is made after an order has been made under subsection (2) shall be void, so, however, that the Court may consider the claim of any person interested and make such order as it thinks fit.*
>
> *(4) The disposition mentioned in subsection (1) is a disposition of property made whether for value or not, by or on behalf of or by direction of or in the interest of any person.*

[51] Section 22 states the following

> *(1) Where the Court is satisfied that any disposition of property referred to in section 21(4) has been made in order to defeat the claim or rights of any other person; the Court may , on the application of that other person order that-*
>
> > *a) The person to whom the disposition was made otherwise than as a bona fide purchaser for value without notice (hereinafter in this section referred to as the recipient) or his personal representative-*
> >
> > > *i) Shall transfer the property or any part thereof to such person as the Court directs; or*
> > >
> > > *ii) Shall pay into Court, or to such person as the Court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or*
> >
> > *b) Any person who, not being a bona fide purchaser for value without notice received any interest in the property from the recipient shall-*

> i) *Transfer that interest to such person as the Court directs; or*
>
> ii) *Pay into Court or to such person as the Court directs, a sum not exceeding the value of the interest.*
>
> *(2) The Court may, for giving effect to any order under subsection (1), make such further order as it thinks fit.*

[52] Section 20 of the PROSA seem to contemplate certain conduct on the part of a spouse or other person that is to say, he or she, in circumstances where proceedings have commenced in relation to property, deals with that property by way of sale, charge or other disposition. Section 21 appears to address a scenario whereby the conduct has not yet occurred but is anticipated. Section 22 seems to be applicable in circumstances where the conduct has already taken place.

[53] The court is being asked to make a finding that the defendant has transferred the subject property to his sister in order to defeat the claimant's claim. The evidence of the first born child of the parties to this claim supports the claimant's evidence that the house on the property in question was being built as the family home. The defendant's brother Albert Smith and his sister Claudette Shaw who were subpoenaed by the claimant to give evidence on the matter supported the defendant's version which is that the property was never intended for the benefit of the defendant when it was transferred to him by Albert Smith.

[54] According to Mr. Albert Smith, he owned a parcel of land consisting of 1 ¼ acres and he subdivided it into three lots. He said that he sold two lots and he gave the third lot to his brother, the defendant. About five minutes later in the witness was asked this question, "do you know if at the time you gave the land to your brother if he had children?" His response was "I cannot pinpoint, I just cannot remember all these things, I really do not pressure my brain with all these things. I should mention that it is a piece of rock land, rock stone." The question which followed was, "what about that piece of rock stone?" His response was "I gave it to Donald Smith with the intention to pass it on to Claudette Shaw, my sister." When asked

why he would not have given the land directly to his sister, his response was that "Donald Smith is an engineer by profession and he would use that title document with his expertise, so she and him would decide what to do with it." Later he was asked whether he would have had an objection to the defendant using the land to construct a home to be enjoyed by the defendant's family. His response was "As I said before, I gave it to him at his disposal." The follow up question was, "And he could do what he wanted to do with it?" His response was "Yes." He agreed that the property had been transferred by him to the defendant in or around 1998. I am fully convinced that this witness merely inserted into his evidence that he gave the property to the defendant in order for the defendant to pass it on to Claudette Shaw when he realized that his evidence that he had given the property to his brother was not consistent with his brother's case.

[55] Another observation to be made of Alfred's evidence is that he expressed somewhat inconsistent positions. If the land was intended ultimately as a gift to Claudette Shaw from Alfred Smith, it could hardly have been the case that Alfred would not have cared what the defendant did with the land once it had been transferred to him. It is to be remembered that the transfer was said to be one of convenience. According to the defendant's case the transfer was done merely in order to facilitate design, approval, financing and project management during the construction phase.

[56] My view of Ms. Shaw's evidence is that it was intended to bolster the defendant's position. Initially when asked how did she come to own the property, her evidence was that it was given to her by a brother who is now deceased. That brother's name was Neville. When asked what was Neville's connection with the property, her response was that it was Neville who had asked Alfred to give the property to her. According to her, in 1998 when Alfred was giving the land to her, she asked him to transfer the land to the defendant because she was not the owner of a motor vehicle and she did not have the expertise to do the building on the land which she had always wanted to do. It was her evidence that her now deceased brother Neville financed the building. Yet she said Neville died in

February 2012 and that it was in 2012 that she was "ready to do something, to put money in the building". She then altered that evidence immediately after to say that she was ready to "put more money in the building". It is also her evidence that the property was transferred to her in January 2012. This latter assertion is in fact true . Many questions were asked of her regarding the size and the layout of the building. Her responses for the most part were that she could not recall. My finding is that she was not speaking the truth and therefore did not have much knowledge regarding the building.

[57] Having carefully considered the evidence surrounding this aspect of the case, I am clearly of the view that the defendant and the two witnesses brought by the claimant to speak to the Cooper's Hill land are less than truthful and honest as it relates to the dealings with, and effective beneficial ownership of the property. As a factual matter, the property in question was transferred to the defendant by his brother during the currency of the marriage of the parties to this claim but after they had separated . This court finds, consistent with the claimant's contention, that the initial transfer by Alfred Smith conferred the property outright whether as a gift or otherwise to the defendant. Further, it was transferred without any conditions or restriction on its usage and was not intended to be held on trust for Ms. Shaw. The subsequent transfer of the property by the defendant to Ms. Shaw after the breakdown of the marital relationship between the parties was not a transfer intended to bestow upon Ms. Shaw the beneficial interest in the property but was a ploy to deprive the claimant of any beneficial interest in the property. I also find that the property was intended by the defendant to become the family home.

[58] The position taken by this court on the matter is largely a function of my view that there was a lack of sincerity in the evidence of the defendant and his siblings. There was marked difference in the demeanour of the defendant when he was being cross-examined in relation to the Cooper's Hill property. His attitude was at times one of defiance; he at times stared angrily, sometimes wildly and was quite belligerent. He displayed impatience and responded to the questions in an angry

tone. I formed the distinct view that his emotions were feigned and that this was done in an attempt to convince the court that he was being pounded with a pack of lies which was causing him to become upset. I was fully convinced that he was not speaking the truth. In addition to my view of his demeanour, I also take into consideration the inconsistency in his evidence in relation to whether or not he was paid for work done to his property. Also it is clear that it would not have been necessary for the property to be transferred to him in order to facilitate his being able to provide his professional skills in relation to the development of the property, specifically the construction of the building which was done.

[59] Notwithstanding my findings, the question still remain whether this court has the power to make the orders that section 22 of the PROSA permits a court to make. I should point out at this stage that the view of counsel for the defendant that the applicable section of the PROSA is section 20 is incorrect. The essence of the defendant's submission is that the claimant, having chosen to subpoena the siblings of the defendant instead of joining them as parties to the claim, the court is fettered and is therefore unable to make the orders sought by the claimant.

[60] In **Pearline Gibbs v Vincent Stewart,** the respondent had brought a claim against the appellant in respect of two properties claiming that he was entitled to a 50% beneficial interest in both properties. The court made orders, among which was an order granting the claimant the interests as sought. One of the grounds of appeal in relation to both properties had to do with the trial judge making an order dividing the beneficial interest in the properties in the absence of parties who held an interest in the properties being joined as parties in the claim. With reference to one of the interested parties, Petrine Stewart, who was said to be a co-purchaser of one of the properties with the appellant, McDonald Bishop JA had this to say at paragraph 85 of her judgment

> *"In my view, natural justice and fairness demand that she should have been given notice of the proceedings and be joined as a party so that she could have made representations before any decision adverse to her purported interests was taken. In all the circumstances, it seems more than just merely "preferable" that Petrine Stewart should have been joined*

> *as a party as the learned trial judge had reasoned. It was necessary and fair that she be joined. The learned trial judge therefore, erred in stating that he was not precluded from making the orders in her absence."*

[61] According to the appellant's version of the claim, the same property was allegedly sold to the appellant by one Lascelles Gordon. The respondent's version was that he had entered into an agreement with one Myrtle Miller to buy the land. The land apparently had not been transferred to either party. It was also apparent that the land belonged to the estate of one Paul Delisser. At paragraph 87 of her judgment, McDonald Bishop JA said :

> *The learned trial judge did no demonstrate that he had paid any regard to the purported involvement of Lascelles Gordon in the transaction relating to the property in question. In that agreement the land was stated to be part of a larger holding owned by the estate of Pal Delisser and is registered land .... The agreement for what it is worth at least points to the estate of Paul Delisser, Myrtle Miller and Lascelles Gordon as other interested parties in the property. Yet the trial was allowed to proceed and orders made ultimately for the property to be valued and sold and no effort whatsoever was made to involve these persons in the proceedings or at least to give them notice of it. This is unsatisfactory in light of the fact that none of the parties t the proceedings had properly established legal ownership to the property in dispute.*

[62] McDonald Bishop JA also quoted Brooks JA in **Hyacinth Gordon v Sydney Gordon.** In paragraph 20 of his judgment, Brooks JA said the following;

> *"It is a basic tenet of our common law that a person could not be deprived of his interest in property without having been given an opportunity to be heard in respect of any such deprivation. A curt 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 in that regard"*

In **Gordon v Gordon,** the parties were husband and wife. The husband resided in the wife's house. When their marriage broke down, the husband brought a claim against the wife for a share in the home in which they resided. The wife claimed that the house was constructed on land belonging to her grandparents with the help of family members. The Resident Magistrate awarded the husband an interest in the house. On appeal, the Court of Appeal held that the Resident

Magistrate, not having had before her all the parties who were interested in the property, erred in declaring that the husband had an interest in it.

[63] This court readily accepts the defendant's submission to the effect that the appropriate procedure to be followed regarding property, the subject of litigation in which a third party has an interest, is that that third party should be made a party to the claim. Further, even assuming to be true the claimant's evidence that she learnt for the first time via the defendant's affidavit filed on the 16th of November 2016 of Ms. Shaw's interest in the property, this fact did not prevent her from seeking to join Ms. Shaw as a party to the claim at that stage. It is true that counsel who had conduct of the trial on behalf of the claimant entered the matter somewhat late. It was counsel however, who requested that subpoenas be issued for Ms. Shaw and Mr. Albert Smith.

[64] I do not however accept that a fetter is placed on this court's discretion in making an order in relation to the Cooper's Hill property in the circumstances of the present case. It depends on the order being made. It seems to me that this court should not in the circumstances make an order that would directly affect the third party's interest. I fully accept the principles distilled from **Pearline Gibbs v Vincent Stewart** and **Gordon v Gordon** but I do not believe that the principles are being violated in this case if the court were to make an order in relation to the property in the absence of Ms. Shaw being a party to the claim. Ms. Shaw, who is the registered proprietor of the property was called as a witness by a party whose interest is adverse to her own and Ms. Shaw was deprived of the opportunity to make representations or to put forward arguments or to bring a counter-claim in relation to the claim. She did not provide an affidavit in the matter. It is also not known what information she would have had in relation to the precise nature of the claim against her brother or the subject matter in relation to which she would be required to give evidence prior to appearing in court as a witness. The court however, has had an opportunity to hear and assess Ms. Shaw's evidence.

[65] In determining that the court is empowered to consider making orders in relation to the property, this court takes into account that the evidence given by Ms. Shaw and Albert Smith created a discrepancy within the claimant's case. The court therefore has to determine how to treat with the evidence overall. It is certainly open to a court to accept the evidence of one or more than one witness while rejecting the evidence of another witness or other witnesses called by the same party. It is on that basis that I reject the evidence of Ms. Shaw and Mr. Albert Smith and accept that of the claimant and also that of Ms. Nia Smith. Nia's evidence supported that of the claimant that the house being built on the property was intended to be the family home.

[66] I do not believe in all the circumstances that Ms. Shaw's position will be prejudiced based on the order that will be made. She gave evidence and was cross-examined on behalf of the party whose claim and assertions her evidence supported. Albeit, the aspects of her evidence which supported the defendant's assertion that there was no ulterior motive for the transfer of the property to her has been rejected. The matter turned on this court's view that Ms. Shaw as well as Mr. Albert Smith lacked credibility as it relates to the reason, circumstances and purpose of the transfer of the property firstly to Donald Smith, the defendant and subsequently to Ms. Shaw.

[67] One of the orders sought by the claimant in relation to this property is that a 50% interest be awarded to her. A division of that property is governed by the provisions of section 14 of the PROSA. Being mindful of the fact that there is a family home in relation to which the claimant is being awarded an interest, and considering all the other matters referred to in section 14(2), I am of the view that the claimant is entitled to far less than the 50% interest sought. I say this in large measure because of the manner in which the parties had organized and carried on their affairs over the years. This aspect of the case will be addressed in more detail when dealing with the Smokey Vale property. The parties for the most part kept their business affairs separate. It is noteworthy that the defendant had acquired this property on his own without the knowledge of the claimant. This

was the evidence given by the claimant. On the face of it, the property in its unimproved state was a gift from the defendant's brother Alfred Smith. In light of the parties' conduct over the years, and having regard also to the claimant's limited financial input, and finding as I do that she did utilize her expertise in the manner she explained in her evidence towards the construction of the house and the landscaping of the property, considering also that the parties jointly cared for the children of the marriage and that non financial contribution bears no lesser value than financial contribution, I am of the view that any interest in the property to which the claimant is entitled ought not to be more than 20%. In view of the foregoing, this court considers that by virtue of the provisions of section 23(1)(i) of the PROSA which empowers the court to make an order for the payment of a sum of money by one spouse to the other spouse, such an order is appropriate in the circumstances to compensate the claimant for her interest in the property.

[68] I believe it necessary to deal with a matter which was addressed by counsel for the defendant. In her submissions, counsel stated that it was her opinion that the insertion of the siblings of the defendant as witnesses against him without notice amounts to trial by ambush and that that may have accounted for the obvious hostility displayed by these witnesses during examination. Further that it was this hostility which may have prompted the claimant's Attorney-at-law to make a verbal application for Claudette Shaw to be treated as a hostile witness and that this application did not find favour with the court. At a point when it became obvious that Ms. Shaw's evidence did not support the claimant's case that the property was transferred to her by the defendant in order to defeat the claimant's potential claim to an interest in the property, counsel for the claimant made an application to the court to have Ms. Shaw treated as a hostile witness. The court did not make a ruling on the application one way or another. The court simply cautioned counsel that she should give thorough consideration before making a decision as to what course she would adopt in the circumstances. Counsel then requested that she be allowed time until the following morning when the matter continued to fully advise herself. That request was granted. When the trial

resumed the following morning, counsel then indicated that she was withdrawing the application.

[69] The court's immediate and preliminary thought, though not fully expressed at the time, was that the claimant might not have been able to rely on any of the witness' evidence if the witness were to be treated as hostile. Upon reflection, the court now takes the view that it would have been able to accept or reject aspects of the evidence of a witness who is treated as hostile. In any event, if by saying that the court did not find favour with the claimant's attorney's application to treat the witness as hostile means that the court had refused the application, then to that extent the statement is inaccurate.

THE SMOKEY VALE PROPERTY

THE CLAIMANT'S EVIDENCE

[70] The claimant also states that the parties together purchased a property at Smokey Vale. This property is registered at Volume 1103, Folio 895 of the Register Book of Titles. The purchase was financed by a mortgage from the Victoria Mutual Building Society for $1.2 million JMD. She claims that shortly after the property was purchased, the defendant expressed that he was no longer interested in the property and suggested that the claimant assume responsibility for the mortgage in exchange for full ownership of the property. She also said that he had asked her to refund him the down payment that he had made. Incidentally, she didn't say whether she did. The claimant said that she then commenced repaying the mortgage loan. She is still responsible for the payments, which is now $18,620 JMD per month. She said that he had agreed to transfer the property fully to her but she had suggested that the children's names be added, a suggestion to which he had initially agreed but later disagreed under the pretext that the son's name was not added. The son was then a minor. She did not say when this agreement to transfer the property to herself and the children was made.

DEFENDANT'S EVIDENCE

[71] While admitting that they purchased the Smokey Vale property together the defendant said that it was he alone who paid the deposit and all of the closing costs in relation to the property. He exhibited receipts in proof of payment of $ 495,000 in respect of the transactions relating to the purchase of the property. He said it was the claimant who agreed to pay the mortgage for the property and that she did so because he had paid all of the deposit and the closing costs as well as the fact that he was responsible for all the household expenses as well as the maintenance of the children of the marriage. He asserts that the Claimant has also taken an additional mortgage on the property in order to support her business.

[72] The defendant said the intention was initially to build a house on the property. He said that the claimant subsequent to the acquisition of the property, expressed a desire to become its sole owner and in or around the middle of 2013, without any prior discussion with him, caused a transfer to be prepared by her attorney in relation to this property to transfer the property to herself solely. He refused to execute the document. He says that the claimant is entitled to a 50% interest in this property.

THE CLAIMANT'S SUBMISSIONS

[73] The claimant contends that she is entitled to the entire interest in this property notwithstanding the fact that the registered title to the property reflects herself and the defendant as proprietors holding the property as tenants in common. The basis for this request is two-fold. Firstly, the claimant says that there was an agreement between the parties that the defendant was no longer interested in the Smokey Vale property and that it was for that reason that the claimant assumed all responsibilities, legally and factually, relating to the care and maintenance of the property. It is her submission that section 14(2)(d) of the PROSA contemplates such an agreement. Counsel says further, that the

claimant has laboured under that agreement for years and it would be unconscionable for the defendant to seek to breach that agreement.

[74] Counsel further submits, that the indirect contribution alluded to in section 14 as guiding the distribution of property other than the family home is not applicable because both parties maintained businesses, assisted with bills relating to the household and played a role in maintaining the children of the marriage. She states that the defendant in any event did not make any of the forms of indirect contribution referred to in section 14(2) to the mortgage payment of the Smokey Vale property.

[75] The further submission is that the claimant is entitled to and raises a limitation defence. She claims she has assumed possessory titles in respect of the defendant's presumed one-half interest in the property. The defendant was entitled since 2003, Says counsel, to make an entry upon the land, take action or make any claim with respect to his title to the property and that the defendant did nothing to assert his legal interest in the property. She cited the provisions of sections 3 and 30 of the Limitations of Actions Act and the cases of **Myra Wills v Elma Roselina Wills** Privy Council Appeal 50/2002 and **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37.

[76] The claimant's alternative submission/request is that if the court does not find favour with the limitation defence, then in addition to granting the claimant her one-half interest in the property, the court should make an order for the defendant to reimburse the claimant one-half of all payments made by her since the acquisition of the property, in respect of the mortgage on the property to the Victoria Mutual Building Society.

THE DEFENDANT'S SUBMISSIONS

[77] The defendant's position is that the property was acquired through the joint efforts of the parties and points to the fact that they are registered as joint tenants of the property (factually incorrect as the parties are registered as tenants in

common) of the property. She also observed that the parties, although married, kept their affairs separate and treated with them accordingly and that there is no reason to believe that having bought the property as joint tenant with the claimant, the defendant did so with a view to holding it on trust for her. Counsel also pointed to the evidence surrounding the acquisition of the property and to various aspects of the evidence which tended to show that the parties have kept their business affairs separate. This included the fact that the claimant purchased the Lancaster property by herself and the defendant's subsequent conduct of lodging a caveat against the property even prior to the parties separating in order to secure his loan that he had made to her to facilitate improvements to the property. She has also asked the court to consider that the defendant refused to sign the transfer which was sent to him by the claimant's Attorney-at-Law.

Finally, Counsel submits that "equity follows the law. Joint tenancy of the property located at Smokey Vale means joint legal and joint beneficial ownership." She further asked the court to say that "the claimant has not discharged the burden placed on her to show that the joint legal ownership should be varied for her to become the sole legal and beneficial owner of the said property."

THE LAW AND ANALYSIS

[78] In reliance on the limitation defence, the claimant cited the provisions of sections 3 and 30 of the Limitation of Actions Act. Section 14 is also relevant to this discussion. Section 3 states:

> *"No person shall make an entry, or bring an action or suit to recover any land, or rent, but within twelve years next after the time at which the right t make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."*

Section 14 states:

> *"When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."*

Section 30 states:

> *"At the determination of the period limited by this part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."*

[79] It is accepted based on the authority of **Wills v Wills** that one joint owner can dispossess another joint owner. It was determined in that case that because joint tenants possess property individually and in their own right, it is possible for one joint tenant to be dispossessed of his right to jointly held property through the operation of adverse possession. The case of **Fullwood v Curchar** is also authority on the point. This decision also makes it clear that a dispossessed land owner cannot seek to recover against a person in possession where his title has been extinguished. Sykes J (as he then was) provides a concise and useful summary of the relevant law in the case of **Lois Hawkins (Administrator f the Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McIniss** [2016] JMSC Civ 14. He said the following in paragraph 12 of his judgment:

> *The law in this area is no longer in doubt. It was most recently expounded by the Court of Appeal in **Fullwood v Curchar** [2015] JMCA Civ 37. This court cannot improve on the clarity, precision and exposition of McDonald Bishop JA (Ag). The court will simply refer to paragraphs [29] to [54]. From these passages the following propositions are established:*
>
> *(i) the fact that a person's name is on a title is not conclusive evidence such that such a person cannot be dispossessed by another including a coowner;*

(ii) the fact of co-ownership does not prevent one co-owner from dispossessing another;

(iii) sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing any action to recover property after 12 years if certain circumstances exist;

(iv) in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenancy dies, the normal rule of survivorship would apply and the co-owner takes the whole;

(v) however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant;

(vi) the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other coowner to resist any claim for possession;

(vii) when a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished thereby proving good standing to bring the claim;

(viii) the reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place;

(ix) dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit;

(x) the relevant intention is that of the dispossessor and not that of the dispossessed;

(xi) in determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists it makes the extinction of title claim stronger but it is not a legal requirement;

(xii) the question in every case is whether the acts relied on to prove dispossession are sufficient.

[80] This court has not been directed to any case law which suggests that limitation can run during the subsistence of a marriage where the parties have not been separated. I would be rather surprised if such a decision were to be unearthed. The union of marriage entails two individuals in a legal relationship in which there is expected to be a high level of bonding, the essence of which is that the two have become one. Further, the promulgation of the PROSA brought about a new and different approach towards deciding matters of property rights between spouses. Section 4 makes it clear that the rules of common law and equity are no longer applicable in determining matters of division of property between spouses. Thus even if factually as the claimant asserts, she has had sole control over the property for the requisite twelve years without the defendant's involvement, I do not accept that limitation would have run for the purposes of the Limitation of Actions Act so that she would have acquired her husband's interest in the property by virtue of his title to the property becoming extinct.

[81] The court first became alert to the fact that the issue of limitation was being raised when final submissions were filed in February 2018, over two months after the trial concluded on the 15th of December 2017. The defendant has not made any submissions on the point. It was suggested to the defendant that he had never paid taxes in respect of the property. He disagreed with this suggestion. It was also suggested to him that he had expressed disinterest in the purchase of the property. The defendant did accept after a document was put to him, that he had expressed disinterest in writing in that document. That document was not however in evidence. The court is not aware of its contents and can place no reliance on it except to the extent of the defendant's admission that he signed the document and that in it he had expressed disinterest in the property. It is not particularly clear whether this happened before or after the defendant had made the down payment and paid the closing costs in relation to the property. It was his evidence that he paid the entire deposit and closing costs. The claimant said in cross-examination that the defendant paid most of the closing costs but that

she paid a small portion. Documents produced by the defendant reveals that he made payments amounting to $495,000.00 JMD in respect of the initial cost of purchasing the property. It is the claimant's evidence that a mortgage in the sum of $1,200,000.00 JMD was taken on the property to be repaid over a 20 year period. The duplicate Certificate of title reveals that the total purchase price was $1.5 million JMD The defendant admitted that it is the claimant who makes the monthly payments. The claimant's evidence is that those payments are $18,850.00 JMD monthly.

[82] It is not difficult to accept on a preponderance of the evidence, the defendant's evidence that the arrangement was that he would pay the initial cost and the claimant would make the monthly mortgage payments, although as indicated elsewhere, I do not accept the defendant's evidence that he was fully responsible for the maintenance of the children and all of the household expenses and therefore this could not have been the reason for that arrangement as the defendant stated. The claimant has had the benefit of the property. She has been able to secure a second mortgage on the property in the sum of $300,000.00 JMD with the consent of the defendant. The defendant has not benefited from this arrangement. The claimant seeks to rely on an agreement as per section 14(2)(d) of the PPROSA. She has not said that she refunded the defendant his initial expenditure of almost $500,000.00JMD. Further the agreement to transfer the property according to the claimant, came in 2013. This was after the parties had separated. There is no indication of any valid consideration having been given to make the agreement a binding one.

[83] The division of this property ought to be governed by the provisions of section 14 of the PROSA. Both parties contributed to the acquisition of the property. There is no indication in the evidence of either party that there has been any improvement to the property. I agree to a large extent with counsel for the defendant that the parties have to a large measure, kept their affairs separate and treated with them accordingly and that there is therefore no reason to believe that they having bought the property as tenants in common, their intention was

otherwise than that both would own the property. It seems clear that during the course of their relationship the parties acted independently of each other in acquiring property and in carrying on their business affairs. The claimant purchased the Lancaster property in her sole name with the full knowledge and apparent concurrence of the defendant. He was clearly very supportive of this acquisition on her part. Whether or not she immediately appreciated that sums passed to her by him were in fact loans, the defendant was clear that he had given loans and not gifts to her. She subsequently repaid him a sum of $800,000.00 JMD which included interest, although she insisted that she was of the view that he had made gifts of the monies to her. The claimant had also acquired two different properties with her sister as joint owner. It seems to me that when they saw it fit, they embarked on joint ventures together. The cosmetology business in Portmore was their only joint business enterprise. The Smokey Vale property represents the only property which they acquired in their joint names. The only intent I can infer from the circumstances of the acquisition of this property is that they intended it to be for their joint benefit. I am in full agreement with the defendant's submissions in this regard.

[84] The claimant has asked that if the court finds that the defendant had not abandoned his interest in the Smokey Vale property, that in addition to being awarded her half interest in the property, that the claimant be reimbursed one-half of all payments made by her since the acquisition of the property with respect to the mortgage on the property held by the Victoria Mutual Building Society.

[85] Counsel for the defendant has submitted that the court should order that the property be sold in keeping with the provisions of section 17 of the PROSA and that any existing mortgage be borne solely by the claimant since that debt would have been taken by her, for her sole use and benefit and that the defendant's Attorney-at-Law should have carriage of sale of the property.

[86] In keeping with the provision of section 12(2) of the PROSA, a spouse's share in property is determined as at the date of separation. In the case of **Forrest v Forrest** SCCA No. 78/93, the court determined that the beneficial interest of one party in property could not be varied on account of mortgage payments having been made by one of the parties subsequent to the separation but that the paying party was liable to be reimbursed by the other party based on the party's proportionate share in the property for payments made after the date of separation. Forte JA quoted Bagnall J in **Cowcher v Cowcher** [1972] 1All E.R. 943 at 951 where he said;

> *".... Secondly that he who discharges another's secure obligation, wholly or in part, is entitled to be repaid out of the security the amount of the sum or sums paid by him. [see **Pitt v Pitt** (1823) Turn & R 180 and **Outram v Hyde** (1875) 24 WR 268].*

[87] Further, Forte JA cited the following passage from **Wilson v Wilson** (1963) 2 All E.R. 447 where Russel LJ said at page 454 of the judgment:

> *"In the result in my judgment the appeal should be allowed and it should be declared that the wife is entitled to half of the net proceed of sale of the house. I think, however, that there must be some adjustment in respect of mortgage instalments paid by the husband, between the time when the wife left the matrimonial home in July 1959 and the sale of the house of March 1961: I do not think that the presumption of gift can continue to apply after the separation, nor consequently that the husband can be taken to have given to the wife the benefit of half these post separation payments; he is in the respect of these payments in the ordinary position of a joint mortgagor redeeming a mortgage and entitled to contribution from the co-mortgagor in proportion to their interests, and from her half of the proceeds of sale, half of such payments should be deducted and added to his half. If necessary, there must be an inquiry to ascertain the amount."*

[88] Although the case of **Forrest v Forrest** was not decided based on the provisions of the PROSA, the principle enunciated in that case was applied in the case of **Narine Marlene Lewis v Anthony Patrick Lewis** HCV 03544/2007 which was decided under the provisions of PROSA. The provision of section 12 of PROSA combined with the principle extracted from **Forrest v Forrest** seems to me to dictate that the date of separation is the relevant date to consider when making an order for reimbursements of mortgage payments by one spouse to another.

Further, based on the evidence in this case, the defendant paid the substantial part (if not all) of the initial cost of acquiring the property and the claimant has been paying the mortgage. There can be no presumption of a gift from one party to another after a separation. My finding is that the claimant is entitled to be reimbursed one-half of the mortgage payments made since the separation. The defendant would also be responsible for half of the entire mortgage outstanding as at the date of separation. The suggestion of counsel for the defendant that the claimant should have sole responsibility for the outstanding mortgage is untenable.

[89] It is the claimant's evidence that she took a further mortgage of $300,000.00 JMD on the Smokey Vale property and that this sum was for her sole benefit. She stated however, that the monthly payment of $18,850.00 JMD is in respect of the original mortgage of $1,200,000.00 JMD. The defendant has not put forward any evidence to show otherwise; an account will have to be taken. The defendant's liability would only be in relation to the repayment of the $1,200,000.00 JMD. It is clearly the position that the claimant will have sole responsibility for the repayment of the additional mortgage amount of $300,000.00 JMD. The only way to determine what the outstanding mortgage in respect of the original mortgage of $1,200,000.00 JMD is to direct that the claimant produces a statement of accounts reflecting the outstanding mortgage as at April 2011, the date of separation of the parties, from the Victoria Mutual Building Society.

COSTS

[90] The general rule is that costs follow the event. I am of the view that there is no clear winner in this case. Having regard to that position, I am fully cognizant of the fact that there is no similar provision in the PROSA to section 33(1) of the Matrimonial Causes Act which provides generally that each party to proceedings should bear his own costs. This is of course subject to the provisions of

subsection (2) which allows a court to make orders as to costs. I believe it appropriate to order that each party should bear his/her own costs.

DECLARATIONS

[91] In the final analysis and having regard to my findings that the claimant is entitled to a 50% interest in the family home, that she is entitled to no interest in the Hillrun property, that the defendant is entitled to a 50% interest in Smokey Vale and that the transfer of the Cooper's Hill property was made by the defendant to Ms. Shaw in an attempt to defeat the claimant's interest in that property, this court makes the orders that follow.

1. That the property situated at 71 St. Theresa Road, Green Acres in the parish of St. Catherine registered at Volume 1123 Folio 45 of the Register Book of Titles is the family home.

2. That the claimant has an equitable half interest in the property situated at 71 St. Theresa Road, Green Acres in the parish of St. Catherine registered at Volume1123 Folio 45 of the Register Book of Titles (hereinafter called "the family home").

3. That the claimant and the defendant are the legal and equitable owners in equal shares of all of the property situated at Lot 295 part of Bellevue known as Smokey Vale Estate, Kingston 8 in the parish of Saint Andrew registered at Volume 1103 Folio 895 of the Register Book of Titles.

4. That the claimant has no beneficial interest in land situated at Hillrun in the parish of Saint Catherine registered at Volume 1310 Folio 364 of the Register Book of Titles.

5. That the defendant shall pay to the claimant, a sum representing 20% of the appraised value of the Cooper's Hill property within 60 days of receiving the valuation report in relation to the property.

6. That the family home, the Cooper's Hill and the Smokey Vale properties are to be appraised by a reputable valuator to be agreed upon between the parties within 14 days of the making of this order. In the event the parties fail to agree on a valuator within the stipulated time, the Registrar of the Supreme Court shall nominate a valuator.

7. That the cost of the appraisals of the family home and the Smokey Vale property are to be borne by the parties equally and that of the Cooper's Hill property, according to the parties' respective interests therein.

8. That the respective Attorney-at-Law with carriage of sale of the family home and of the Smokey Vale property shall be entitled to deduct the cost of the appraisal of the property and pay same from the net proceeds of sale if not paid before by the parties or any of them.

9. That the family home be sold and the net proceeds of sale be divided equally between the parties.

10. That the defendant is granted first option to purchase the claimant's half share in the said family home; the said option to be exercised by payment to the claimant's Attorney of the sum of the equivalent of ten percent (10%) of the appraised value of the property within sixty (60) days of the delivery to the claimant or her Attorney-at-Law of the Appraisal Report as ordered herein.

11. That the said option money be treated as deposit on the purchase of the claimant's interest in the family home by the defendant.

12. That should the defendant fail to exercise his option to purchase the claimant's half share in the family home within the sixty (60) days period as ordered herein, the family home be offered for sale on the open market; both parties to cooperate in facilitating the sale and share equally the necessary and reasonable costs incidental to the sale including but not limited to realtor's fee and advertisement.

13. That the defendant's Attorney-at-Law shall have carriage of sale of the family home.

14. That the defendant shall produce a statement of account in respect of the outstanding mortgage/s (if any) in relation to the family home, as at April 2011, the date of separation of the parties from the relevant institution.

15. That the amount outstanding on mortgage loan/s if any including principal and interest, as of April 2011 in respect of the acquisition of the family home shall be paid by both parties in equal portion.

16. That the Smokey Vale property shall be sold and the net proceeds of sale be divided equally between the parties.

17. That the claimant is granted first option to purchase the defendant's half share in the said Smokey Vale property; the said option to be exercised by payment to the defendant's Attorney of the sum of the equivalent of ten percent (10%) of the appraised value of the property within sixty (60) days of the delivery to the defendant or his Attorney-at-Law of the Appraisal Report as ordered herein.

18. That the said option money be treated as a deposit on the purchase of the defendant's interest in the Smokey Vale property by the claimant.

19. That should the claimant fail to exercise her option to purchase the defendant's half share in the Smoke Vale property within the sixty (60) days period as ordered herein, the Smokey Vale property be offered for sale on the open market; both parties to cooperate in facilitating the sale and share equally the necessary and reasonable costs incidental to the sale including but not limited to realtor's fee and advertisement.

20. That the claimant's Attorney-at-Law shall have carriage of sale of the Smokey Vale property.

21. An order that in the event that either party neglect or refuse to sign or to execute any document to facilitate or execute the sale or transfer of the family home and the Smokey Vale property including but not limited to the Agreement for Sale or Instrumental of Transfer after fourteen (14) days of the said document being presented to his/her Attorney-at-Law the Registrar of the Supreme Court is empowered to and shall sign the said documents on his behalf.

22. That the claimant shall produce a statement of account from the Victoria Mutual Building Society in respect of the outstanding mortgage loan of $1,200,000.00 JMD on the Smokey Vale property as at April 2011, the date of separation of the parties.

23. That the amount outstanding on the mortgage loan of $1,200,000.00 JMD as at April 2011 including principal and interest is to be paid by both parties in equal portion.

24. That there be liberty to apply.

25. That each party to bear his own cost.