IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV OOO69 OF 2007

BETWEEN **PAULA-ANN TRACY STERLING** **CLAIMANT**

AND **WAYNE FABIAN STERLING** **DEFENDANT**

Heard on October 28, and December 3, 2008

Property (Rights of Spouses) Act 2004: Declaration of interest in Property. Whether house is family home for purposes of sections 6 and 7. Whether application has to be made pursuant to section 7. whether section 7 (2) exhaustive; scope of section 14. Circumstances informing a just and reasonable division of property; Whether decree nisi is appropriate trigger for the purposes of section 13 application; Application of Section 11 where cohabitation continues

Mr. G. Steer and Mr. C. Dowding instructed by Pickersgill, Dowding and Bayley-Williams for Claimant.
Mrs. J. Brown Ramanand (instructed by Judith Brown Ramanand & Co. for the Defendants

ANDERSON J

This is an application by way of a Fixed Date Claim Form pursuant to the provisions of **The Property (Rights of Spouse) Act**.("the Act") The claim is brought by Paula Ann Sterling ("the Claimant") against her husband, Wayne Sterling (hereinafter "the Respondent" or "the Defendant"). In this matter, the Claimant seeks a declaration that she is entitled to the entire 100% beneficial interest in property located at Lot 88, 10 Lorraine Drive, Gregory Park in the Parish of St. Catherine. For his part, the Respondent opposes the application by the Claimant and asks the court to declare that each party is entitled to a fifty per cent (50%) interest in the property. The Claimant has filed an affidavit which seeks to detail the factual basis for her claim to the entire beneficial interest in the property.

For reasons which will become apparent later, I should point out that this claim was filed by the Claimant under the now repealed Married Women's Property Act, an Act which had by then been repealed and replaced by the Property (Rights of Spouses) Act 2004. When the matter came on for hearing, the parties agreed that it should proceed and the matter be treated as a claim under the Act. It was so ordered.

The Facts

It is not disputed that the parties were married at the Emanuel Apostolic Church, Slipe Road, Kingston 5 on December 5, 1998. A decree nisi in relation to the marriage was granted on September 19, 2006. There was no evidence available to the Court that a decree absolute has yet been pronounced. There is one child of the marriage, Dominick Jordan Sterling, born September 27, 2000.

At first the couple lived in rented premises at 30 Highland Drive, in Havendale, St. Andrew. The Claimant alleges that, by agreement between themselves, the Respondent was to be responsible for the payment of the rental for the premises, while she would pay for food and other outgoings. She states in her affidavit that at first things went well, but that about the time she became pregnant in 2000, she discovered that her husband had not been paying the rent. This led to their being served with a notice to quit the rented accommodation. However, after discussions with the landlord and promises to live up to their obligations, they were allowed to continue living there.

My reading of paragraph 8 of the Claimant's affidavit is that after the parties had discussed the possibility of buying a home and having got past the Respondent's initial concern as to whether they could afford the down payment, they decided to go ahead to try to purchase a home in a scheme which had been identified by her uncle, a realtor. It is common ground that between them they had no money for the down payment and I accept as the evidence, that both parties sought the assistance of their respective families. In the result, the Claimant's family came through with assistance for the deposit and closing costs, a figure totaling some $360,000.00.

In terms of the evidence that I accept, I find it of instructive that both the Claimant and the Respondent, along with the Claimant's mother, went to Jamaica National Building Society ("JNBS") in their attempts to secure a loan to cover the balance of the purchase price for the home, the subject matter of this suit. Additionally, I accept the Claimant's averment in paragraph 11 of her initial affidavit, that "It was agreed between the Defendant and myself that as we were getting our own house, he would now live up to his obligations".

The Claimant, in the course of being cross-examined, acknowledged that "at first" her husband had not been enthusiastic, but he did eventually warm to the idea of purchasing their own home. She also acknowledged that the Respondent did indicate that he would approach his family in light of the difficulty that they would have in coming up with the deposit. However, as noted above, her family came through with assistance first.

Some time after the purchase of the home in January or February 2001, the Respondent advised the claimant of the existence of a job opportunity in Montego Bay. There was a discussion of the possibility of him taking this job, but the Claimant stated that she did not believe that it was a good idea at that time. There is some dispute here about the time when the issue of a job opportunity came up and the Respondent in his affidavit claims that this was in 2004. However, for reasons noted below, I accept the Claimant's version as more likely.

In her paragraph 11 of her first affidavit, the Claimant talks about getting "our house" and the Respondent agreeing to "live up to his responsibility." There is no disputing the fact that the transfer of the property being acquired by the couple was registered in January 29, 2001 in the names of the Claimant and the Respondent, as joint tenants. There is also clear evidence that the offer of finance from the JNBS was made to the parties along with the Claimants mother as guarantor as their joint incomes were inadequate to service the mortgage on the property. However, the letter from the Society informing them that the loan had been finalized, dated February 15, 2001, was addressed to both parties to this action.

It is the Claimant's position that after the acquisition of the house the parties had an agreement pursuant to which the Respondent was to pay the mortgage and expenses associated with their young son. The essence of this agreement is not denied by the Respondent. However, he says that he also eventually was responsible for the payment of the utility bills. The Claimant for her part also agreed in cross examination, that the Respondent did pay utility bills from time to time.

There is some dispute in the evidence as to whether an incident involving the Respondent finding the Claimant in bed with another man at their house had anything to do with the

Claimant's leaving the matrimonial home to take up a job in Montego Bay. The Claimant admitted that the incident did take place but stated that by then, the Respondent had already decided to take up the job offer in Montego Bay.

In or around February 2005, the parties refinanced their home through the National Housing Trust ("NHT"). This required that all arrears of mortgage which had accumulated at the JNBS be paid off by the borrowers. Insofar as the payment of mortgage to JNBS was concerned, it is common ground that the Respondent did not pay the sums due on a consistent basis and that arrears built up over time. However, based on exhibit WS2 to the Respondent's affidavit, I have come to the view that he did in fact make payments from time to time and that at the time of the refinancing, he provided the resources to pay off all the sums to be liquidated before the property could be re-financed.

There is also consistency in the evidence of both parties that after the refinancing by the NHT, which mortgage was registered at the Registrar of Titles in February 2005, the Respondent only made one (1) payment by way of a cheque for $5,000.00 which cheque was dishonoured by the bank. The Respondent explains this on the basis that by this time the marriage had "crashed" and his wife had locked him out of the house by changing the locks.

Part of the dispute between the parties focuses largely upon whether, and if so to what extent, the Respondent contributed to

(1) The acquisition of furniture for the home;
(2) The maintenance of the child Dominic.

There is little in the way of hard evidence to show that the Respondent made any significant contribution to the acquisition of furniture. In fact, he admits that the Claimant was the one who was more assertive in acquiring things even when he had reservations about their ability to afford it. As far as the latter is concerned, the Respondent says that since 2005, he has paid sums into the Claimant's bank account for the child and that he also gave the child gifts in cash and kind when he visited him. He further says that the child was on his health insurance policy and at least to that extent, he was responsible for the child's health care costs. The Claimant denies this claim.

In reviewing the evidence given under cross examination by the Claimant, it is to be noted that she stated that attempts at refinancing the property started in or around May 2005. She also said she had changed the locks in the house in or around August 2005. This, however, seems inconsistent with the fact that the mortgage in favour of the National Housing Trust was registered on February 22, 2005, which would be six (6) months before she alleged the efforts to refinance started.

It is difficult to accept completely the accounts as to the timing of specific events as set out by either the Claimant or the Respondent as each has inconsistencies in the evidence proffered. I have already adverted above to the timing of the refinancing as outlined by the Claimant. At the same time, the Respondent states that it was in January 2004 while he worked at the Norman Manley International Airport that he first was made aware of the existence of a job opportunity in Montego Bay. He said he thereafter applied for the position. He goes on to refer to the incident of finding his spouse in a compromising situation with another man at their then home as being the incident that precipitated his leaving for Montego Bay. At the same time, he says that despite this incident he continued for two (2) years to "maintain the marriage" and over that time he came home every weekend "unless I was prevented from doing so by work commitment."

Counsel for the Respondent, when asked to comment upon the draft of this judgment, had indicated that the reference in the affidavit, to "2004" as the time at which he first heard about the job in Montego Bay, was an error and should have been a reference to 2001. She conceded that there was no correcting averment in any other affidavit. Even if this is accepted, I do believe that the evidence of the Respondent in important respects cannot be given any, or any significant, weight.

In terms of his continuing interest in the property at issue, I am also not impressed by the fact that it was also his evidence that, after the refinancing in 2005, he only paid one mortgage instalment in June 2006, by a cheque which was subsequently dishonoured. But it is also intriguing that despite the fact that according to him he continued coming home regularly for at least two years after his move to Montego Bay, (presumably pursuant to his efforts to "maintain the marriage"), the deposits to the account of the Claimant for the purposes of

maintenance of their son are evidenced by slips which start as early as March 2002. I find it difficult to accept that although he was home "regularly" and was still trying to maintain the marriage, he would consider it appropriate to make deposits to a bank in Montego Bay. I have some difficulty with Respondent's evidence as to the time and result of his move to Montego Bay.

It is common ground that sometime in or around 2004, the decision was taken to add a double carport to the premises by way of improvement to the property. Both parties say the idea to do this was the other's. However, it is not denied that the payment of the associated costs was made by the Claimant without any contribution on the part of the Respondent.

It is very clear from all the evidence before me that the Respondent made no contribution to payment of the monthly mortgage payments after the refinancing by the National Housing Trust. It is also not denied that the Claimant has incurred additional expenditure in terms of a new front door and the installation of storm shutters. I accept the evidence of the Respondent that his NHT refunds were applied to payments due on the mortgage, and I take judicial notice of the fact that where there are outstanding sums due on a mortgage with the NHT, any refunds due to a contributor are applied by the Trust towards the payment of arrears.

Submissions for Claimant

Against the background of the evidence adduced, Mr. Steer for the Claimant, submitted that the Claimant should be awarded the full 100% beneficial interest in the subject property. It was his submission that the Respondent had made no contribution to the deposit or the closing cost of the subject property. He submitted that the only contribution of the Respondent to the acquisition of the property was a contribution to the principal of $52,000.00, of a total loan amount of $2,000,000.00. This is the sum by which the principal amount borrowed from JNBS had been reduced up to the time of the pay off of that loan to facilitate the borrowing from the NHT. He posited that whatever additional sums had been paid by the Respondent, were towards interest. He submitted that based upon this analysis, the Claimant should be regarded as having the entire beneficial interest in the property. He

cited as authority for this approach, a decision of the English Court of Appeal **Young v Young 1984 FLR page 375**.

In that case, the plaintiff and the defendant who shared a cohabiting relationship, purchased freehold property. The plaintiff provided £4,150 of her own money and the balance of the purchase price of £15,900 was raised by way of mortgage. The property was acquired in their joint names. Between the date of the acquisition of the property and the date of the break up of the relationship, a mere sixteen (16) months, the mortgage was paid from their pooled resources. About £200 of the mortgage capital had been paid over that time, of which the defendant had paid about two-thirds. The plaintiff sought a declaration that she was beneficially entitled to the entire property arguing that the defendant held his legal interest in the property on a "resulting constructive trust" for her. It was held that she was so entitled and this was upheld on appeal. Counsel acknowledged that the time during which the parties cohabited in **Young v Young** was different to and shorter than the period in the instant matter but submitted that the principle was the same. It should be noted however, that in **Young v Young**, the headnote states: "*The judge found that as the Plaintiff's earning power was insufficient to raise a mortgage, the house had been taken in joint names in order to get a mortgage and he held that merely lending his name to the transaction did not produce a share in the beneficial interest in the house."* It seems to me that this holding by the court distinguishes that case from the present as it cannot be said on the evidence that the Respondent's name was only placed on the application to facilitate getting a mortgage.

It was submitted further, that based upon the agreement between the parties, Respondent was to have paid mortgage and the costs of maintenance for the child. This he had failed to do. In fact, based upon the receipts which the Respondent had submitted along with his affidavit, he had contributed merely one hundred and ninety-eight thousand dollars ($198,000.00) to the maintenance of the child over a period of over five years, the equivalent of less than three thousand dollars ($3,000.00) per month.

Counsel referred to section 6 of the Act of, which had come into effect on April 1, 2006. That section deals with treatment of the "family home". "Family home" is defined in the legislation as "the dwelling house that is owned by either or both spouses and used habitually

or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling house and used wholly or mainly for the purposes of the household….". Section 6 is in the following terms:

Section 6

1) Subject to subsection (2) and sections 7 and 10, each spouse shall be entitled to one-half share of the family home
    a. On the grant of a decree of dissolution of a marriage or the termination of cohabitation
    b. On the grant of a nullity of marriage;
    c. Where a husband and wife have separated and there is no likelihood of reconciliation.

The section therefore mandates, subject to the provisions referred to therein, that where there is a family home each spouse is entitled to one-half interest in the property upon the occurrence of an event as set out in sub-section (1) paragraph (a), (b) or (c). Counsel was, however, of the view that since, on his case, the couple's separation took place in January 2003 and this predated the coming into force of the Act, and that the Act did not have retroactive effect, there was no basis for the property to be treated as a "family home" for the purposes of the equal division in the section. He cited the first instance decision of the learned judge, Norma McIntosh J in **Boswell v Boswell HCV 2463 of 2006** in this court. In that case, the decree absolute had been granted on June 3, 2005 and the application under the Act was filed on July 11, 2006. An application for the twelve (12) month period allowed for filing a claim under the Act to be extended was granted. Her ladyship had opined that since the dissolution of the marriage had been effected prior to the Act coming into force, the Act could not apply retroactively so as to confer an automatic right to a fifty per cent (50%) interest in the matrimonial home. He submitted that this was the position here. In any event, he argued, the fact that the Respondent had left the home for his new job in Montego Bay as long ago as 2001, the definition of family home as the only or principal family residence, was not fulfilled.

Notwithstanding his earlier submission that the Act did not apply so as to avail the Respondent of the provisions in section 6, because it had no retroactive effect, he proceeded to argue, without saying why one section of the Act should apply but not another, that the

relevant provision to be considered was section 14 of the Act which deals with the position where the property is *other than a family home*.

Section 14 of the Act is set out below:

(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 that the family home, as it thinks fit, taking into account the factors specified in subsection (2),

  or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

(2) the factors referred to in subsection (1) are –
  (a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;
  (b) that there is no family home;
  (c) the duration of the marriage or the period or cohabitation;
  (d) that there is an agreement with respect to the ownership and the division of property;
  (e) such other fact or circumstance which in the opinion of the Court the justice of the case requires to be taken into account.

(3) In subsection (2)(a) "contribution" means
  (a) the acquisition or creation of property including the payment of money for that purpose;
  (b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;
  (c) the giving up of a higher standard of living than would otherwise have been available;
  (d) the giving of assistance or support by one spouse to the other whether or not of a material kind including the giving of assistance or support which

    (i) which enables the other spouse to acquire qualifications;

    (ii) aids the other spouse in the carrying on of that spouse's occupation or business;

  (e) the management of the household and the performance or 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 purposed 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 that a non-monetary contribution.

He argued that sub-sections(2) and (3) of section 14, were important in determining whether, and if so in what measure, the Respondent had made any contributions to the acquisition of the subject property. He recounted what he characterized as the miniscule contribution of the Respondent to the capital costs of the home and his failure to contribute to the maintenance of his son as well as to the other expenses of the home. He pointed out that the Claimant had made payments of over $400,000.00 to the National Housing Trust in respect of the mortgage from that institution; that the initial deposit for the home had come from the Claimant's; that she had borne the main burden of the expenses of running the family and had also done improvements to the property.

In summary, Mr. Steer suggested that there were seven (7) factors which should weigh heavily in favour of granting the Claimant's application. These, he said, were:

1. The Respondent had paid some $52,000.00 in total to the principal sum of the loan from JNBS.
2. He had made no payment towards the mortgage from the NHT.
3. The Claimant had had to pay some $400,000.00 towards the NHT loan.
4. The deposit and closing costs for the property had come from her family.
5. The Claimant has had to bear the cost of maintaining the home.
6. She has also carried out additions and improvements.
7. The Respondent's contribution to the maintenance of the child of the marriage was negligible.

Submissions for Respondent

Counsel for the Respondent, Mrs. Brown-Ramanand, on the other hand, reminded the court that there was no evidence of a decree absolute having been pronounced, and suggested that there was perhaps no "dissolution" of the marriage. In any event, the matter having proceeded, by agreement, on the basis that the application was properly brought under the

terms of the Act, she referred to the definition of "family home" and was of the view that the property fell within the definition. She submitted that although counsel for the Claimant had said that there was no family home she believed it was open to the court to find that the property now the subject of this application was such. She further submitted that the Boswell case cited by counsel for the Claimant was support for the proposition, not that there was no family home, but that the automatic 50/50 division of that home by virtue of section 6, would be inapplicable. It was, accordingly, her submission that, even in the absence of the dissolution of the marriage, the premises at Cedar Grove, was in fact the family home and should be the subject of the 50/50 rule set out in section 6. It was, therefore, open to the court to find that this was a proper claim for an interest in the family home and that the Respondent should be granted his fifty per cent (50%) share therein in light of the statutory provisions on which he was relying.

She further submitted a claim in relation to the family home must be the subject of a section 6 division unless the circumstances set out in section 7 apply. That section is set out below:

Section 7

1) Where in the circumstances of any particular case the court is of he opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by any interested party make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following:
   a) That the family home was inherited by one spouse;
   b) That the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
   c) That the marriage was of short duration.
2) In subsection (1) "interested party" means:-
   a) A spouse;
   b) A relevant child; or
   c) Any other person within whom the court is satisfied has sufficient interest in the matter.

In the circumstances where the latter section applied, the court may be able to make some other declaration having taken into account those factors listed in that section. She listed some of the factors which the court could consider in relation to a section 7 application and submitted that the list set out therein, was not exhaustive. In support of this submission, she cited the first instance decision of McDonald Bishop J (Ag) in the April 2008 case **Graham**

v Graham HCV 3158 of 2006. (See paragraph 27 of the judgment) She submitted that in this case, the court ought to consider whether section 7 applied.
In that case, Mr. Steer appeared for the claimant who was seeking a 50% interest in property held solely in the name of the defendant ex husband. The parties had also separated in 2003 while a decree nisi had been pronounced in July 2006, while at the time of hearing no decree absolute had been granted. The learned judge at paragraph 12 of her judgment indicated that the application was "properly made pursuant to section 13 of the Act". It would appear that for the purposes of that section 13, her ladyship treated the application as being made under section 13(1) (c); that is, the parties had "separated and there was no reasonable likelihood of reconciliation", and that the application had been made within the time specified in section 13(2). .

Among the other issues to which she suggested the court should pay attention, was the intention of the parties. In that regard she pointed out that it was clear from the evidence that the parties jointly pursued the process of seeking to acquire a property which they would own themselves. Both parties had approached their respective families and although the money for the down payment came from the Claimant's family it was clearly a gift to both. Secondly, the nature of the agreement into which they had entered as to how their expenses would be shared was also relevant. Thirdly, the extent of his contribution was quite significant in that the Respondent had paid in excess of one million six hundred thousand dollars ($1.6 million) towards the mortgage with Jamaica National Building Society. She also referred to as being of relevance, the incident involving the Claimant in which she was caught in a compromising situation by the Respondent. She asked the court to say that to the extent that this contributed to the Respondent leaving home, that the Claimant ought not now to benefit from her own misconduct.

In terms of his contribution as well she submitted that the contributions made to his son were evidenced by receipts for deposits to the Claimant's account. She said these were not all the deposits but had been merely appended to his witness statement to contradict the evidence of the Claimant that he had made "no contribution at all". He had also given evidence that he gave money and gifts to the child on occasions when he went to see him. Based upon his evidence the Respondent had also paid at least one half of the child's educational expenses.

Counsel conceded that the Respondent had made no contribution to the maintenance of the property but pointed out the fact that the Claimant had agreed under cross examination that contrary to her earlier assertions, the Respondent had also paid utility bills.

With respect to the seven points put forward by the Claimant's attorney she asked the court to find that there was in fact a family home and that both the Claimant and the Respondent were equally entitled. She said there was no evidence to suggest that such a determination would be unjust or unfair. She was also prepared to concede that the Claimant had made improvements to the property but argued that those improvements enured to the benefit of both. Finally she submitted that it was not true that the entire burden of the family's expenses had been completely bourn by the Claimant.

In summary she said that section 14 did not apply but rather only section 6 and 7. However, even if the Court found otherwise, there was evidence of contribution which would entitle the Respondent to a share of the subject property.

In response to the submission on the authority of **Graham v Graham** Mr. Steer pointed out that in that case the learned judge had found as a fact that the property in question was the family home and he reiterated his earlier submission that the parties having separated prior to the Act coming into force there is no family home to be considered and only section 14 can apply.

Court's Decision

The appropriate point of departure is to consider whether there is an appropriate application under section 13 of the Act. That is, one of the trigger provisions in subsection (1) paragraph (a), (b), (c) or (d) and within the period specified in subsection 2 where paragraphs (a), (b) or (c) applies. This is an issue which was relevant in two cases brought under the Act in this court, both cited in the instant case. In **Boswell v Boswell**, McIntosh J considered this under the heading "The time for making the application". Having determined that the date of dissolution of the marriage was the date of the decree absolute, as that date had been verified by the court's records, she granted an extension of the twelve month period from that date for

bringing the action. In **Graham**, her ladyship, McDonald Bishop J (Ag) was faced with a situation where no decree absolute had as yet been granted at the time of the hearing. Indeed, the parties had separated in October 2003 and a decree nisi had been pronounced in July 2006. In that case, the learned judge concluded at paragraph 12 of her judgment that "The Claimant's claim is properly made pursuant to section 13 of the Act". It would appear that her ladyship was prepared to hold, in my view correctly within the context of the Act, that the pronouncement of a decree nisi was sufficient to satisfy the provision in paragraph (c) of section 13 (1), that is one where "husband and wife have separated and there is no likelihood of reconciliation".

A close look at section 13 reveals that it can give rise to certain anomalies. If indeed, by "dissolution" is meant the pronouncement of the decree absolute, there could well be cases where a party to a marriage which has been "dead" for many years, because the parties have long since gone their respective ways, could now benefit from the provisions of the Act upon a pronouncement of that absolute. For example, a nisi has been pronounced but there has been no application for the absolute because of oversight or mistaken belief that the marriage was at an end. Similarly, where the marriage has broken down in circumstances where one party has begun a new relationship so that "there is no likelihood of reconciliation" but no steps have been taken to end the marriage, an application may yet be filed within the twelve month period once the absolute is pronounced. On the other hand, where the marriage has already been the subject of the decree absolute, but the parties resume cohabitation, a party to that post-absolute cohabitation may have difficulty providing evidence of its ending especially if it involved a visiting relationship. In other words, the time within which the application may be brought, may be the subject of some manipulation depending upon the specific factor upon which its start is premised.

In the instant case, like that in **Graham**, there is no decree absolute and there is considerable difficulty in determining when the parties became separated in circumstances in which reconciliation seemed unlikely. It seems that the Respondent had taken a job in Montego Bay sometime after 2001. But we know that as late as 2004 they were discussing the addition of the double carport and had jointly pursued refinancing in early 2005. From all accounts, it seems that the marriage had, for all practical purposes, ended by sometime in 2005, some

time before the coming into effect of the Act. Nevertheless, a decree nisi was only pronounced on or about September 19, 2006. I am prepared to hold that, for the purposes of the Act, the decree nisi pronounced in this case is appropriate evidence of the parties having separated with no likelihood of reconciliation.

In any event, even if I am wrong in this approach to the correctness of using section 13, it is noted that section 11 gives the court jurisdiction where the marriage continues to subsist. Section 11 provides as follows.

> (1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party ……..may apply by summons or otherwise in a summary way to a Judge of the Supreme Court, or at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides.
>
> (2) The Judge of the Supreme Court or the Resident Magistrate as the case may be, may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.

In section 2, "property" is defined as "any real or personal property, any estate or interest in real or personal property, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled". It is clear that whether or not the parties are continuing to cohabit, the Act grants this court jurisdiction to hear the application. Indeed, in the instant case, the Claimant is claiming not 50% of the property but 100% thereof.

Based upon the evidence which I have accepted, I hold that the parties hereto went into the transaction of purchasing the subject property as the matrimonial home. I also hold that the contribution by the relatives of the Claimant to the deposit and closing costs was a contribution to both of them. Further, it is my view that there was no consideration by either party, at the time of the acquisition, of the purchase being other than for their family use. Once I have accepted that this claim is properly before the court under section 13 of the Act, I next must decide whether the automatic provisions of either section 6 or 7 apply and if not, ought the court to apply section 14 as contended for by the Claimant.

It is worth recalling, en passant, that in this case, the Claimant's claim is not for the automatic fifty per cent (50%) but is a claim for one hundred per cent (100%), and at least one of the bases for the claim that the fifty/fifty rule does not apply, is that the property is not the "family home" and so not subject to the automatic division under section 6. In this regard, it is useful to remember that section 6(1) which sets out the fifty/fifty rule, is stated to be subject to section 6(2), as well as sections 7 and 10. In **Graham** above, Mr. Steer for the then Claimant, submitted that section 7 ought not to be invoked to vary the fifty/fifty rule. He also submitted that there was no application under that section as seemingly is required by that section. Section 7 (1) provides:-

> (1) Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by an interested party make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following:-
> (a) That the family home was inherited by one spouse;
> (b) That the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
> (c) That the marriage is of short duration.

In that case, the claimant was claiming a fifty per cent interest in two properties, one of which (Murray Drive) the defendant accepted should be considered the family home, to which the fifty/fifty rule should be applied. With respect to the other property, (Durie Drive) the defendant in an affidavit denied that it was the family home and prayed that the fifty/fifty rule be applied only in respect of Murray Drive. At the beginning of that trial, however, the defendant conceded that the latter property was in fact the family home but asked that the court not apply the fifty/fifty rule to that property. Her ladyship took the view that by the express request to grant relief other than the fifty/fifty rule, this was tantamount to an application under section 7. She said, and I adopt her reasoning:

> "There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of Durie Drive. That, however, is a matter of form. The substance of this response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of Durie Drive and for the court to make an order that is, in the circumstances, "fit and just". This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7".

The difference in the instant matter is that it is the Claimant who is asking for the equal share rule not to apply for the reasons set out in her fixed date claim form and supporting affidavit. The Respondent is, in his response, asking for the full application of that rule. Notwithstanding this difference, I do not believe that it affects the courts ability to treat this as an application under section 7 if, as I believe is the case, the home is the "family home" for the purposes of the Act. I have come to the view that the property, the subject of this claim, is in fact the family home and using the date of the decree nisi as being an appropriate trigger for the running of time to file a claim under the Act, the matter is properly before me. I also hold that in these circumstances, the court can treat section 7 as being applicable. This means that the court has formed the view that it would be unjust and unreasonable to treat each party as being equally entitled. In this regard I accept the view of her ladyship in **Graham**, that the factors set out in section 7(2) are not exhaustive. Indeed, the factors set out in section 14 are far more comprehensive. There does not appear to be any reason why the court would not be able to consider the section 14(2) factors to the extent that they are relevant in considering what is a reasonable determination for the purposes of section 7. I should emphasize here that since the Act establishes a presumption in favour of equal sharing, it is for the person who advances a right to a greater share to justify that claim. Here it is the Claimant.

According to the evidence which I have accepted, the Respondent contributed to the application for the original mortgage loan at JNBS. He made irregular payments on the mortgage which it is agreed, he had accepted as his responsibility. He moved to Montego Bay sometime between 2001 and 2003 and has failed to convince me, on a balance of probabilities, that he made significant contributions to the welfare of the household. He has made no contribution to the re-financed mortgage at the NHT, since that mortgage was obtained in 2005. He says that he was justified in this regard because the marriage had broken down. In addition, the Claimant made improvements to the property for which she alone paid. The Respondent makes no claim that he contributed either in terms of ideas or in material terms to the execution of the improvements since 2004. In light of these holdings, the court is of the view that even if the Respondent were to be entitled to a fifty per cent interest in the property at some stage, that could not be the case beyond the time he

effectively moved out of the home, around 2003 to 2004. The court can take judicial notice of the fact that since 2004, the cost of real estate has increased considerably and it would be unfair and unreasonable for the Respondent to benefit substantially from these circumstances, when for all practical purposes he had ceased having any real connection with the property since around 2004.

There is no slide-rule method with precise mathematical accuracy with which a court, faced with these realities, can proceed to divide the property interests between parties in cases such as these. However, it is clear that the court, so far as is reasonably practicable, must try to ensure that its orders reflect the equity of the actual situation. It is, therefore, in my view open to me to exercise my discretion so as to award the Respondent a figure of twenty per cent (20%) of the present value or, if it can be ascertained, a figure equal to 40% of what the property would have been valued at in June 2004, whichever figure is less.

Even if I am wrong in applying section 7 to this matter, in that the subject property is not the family home, the court would still have jurisdiction under the provisions of section 14(1) (supra) to make such division as it thinks fit in relation to property "other than the family home" as urged by Mr. Steer. In fact, the wording of the alternative in section 14(1) would seem to indicate that the court may make such just and reasonable orders under the section both in relation to the family home and other property. In that regard, it is open to the court to take into consideration all the factors listed in subsection (2) of that section. (The section has been set out, *in extensu*, above). In that regard, the list of seven factors adverted to by Mr. Steer is relevant, subject to what I have already said about the Respondent's contribution to payments in respect of the JNBS mortgage and his contribution to the increased equity in the premises. In looking at the factors listed in 14(2), the court in the instant matter would be obliged to take into account, "the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement" of the property; the relatively short duration of the marriage; the contribution of the Claimant to the maintenance of the home and the child of the family and the fact that all improvements were paid for by the Claimant.

In so far as there is any dispute as to the ownership of furniture in the home is concerned, I have, as indicated above, found little in the way of evidence to substantiate any claim by the Respondent to having contributed to the cost of the acquisition thereof. I would accordingly hold that the furniture belongs to the Claimant beneficially.

In the result, I would order a division in terms of that set out above, whether according to section 7 or section 14 and make the following Orders.

1. The Claimant's application for a declaration that she is entitled to 100% interest in the subject property is denied.
2. The Defendant's claim to a fifty/fifty share in the subject is also denied.
3. The Court declares that the Claimant is entitled to 80% of the present value of the property, or 60% of the value that it had at June 2004, if that valuation can be ascertained, whichever is greater, and the Respondent's share is the remainder, based upon the said valuation.
4. A valuation is to be carried out by a firm of valuators agreed within sixty (30) days by both parties. If no agreement is reached on a valuator within that time, the Registrar is empowered to appoint a valuator form a list of four (4) valuators, two (2) named by the Claimant and two (2) named by the Respondent.
5. The valuation is to be carried out within two months of the appointment of the valuator.
6. The Claimant shall have a right of first refusal to purchase the share of the Respondent as determined pursuant to the order above, such right to be exercised within six (6) months, or such longer period as this honourable court may determine, and the Registrar of the Supreme Court is empowered to sign any document to give effect to this order, should either party be unable or unwilling to sign.
7. The Claimant is to have eighty per cent of her costs of this action, to be taxed if not agreed.
8. Liberty to apply

ANDERSON J.
December 3, 2008.