[2013] JMSC Civil 121

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 05190 OF 2010

BETWEEN	**GETFIELD STEWART**	**CLAIMANT**
AND	**PEARLENA STEWART**	**DEFENDANT**

Mrs. Angela Cousins-Robinson, instructed by Robinson & Clarke for the Claimant.

Ms. Kayann Balli, instructed by Balli & Associates for the Defendant.

Claim for Division of Matrimonial Property – "Family Home" – The Property (Rights of Spouses) Act – Claim for Maintenance of Divorced Wife and Child of the Parties – Principles to be Considered – Maintenance Act.

In Chambers

Heard: November 27, 2012; & September 16, 2013.

Coram: F. Williams, J.

The Nature of the Claim

[1] By way of Fixed-Date Claim Form dated and filed October 28, 2010, the claimant seeks the following orders:

1. A Declaration that the Claimant is beneficially entitled to half the estate and interest in all that parcel of land part of Bellevue Hospital Land (in) the parish of Kingston (;) Lot numbered ONE THOUSAND TWO HUNDRED AND

SEVENTY-FIVE A and SECONDLY all that parcel of land being Lot numbered ONE THOUSAND TWO HUNDRED AND SEVENTY FOUR being all the land registered at Volume 1341 Folio 867 of the Register Book of Titles.

2. An Order that the property be sold and the proceeds of sale be divided equally between the parties.

3. An Order that the Defendant be given first option to purchase the Claimant's interest within twenty-one (21) days of the date of any court order hereof.

4. An Order that in the event that the Defendant fails to exercise her option within the time stipulated, that the property be put up for sale on the open market and the proceeds of sale be divided equally.

5. That the Registrar of the Supreme Court be empowered to sign any and all documents giving effect to this order in the event that the defendant neglects or refuses to sign".

The Nature of the Defendant's Claim

[2] For her part, the defendant has asked for the following orders:

"i. The Claimant and the Defendant each have a 50% interest in the said property situate at 4A Carlisle Close, Manley Meadows, Kingston 2.

ii. The said property is to be valued by a reputable valuator to be agreed on by both of the parties to determine the current market value of the property and also to determine the costs of construction

of the 2nd floor at 2003 prices. That upon the costs being so ascertained the Claimant is to pay to the Defendant 60% of the costs as indicated by the said valuation report expended in effecting the improvement work on the premises between 2001 and 2003.

iii. The Claimant pay to the Defendant the sum of $150,000 being one-half the costs expended by her in effecting improvement work on the said premises in 1999;

iv. The Claimant shall pay to the Defendant the sum of $37,500 monthly by way of maintenance for the child Levar Stewart plus one half educational expenses as they arise together with continuing to maintain health insurance for the benefit of the said child;

v. That the Claimant shall also pay to the Defendant the sum of $55, 965.76 by way of a refund of amounts spent by the Defendant for educational expenses for the school years 2011/2012 and 2012/2013;

vi. That the sums hereby ordered to be paid by way of maintenance for the child Levar Stewart be secured against and shall be a charge on the Claimant's interest in the family home. In the event of a sale of the said property the said amounts shall be deducted as a lump-sum from the proceeds of sale of the Claimant's interest in the said property and paid to the Defendant;

vii. The Claimant pays the Defendant the sum of $8,000.00 monthly for a period of 3 years [by] way of maintenance for the Defendant payable on the first day of the month until the expiry of the period. The said sums shall also be secured against and be a charge on the

> Claimant's interest in the family home and in the event of a sale of the premises shall be deducted as a lump sum and paid from the proceeds of sale of the Claimant's interest in the said property and paid to the Defendant."

[3] The Defendant also seeks, as an alternative, the making of two other orders: one delaying the sale of the property until the child of the parties has attained the age of majority; and that, pending the sale, the claimant pay to the defendant the sum of $20,000; and a further sum of $5,000 per month for maintenance of the defendant.

[4] Initially, the defendant had sought an order that the parties' respective interests be declared to be 60%:40% in favour of the defendant and claimant respectively. Based on this initial approach, considerable time was spent prior to the hearing; and considerable affidavit evidence was devoted to the exploration of the contribution of the parties to the building of the family home. However, as the matter progressed, the defendant relented from this position, conceding that, on the state of the law as it stands, she would not be able to demonstrate sufficient cogent and exceptional circumstances that would cause the court to displace the presumption of the equal-share rule. In coming to that decision, she had the guidance of the case of **Christian v Christian** 2012 JMSC 036 in which Campbell, J opined that:

> "the disparity of contributions between the parties is insufficient, by itself alone, in proving that equal entitlement is unreasonable".

[5] Additionally, there was evidence from both parties, and in particular, the defendant, to the following effect:

> "When we did the expansion it was for our continuing lives together.
>
> At the time, it was a joint effort. It did not matter who put what…"

[6] This evidence came from the defendant in cross-examination.

[7] With this acceptance by the defendant, the matter has been transmuted from being (as it at first "threatened" to be), a battle as to the percentage apportionment between the parties; into a matter whose main focus is on the appropriateness or otherwise of maintenance payments and, if they should be made, how they are to be secured. So that, instead of the Property (Rights of Spouses) Act occupying centre stage by itself, it must now share that position with or yield that pride of place to the Maintenance Act.

[8] While this is so, it will still be useful to give some background to the parties and the substance of their claims.

Background

[9] The parties were married on December 18, 1999 and obtained a decree absolute on December 12, 2009. They have one child together, Levar Stewart, who was born on December 16, 1997 (on the evidence of the defendant). Whilst the parties lived together as man and wife at the subject property or family home, they shared it with two of the defendant's children from previous relationships. These are Jermaine Hayle and Sharmaine Smart, who are now adults.

The Claimant and His Claim

[10] The claimant is a corporal of police. He has now re-married and his wife resides in the United States of America (USA). He left the family home which he occupied with the defendant in November of 2005. At that time he was a constable. With his promotion to the rank of corporal in 2008, came a salary increase. In spite of his departure from the family home, he has continued to make the mortgage payments for the mortgage loan for the family home. (It should be pointed out as well that when the family home was bought, two mortgage loans were obtained: the one that is still being paid by the claimant, which was taken out in his name; and another in the sum of

$200,000, taken out in the name of the defendant, which has since been repaid by her; both being loans from the National Housing Trust (NHT)).

[11] The claimant now resides with his brother in a two-bedroom apartment in Cooreville Apartments, St. Andrew, which apartment his brother owns. His proposal is that, on the family home being sold, his son, Levar, could live there with them.

[12] There is no dispute that he contributes a sum of about $10,000 per month for the maintenance of Levar. The claimant's position is that if this amount is to be increased, an increase to the sum of $15,000 should be sufficient. The defendant, on the other hand, seeks to have the amount being paid for maintenance increased beyond that sum (as the proposed orders earlier set out indicate).

The Defendant and Her Claim

[13] The defendant in her testimony indicates that when she met the claimant, she was an informal commercial importer (that is, an ICI, or higgler). She largely gave this up or significantly reduced the frequency of her trips upon her marriage to the claimant and upon Levar's being born. She also ceased this type of work completely in 2008.

[14] Apart from obtaining the loan from the NHT, she was otherwise able to contribute significantly to the expansion and physical improvement of the home – by obtaining free or cheap labour from family and/or friends; and from her earnings from a bar that she operated for some time (and which she eventually closed, primarily (on her evidence) because of the claimant's dissatisfaction with her working there); and from earnings from a taxi that her son, Jermaine, operated and still operates.

[15] Although claiming in an affidavit previously filed in court that he contributes sums of between $10,000 and $20,000 monthly towards Levar's maintenance, the claimant has always and only contributed $10,000 per month; and this is the same sum he has contributed for five years – up to 2011. This sum has always been inadequate and has become more so as the cost of living has increased.

[16] Since leaving the family home in or about October 2005 (and not, as he says, November), and up to the time he was served with papers for the divorce, the claimant had told her that he would not be making any claim for an interest in the family home. Accepting this assurance, she was lulled into a sense of security (now proven, on her case, she contends, to have been false) which made her decide against pursuing a claim for maintenance for either herself or Levar. In light of his reneging on his assurance, she now wishes to make these claims. Should the court make an order that the house be sold, she will also have an additional expense of accommodation for Levar and herself.

[17] We may now proceed to examine the claim for maintenance for a spouse under the provisions of the Maintenance Act.

The Claim for Maintenance of a Former Spouse

The Maintenance Act

[18] The section of the Maintenance Act dealing with the issue of the maintenance of a spouse or former spouse is section 4, Part 2 of the Act, the title to which part reads as follows:

> "Obligation of Spouses during Marriage or Cohabitation".

[19] The claimant's submission on this issue is that this claim is statute-barred – having regard to the passage of time since 2005 when the parties separated and since 2009 when the decree absolute was granted.

[20] The defendant, on the other hand, is of the view that this aspect of the claim still subsists, despite the passage of time. Such a claim, she submits, extends beyond the life of a marriage. Where the court makes such an award or order, it is the means by which the court seeks to "disentangle the bonds that intertwine the financial arrangements common to spouses in a partnership". (see paragraph 49 of the

defendant's written submissions). In a sense (according to the submission), this is a recognition of "the clean-break principle", according to which parties are expected, as much as possible, to make a clean break of each other and of the ties that previously bound them together during the course of their marriage or cohabitation. It was further submitted that remarriage does not preclude the making of a maintenance order for a former spouse.

[21] Section 6 (3) (b) of the Maintenance Act might be regarded as enshrining the clean-break principle, providing, as it does, that:

> "(b) the Court shall, as far as practicable, make such orders as will finally determine the financial relationship of the parties and avoid further proceedings between them."

Discussion

[22] A perusal of the Act (that is, the Maintenance Act) does not reveal a limitation period beyond which a claim for maintenance by a former wife cannot be made.

[23] There is a provision in the Act dealing with a requirement that applications for maintenance be brought within 12 months of the cessation of cohabitation. That is section 6(2), which states:

> "(2) An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination..."

[24] Section 2 of the Act defines cohabit:

> "cohabit" means to live together in a conjugal relationship outside marriage".

[25] This effectively, in the court's view, limits the 12-month limitation period to situations of cohabitation; and renders it inapplicable to marriages. No similar provision has been brought to the court's attention dealing directly, expressly and specifically with marriages. The sole possibilities that have been seen are section 14(4) (d), (g) and (m), (in particular (g)), which provisions require the court to have regard to "all the circumstances of the parties", including:

> "(d) the capacity of the respondent to provide support;
>
> (g) any legal obligation of the respondent or the dependant to provide support for another person;
>
> (m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account." (Emphasis added).

[26] At the end of the day, therefore, whether or not such a claim might properly be made will have to be determined by the particular facts and circumstances of a given case considered broadly. It will not be enough to compare the date of the parties' separation or of their obtaining of the decree absolute, with the date of the filing of this claim. We may start there, however. The date of the separation was late 2005; and the decree absolute was granted (it might be recalled) in December, 2009. This claim was filed in 2010.

[27] However, as indicated earlier in this judgment, this matter did not originally have as a feature, the claim for maintenance. That claim came about shortly before the hearing commenced, by way of the filing of a document in October, 2012 indicating such an intention. It was given greater emphasis in the defendant's cross-examination of the claimant and in her submissions at the hearing of this matter – that is, some eight years after the separation and some three years after the grant of the decree absolute.

[28] As also indicated before, however, the reason for this late change might have arisen from the withdrawal, of what the defendant says was an assurance which was given to her by the claimant, that he would not have been making a claim for an interest in the family home. It is the defendant's evidence that this assurance was given to her in response to her enquiries about maintenance payments for herself and increased payments for Levar. She had, she testified, started proceedings for making a maintenance claim in the Family Court. However, this was withdrawn by her in light of the assurance given to her by the claimant.

[29] This, however, is only a part of the evidence on the issue of the application for the maintenance of the defendant in this case. Another aspect of her evidence is her clear and unambiguous testimony to the following effect:

> "He gave me no money for myself since we separated in 2005. I have been still able to survive and maintain myself."

[30] The case of **S v S** [2001] 2 FLR, 246, was cited on behalf of the defendant in relation to the clean-break principle. That case in substance really dealt with the question of whether the court should depart from the equal-share rule. The court concluded that, were it to strictly adhere to the equal-share rule and make the order contended for on behalf of the wife in that case, that order would have had the effect of discriminating against the husband. It, therefore, decided to depart from the equal-share rule. The judgment of Peter Collier, QC, who decided the case, sitting as a Deputy Judge of the High Court, was ultimately informed by his satisfaction that:

> "…to deal with the matter in the way I have proposed will result in as fair an outcome to both parties as is possible in this case". (See page 259 D of the judgment).

[31] Fairness, therefore, was the guiding principle for him in deciding whether to depart from the equal-share rule. And, it is the court's view, that fairness must also be the guiding principle on this issue, although this issue is not directly concerned with the

question of whether or not to depart from the equal-share rule (the parties being on the face of it *ad idem* that there should be no such departure); but whether in all the circumstances the former wife should be entitled to a maintenance payment.

[32] In fact in the case of **White v White** [2000] UKHL 54, (one of the cases considered in **S v S**), Lord Nicholls of Birkenhead stated the considerations in the following admirable and most eloquent terms in paragraph 1 of the judgment:

> "1. Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."

[33] Similarly, in the case of **Miller v Miller** [2006] UKHL 24, Lord Nicholls put the matter relating to the considerations of fairness thus, at paragraph 4 of the judgment:

> "Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case."

[34] So that it is clear that the court's task of resolving matters of this nature is a difficult one, and will vary from case to case. At the end of the day it is for the court to exercise its discretion having regard to broad considerations of fairness and to do the best it can, based on the evidence in each particular case.

[35] Taking this approach, the court considers that the approach for which the defendant argues has not been elevated to the level of an estoppel. Nor, perhaps, could it be – especially in light of the concession of the applicability of the equal-share rule among other considerations.

[36] The court puts in the balance as well in respect of the claimant, the fact that, since the divorce, he has remarried. Admittedly, however, there is no evidence of his having to maintain his present wife. He has also seen an increase in salary since his promotion to the rank of corporal in 2008 and he now earns about $160,000, gross per month (according to his oral evidence and Exhibit 2 – his salary slip dated November 22, 2012).

[37] The court also puts in the balance in respect of the defendant the fact that, since the parties' separation in 2005, she has been able to survive on her earnings from the operation of the taxi, driven by her son Jermaine.

[38] There, additionally, is no indication on the evidence as to why, since that time, she has been unable to continue or resume her previous income-earning activity of an informal commercial importer. It will be recalled that her evidence is that, on the basis of her earnings from this occupation, as well as from the operation of the taxi(s) she was able to make a significant contribution to the expansion and improvement of the family home – so much so that she initially sought a division of a 60%-40% in her favour. Her earnings in 1999 were also sufficient (meaning reliable and consistent enough), for her to have been able to obtain from the NHT a loan of $200,000 when the family home was being acquired in 1999. She, therefore, has and has had, since at least 2005, the potential and/or ability to strive to earn on her own from her importing and selling alone

a figure equivalent in today's money to what she said was $50,000 per month in or around 1999.

[39] But, then again, if in previously seeking to receive maintenance payments from the claimant, the defendant was given the impression that the family home would not be subjected to a claim by the claimant, then that would likely have reduced (at least) any impetus on her part towards maximizing her earnings; and making provision for either attempting to purchase the claimant's interest in the family home, or trying to later obtain alternative accommodation. At this juncture it is best to state that the court's finding on this aspect of the matter is that the evidence of the defendant on this issue is to be accepted, as the court found her to be a credible witness and in many respects, a more credible one than the claimant. In fact the claimant's evidence, though it does not go as far as the defendant's on this score, is not that dissimilar from it - in that he admits having some conversation along these lines with the defendant. His evidence, however, is that what he said was that he would not be making any other payments to them as they were allowed to live in the family home free of cost.

[40] All these considerations must ultimately affect the court's decision on this issue.

[41] The amount that the defendant considers as being reasonable for her maintenance is the sum of $8,000 per month for three years, which amounts to $168,000.

[42] No explanation was given as to why this amount would be best and why the period of three years would be appropriate. However, the court must do the best that it can in the circumstances. Finding an award under this aspect of the claim to be appropriate, the court is of the view that the payment of a monthly sum of $5,000 for a period of two years (making a total of $120,000) would be reasonable in all the circumstances. This is in respect of the period 2006 and 2007, after which the court considers that she should have been able to put herself in a position where she would have been able to live independently of the claimant.

[43] In relation to this issue, (as well, indeed, as the other issues in this case), the court (as indicated previously) has considered the fact that the claimant has remarried. Interestingly, however, a perusal of the Maintenance Act, and in particular, section 7 thereof, indicates that the framers of the Act did not contemplate that this ought necessarily to have an effect on the court's ultimate decision; for, while it precludes the making of a maintenance order where the applicant remarries or is cohabiting with someone else, the Act does not preclude, but instead is silent on the situation in which the defendant to the maintenance application remarries or cohabits with someone else.

Claim for Apportionment of a Part of the Family Home

[44] The just-discussed issues must also affect (along with the other evidence in the case), the court's decision on the defendant's claim for an accounting to be made of the defendant's contributions to the construction of the upper floor of the family home. In particular, the court cannot put aside the defendant's own evidence concerning the intention of the parties at the time of the expansion and improvement of the family home – that is, it was done for the equal benefit of the parties, without consideration given to division. Also, it seems to the court that the concession of the application of the equal-share rule runs counter to this submission as it does in relation to the accepted dictum of Campbell, J in **Christian v Christian**.

[45] In the case of **Simpson v Simpson**, claim # E 129 of 2000, cited by counsel for the defendant in support of the submissions on this issue, the court considered an application for a displacement of the equal-share rule on the basis of expenditure by one party only. A very brief summary of the view of the learned judge who decided that case (Mangatal, J) was that stated at paragraph 25 of that judgment, which was:

> "The person who has spent is entitled to compensation
> for that expenditure".

[46] However, it should be noted that there was evidence as to the value of the improvements in that case, providing the learned judge with a sufficient basis for the

making of an order that that claimant reimburse the defendant the sum of $100,000, being the half share of the cost of the improvements.

[47] In the court's view, however, that is the difference between that and the instant case. Here, there is no such clear evidence. The defendant testified of improvements and of doing work on the family home even after the departure of the claimant. However, evidence as to the exact nature of the improvements and their respective costs was not forthcoming. The court is of the view that, in order for this line of argument to have been sustainable, this is the kind of evidence that should have been placed before it. To order that an account now be taken, would, in the court's view, be in effect to give the defendant a "second bite of the cherry", allowing her to present material that would best have been presented before a judge and considered against the background of questions of credibility and the rules of evidence, and tested by cross-examination. In these particular circumstances, the production of such evidence in contested proceedings such as these would have been best; and such proceedings would not be best handled by the Registrar. So that while the court accepts the principle enunciated in **Simpson** and other cases such as **Baumgartner v Baumgartner** [1987] 164 CLR, 137, it finds that the factual circumstances of this case are different. The defendant's application in this regard is, therefore, refused.

<u>The Claim for Maintenance of Levar Stewart</u>

[48] In relation to this aspect of the claim, it is useful to remind ourselves of the statutory provisions governing the requirement for maintenance of a child by his or her parents. The main provisions are to be found in sections 8 and 9 of the Maintenance Act. This is how those sections read:

> "8.-(1) Subject to subsection (2), every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent's unmarried child who
>
> (a) is a minor; or

(b) is in need of such maintenance, by reason of physical or mental infirmity or disability.

(2) Every grandparent has an obligation, to the extent that the grandparent is capable of doing so, to maintain the grandparent's unmarried grandchild to whom the provisions of subsection (l) (a) or (b) apply, in the event of the failure of the grandchild's parents to do so owing to death, physical or mental infirmity or disability.

(3) For the purposes of this Act, a person is the parent of a child if-

(a) the person's name is entered as a parent of the child in the general register of births pursuant to the Registration (Births and Deaths) Act, or in a register of births or parentage information kept under the law of any overseas jurisdiction;

(b) the person is or was a party to a marriage (including a void marriage) or cohabitation and the child is a child of the marriage or cohabitation;

(c) the person is a party to a marriage or cohabitation and accepts as one of the family a child of the other party to the marriage or cohabitation;

d) the person adopts the child;

(e) the person has admitted paternity or a court has made a declaration of paternity under section 10 of the Status of Children Act against the person in respect of the child;

(f) the person is the child's natural mother;

(g) the person has at any time in any proceedings before a court, or in writing signed by the person, acknowledged that the person is a parent of the child, and a court has not made a finding of paternity of the child that is contrary to that acknowledgement; or

(h) the person is in loco parentis to the child, including a person who has demonstrated a settled intention to treat a person as a child of the person's family, except under an arrangement where the child is placed for valuable consideration in a home by a person having lawful custody.

9.-(1) A maintenance order for the support of a child

(a) shall apportion the obligation according to the capacities of the parents to provide support; and

(b) may make an award for the payment of a sum of money for expenses in respect of the child's prenatal care and birth.

(2) In considering the circumstances of a dependant who is a child, the Court shall have regard to the following matters in addition to the circumstances specified in section 14(4)-

(a) that each parent has an obligation to provide support for the child;

(b) the child's aptitude for, and reasonable prospects of, obtaining an education; and

(c) the child's need for a stable environment.

(3) The Court shall have regard to the matters set out in subsection (4) in considering whether any and what order should be made under this section for requiring any party to make any payment towards-

(a) the payment of expenses in respect of the prenatal care and birth; or

(b) the maintenance or education,
of a child who has been accepted by that party as a child of the family.

(4) The matters referred to in subsection (3) are-

(a) the extent (if any) to which that party had, on or after such acceptance of the child, assumed responsibility for the child's maintenance; and

(b) the liability of any person, other than the persons who cohabited, to maintain the child.

Application of the Law to the Facts of this Case

[49] Although the defendant has submitted fairly extensively on this issue, the concession of the claimant that an increase would be reasonable has reduced the need for much of the analysis that would normally have been necessary. The discussion that remains necessary will focus primarily on whether the sum of $15, 0000 per month suggested by the claimant's counsel is a figure that should be regarded as reasonable in all the circumstances; or whether the sum of $37, 500 per month put forward by the defendant's counsel is to be preferred; or whether there is some more-appropriate sum that commends itself to the court.

[50] As section 9 requires a consideration of the provisions of section 14(4) of the Maintenance Act, as well, that section will also be considered. It reads thus:

> "(4) In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and-
>
> (a) the respondent's and the dependant's assets and means;
>
> (b) the assets and means that the dependant and the respondent are likely to have in the future;
>
> (c) the dependant's capacity to contribute to the dependant's own support;
>
> (d) the capacity of the respondent to provide support;
>
> (e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;
>
> (f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;
>
> (g) any legal obligation of the respondent or the dependant to provide support for another person;
>
> (h) the desirability of the dependant or respondent staying at home to care for a child;
>
> (i) any contribution made by the dependant to the

> realization of the respondent's career potential;
>
> (j) any other legal right of the dependant to support other than out of public funds;
>
> (k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
>
> (l) the quality of the relationship between the dependant and the respondent;
>
> (m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."

Discussion

[51] There can be no doubt that Levar is a minor within the meaning of section 2 of the Maintenance Act; or that, within the meaning of section 8 of the Act, there is a duty on his parents to maintain him to the extent that they are "…capable of doing so" (see section 8 (1); or that he is the child of the parties.

[52] It falls to the court (within the intendment of section 9(a)), to:

> "(a)… apportion the obligation according to the capacities of the parents to provide support…"

[53] In relation to the matters mentioned in section 14 (4) of the Act, the court considers that Levar, at present, is a minor attending school. He is as yet unable to contribute or contribute significantly to his own maintenance. He is in need of maintenance and of maintenance in a sum sufficient to take care of his necessities. As a student, his ability

to earn now is limited and at this stage of his life the emphasis should be on his obtaining sufficient education to a standard that will maximize or strengthen his earning potential for later years.

[54] Is the sum of $10,000 which has been paid for the past five years (up to 2011) a reasonable one for the claimant to have paid for the maintenance of Levar? In examining this issue, the court bears in mind that the claimant's evidence is that, in addition, to the maintenance payments, he also pays (and has paid) Levar's school fee; he has bought books; as well as being responsible for his medical expenses. His counsel has submitted on his behalf that the sum of $15, 000 per month would be a reasonable one to which the maintenance payments could be increased. Is this so? It should be noted, as well, that no reasons have been advanced as to why this figure would be appropriate in all the circumstances. It is therefore left to the court to do the best it can in this scenario. The claimant testified that he has never bought school uniforms for Levar; and in respect of most of the expenditure he says he made to maintain Levar (for such items as shoes and clothing), he is unable to produce receipts as, on his evidence, the information on them has faded with the passage of time.

[55] It is important to bear in mind that there has been no increase in this sum for the past five years, at least. Yet, even if he had been unable to increase this amount over the years prior to 2008, it is clear that, with his promotion in 2008, the claimant received a salary increase which would have made him better positioned financially to contribute to his son's maintenance. He earns a steady income and can increase this when he does overtime work; whereas the defendant's earnings would largely depend on the number of passengers the defendant's son is able to carry in a given week, amongst other factors attendant upon the taxi business such as down time for repairs and servicing and so on.

[56] Additionally, in the divorce proceedings between the parties, the claimant swore an affidavit stating, *inter alia*, that he contributed between $10,000 and $20,000 to his son's maintenance. This would have been prior to the decree absolute being granted in 2009.

In all the circumstances, the court is of the view that the sum of $25,000 per month would be reasonable for the years 2009 and 2010; $30,000 for the years of 2011 and 2012 and $35,000 for 2013, the sums being increased periodically in what is, admittedly, a less-than-scientific attempt to acknowledge the effect that inflation would necessarily have had on these sums. The claimant would, therefore, having already paid $10,000 monthly over these periods, owe a balance of $120,000 for each of the years 2009 and 2010; a balance of $240,000 for each of the years 2011 and 2012; and, up to the end of September, 2013, a balance of $225,000 for 2013. This makes a total of $480,000. Section 15 (1) (e) is the provision that the court invokes to make the order in respect of the previous years. Now how is this amount to be secured or paid?

Securing the Payment of the Sums Being Ordered for Maintenance

[57] Counsel for the defendant has urged the court to delay the sale of the premises until Levar attains the age of his majority or for some three years. It has also been submitted that the sums be secured by way of, in effect, setting them off against the claimant's interest in the premises, so that, were the defendant to be offered the first option of purchasing the family home when the premises are being sold, the sum she would have to pay would be reduced by these sums; or she would be guaranteed payment from the proceeds.

[58] These submissions were based in the main on the provisions of section 15 (1) (g) of the Maintenance Act. Arguments were also advanced along the lines that, deferring the sale would ensure that Levar is provided with continued residence in the home to which he has grown accustomed and has lived in for most of his life.

[59] It appears to the court that one of the matters on which it must place great emphasis is that in section 9 (2) of the Maintenance Act, which reads as follows:

> "(2) In considering the circumstances of a dependant who is a child, the Court shall have regard to the following matters in addition to the circumstances specified in section 14(4)-

(a) that each parent has an obligation to provide support for the child;

(b) the child's aptitude for, and reasonable prospects of, obtaining an education; and

(c) the child's need for a stable environment." (Emphasis added).

[60[It appears to the court that there is considerable force in the arguments advanced on behalf of the defendant both in relation to deferring the sale and also in relation to how the payments are to be secured. In the first place, in relation to the deferring of the sale, it appears to the court that deferring the sale would definitely be in Levar's best interest. It would undoubtedly lend continued stability to his upbringing. Although in an answer to a question posed in cross-examination the claimant indicated that Levar could reside with him at his brother's apartment, there is no evidence that this arrangement would be approved of or consented to by his brother. Further, the arrangements for the care and upbringing of Levar which would have been certified by the court during the divorce proceedings, no doubt spoke to his continued residence at his present address until he attained the age of majority. In the court's view these are sufficient reasons to let the present *status quo* remain - the alternative, in the court's view, tending to have the likely effect of causing a disruption or dislocation to Levar's accustomed existence.

[61] In respect of securing the payment of the sums by way of charging them against the claimant's interest, it appears to the court that this way of proceeding is also reasonable and, from one perspective, might also assist the claimant. It would assist him by making it unnecessary for him to accumulate and pay at this stage in one lump sum, all the sums that the court has ordered be paid for maintenance. And it is also fair to the defendant in that it ensures that the payments in respect of herself and Levar will be secured and certain of ensuring her and him some benefit at the end of the day.

The Claim for Reimbursements

[62] The defendant's claim for a reimbursement of the sum of $55, 965.76 spent by her on maintaining Levar also appears to be reasonable to the court and appears to have been made as a result of a deficiency in or insufficiency of the amount being paid the claimant. This expenditure was made in respect of the academic years 2011/2012 and 2012/2013.

Conclusion

[63] Applying the guidance provided by the authorities, along with the guidance provided by the statutory provisions, not the least of which include such matters as the requirement that the responsibility for maintenance be borne equally to the extent possible, having regard to the means and other relevant factors of the parties; and having regard primarily to considerations of what is fair and just in all the circumstances, the court has dealt with the matter as indicated above.

[64] Having regard to these considerations, the court is minded to make the following orders:

It is here by ordered that:

i. The claimant and defendant are each entitled to a 50% interest in the property known as all that parcel of land part of Bellevue Hospital Lands, now called Manley Meadows, in the parish of Kingston being the strata lot numbered ONE THOUSAND TWO HUNDRED AND SEVENTY-FIVE A and SECONDLY all that parcel of land part of Bellevue Hospital Lands, now called Manley Meadows, in the parish of Kingston being Lot numbered ONE THOUSAND TWO HUNDRED AND SEVENTY FOUR on the plan of Bellevue Hospital Lands, together being all the land registered

at Volume 1341 Folio 867 of the Register Book of Titles; and known as 4A Carlisle Close, Manley Meadows, Kingston 2 in the parish of Kingston (hereinafter referred to as the said property).

ii. The said property is to be valued by a reputable valuer to be agreed on by both the parties, to determine its current market value; the cost of such valuation to be borne equally between the parties.

iii. The claimant shall pay to the defendant the sum of $55, 965. 76 by way of reimbursement of amounts spent by the defendant for educational expenses in respect of the child Levar Stewart for the academic years 2011/2012 and 2012/2013.

iv. The claimant is to pay to the defendant by way of maintenance for herself the sum of $120,000 for the years 2006 and 2007.

v. The claimant is to pay to the defendant by way of maintenance for the child Levar Stewart the following sums: (a) the sum of $480,000 being arrears for maintenance payments for the child Levar Stewart for the years 2009 to September, 2013; and

(b) the sum of $35,000 per month for the current maintenance of the child Levar Stewart with effect from October 1, 2013 plus one half educational expenses as they arise, together with continuing to maintain health insurance coverage for the benefit of the said child.

vi. The sums ordered to be paid for maintenance of the child, Levar Stewart, and the defendant be secured against and shall be a charge on the claimant's interest in and share of the said property. In the event of a sale of the said property, the said amounts shall be deducted as a lump-sum from the claimant's share of the proceeds of sale of the said property and paid to the defendant.

vii. The property shall not be sold until the child of the parties, Levar Stewart, attains the age of majority; provided that the defendant does not remarry or cohabit with someone else.

viii. The child, Levar Stewart shall continue to reside with the defendant at the said property until he attains the age of majority.

ix. The claimant shall continue to make the monthly mortgage payments by way of salary deduction in respect of the said property until the said property is sold; and shall do nothing to alter this arrangement.

x. The said property is to be sold upon the child, Levar Stewart's, attaining his majority; and the proceeds of sale divided equally between the parties, subject to the maintenance payments made herein; unless an order extending the order for his maintenance is made for a further period beyond the age of 18 on account of his being engaged in a course of training or education.

xi. The defendant be given first option to purchase the claimant's interest in the said property within twenty-one (21) days of the date of the child, Levar Stewart, attaining his majority, unless an order extending the maintenance order is made for a further period beyond the age of 18 on account of his being engaged in a course of training or education. In such an eventuality, the period of 21 days shall be calculated from the expiration of that further maintenance order.

xii. Should the defendant fail to exercise her option within the time stipulated, the property shall be put up for sale on the open market by private treaty or by public auction and the proceeds of sale be divided equally between the parties, subject to the maintenance orders made herein.

xiii. The Registrar of the Supreme Court be empowered to sign any and all documents giving effect to this order in the event that the claimant neglects or refuses to sign; such refusal being deemed to have occurred where there is non-compliance for seven days after the service of a written request on the claimant.

xiv. Liberty to apply.