[2016] **JMSC Civ. 153**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 00242

BETWEEN	**PAULETTE TREASURE**	**CLAIMANT**
AND	**RUDOLPH TREASURE**	**DEFENDANT**

Ms. Gail English instructed by Gilroy English & Co for the Claimant, Mrs. Pamela Shoucair-Gayle instructed by Damion Barrett for the Defendant.

Heard 16th November, 17th November, 11th December 2015, 21st March 2016 and 15th September 2016.

Matrimonial Property – Parties separated – Whether property is the family home - Variation of equal share rule - Factors to be considered- The Property (Rights of Spouses) Act.

IN CHAMBERS

LAING, J

[1] By Fixed Date Claim Form filed on 10th January 2012, the Claimant sought a declaration that she is entitled to a seventy percent (70%) beneficial interest in a parcel of land located in Springfield, St. D'Acre, St. Ann ("the Property") and other consequential orders.

[2] On the first day of the hearing, the Court was advised that the Claimant had changed her position and was prepared to accept an order that she is entitled to fifty percent (50%) of the beneficial interest in the Property. The Defendant was

not prepared to agree to a 50:50 division and the Court was asked to make a determination as to the parties' relative interests in the Property pursuant to The Property (Rights of Spouses) Act ("PROSA").

Is the Property the Family home?

[3] The main plank of the Defendant's resistance to a 50/50 apportionment is that the Property was not the Family home. Section 2 (1) of PROSA defines family home as follows:

> *"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, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purpose 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."*

[4] In the case of **Weir (Dalfel) v Tree (Beverly) Weir** [2014] JMCA Civ. 12 the Court of Appeal had to consider the issue of what constituted the Family home. In that case, the parties met in 1982 and the Respondent, Beverly Tree bought 16.5 acres of land in 1986. The parties were married in 1987. The Appellant Weir constructed a wooden structure with a stone base ("the Board House") on a 6 acre portion of the property referred to as Lot 9, with financial assistance from the Respondent Weir. She was ordinarily resident in the United States but would visit Jamaica about three times per year. During these visits she would stay for three to four weeks and stay in the Board House. The Board House eventually deteriorated and it was replaced by the Appellant with a building constructed of concrete ("the Concrete Structure") after the parties had separated. The Respondent admitted that she had never stayed in the Concrete Structure because it was built without her permission.

[5] The Court of Appeal had to consider whether the Board House or the Concrete Structure could be considered a "dwelling house" and by extension the family home, for purposes of section 2 of PROSA. The Court adopted portions of the judgment of Sykes J in **Peaches Stewart v Rupert Stewart, Claim No HCV**

0327/2007, delivered 6th. November 2007, and his analysis of the interpretation to be given to the definition of "family home". The relevant portions of paragraphs 22 and 23 of the Judgment of Sykes J are set out below:

> *"22. It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended…*
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> *23. It should be noted that the adjectives only and principal are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. Only means sole or one. Principal means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression family residence. Indeed even the noun residence is qualified by the noun family which is functioning as an adjective in the expression family residence. Thus it is not any kind of residence but the property must be the family residence. The noun residence means one's permanent or usual abode. Thus family residence means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses."*
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> *24. It is important to note that in this definition of family home it is vital that the property must be used habitually or from time to time by the spouses, as the only or principal family residence. The adverbs habitually and from time to time tell how the property must be used. The definition goes on to say that such a property must be used wholly or mainly for the purposes of the household. Thus using the property in the manner indicated by the adverbs is crucial. The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, 'Is this the dwelling house where the parties lived?' In answering this question, which is clearly a fact sensitive one, the court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items; (c) if there are children, where [do] they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items."*

[6] The Court concluded in **Weir** that the Wooden Structure was at that point the only family residence as the parties did not live together anywhere else. The

Court also found that the fact that the nature of the building material used to construct the family home had changed did not remove from the dwelling house [the Concrete Structure] the elements that originally qualified it to be the family home.

[7] As Sykes J indicated and Brooks JA acknowledged, the question as to whether a dwelling is a family home is fact sensitive and accordingly each matter must be dealt with on its own peculiar facts.

[8] In this case the parties met when the Claimant was employed as a Pharmacy Assistant at York Pharmacy, located in Half-Way-Tree, St. Andrew. The Claimant was then residing in St. Andrew. The parties were married on 24th April 1999. The union produced one child, Rojae Treasure who was born on 6th September 2000.

[9] The Defendant's evidence as contained in his affidavit filed 20th June 2013 is that the Claimant at no point lived under the same roof with him as his wife and has never lived at the Property. He asserted that the longest period of time that the Claimant had ever spent at the Property was at the very most, two to three days at a time on any one visit. He said that she would always arrive on a Saturday at about 10:00 p.m. and would leave before dawn on the following Monday at about 4:00 a.m. The Defendant stated that furthermore, at the very beginning of the marriage the Claimant would only visit the Property once a month every two months or so and that in fact, long periods of up to six months would go by without the Claimant "dropping in" for her usual brief visits with him. The evidence of the Defendant is that the Claimant did not intend for the Property to be the family home because she said that she did not want to live in any bush but was interested in living in Moneague, St. Ann or Mandeville in the parish of Manchester. I do not accept the Defendant's evidence on this point.

[10] The Claimant's evidence, which I accept, is that while working in the corporate area she would go the Property on Friday nights at about 10 p.m. or Saturday

afternoons, but mostly Friday nights. Whenever she arrived on a Friday night she would leave on the following Sunday afternoon, but if she arrived on a Saturday she would leave on the Monday morning instead.

[11] In the case before this Court, it is a relevant fact that at the time of the marriage the Claimant was a Pharmacy Assistant. She explained during cross examination that this post does not require formal qualification but that it only requires on the job training. It is noteworthy that the marriage certificate states her occupation to be "Pharmacy Technician". The Claimant's evidence was that in 2002 she began a Pharmacy Technician course online, which was paid for by Health Corporation Limited and which she completed in 2003. Her Affidavit in support of the Fixed Date Claim Form also declares her occupation to be a Pharmacist and she is not in fact a Pharmacist. Leaving to the side, any issues of credibility which could potentially arise relating to the conflicting representation made by her as to precise post, (and I find that this has not materially affected my view of the Claimant's credibility), what is not disputed is that her employment involved, at some level, assisting in the dispensation of drugs.

[12] The Claimant's evidence is that she stopped working at York Pharmacy in or about July 2000, the Parties' son Roje was born on 6th September 2000 and she officially left her job at York Pharmacy in November 2000. She said she went back to work in April 2001 at Health Corporation Limited. She further explained during cross examination that it was not possible for her to have obtained a job closer to the Property. She said she tried to get a job in Brown's Town and St. Ann's Bay but was unsuccessful. Considering the somewhat specialised nature of the Claimant's work, I accept that on a balance of probabilities she is speaking the truth in this regard.

[13] The Claimant is therefore no different from thousands of Jamaicans of various backgrounds and social class, who because their primary place of employment is in Kingston, find it necessary to spend a considerable portion of each week in the capital city only returning to their family home on weekends. That is the reality of

the Jamaica rural / urban dichotomy. The Defendant himself is no different from thousands of Jamaicans who in an effort to grasp employment opportunities abroad are constrained to leave the family home for extended periods of several months at a time. That is the reality of the first world/third world divide. The parties are therefore quite similar in that, being ambitious, and in a quest for a better life for themselves and for each other, they each sought to take advantage of employment opportunities which took them away from the Property and from each other for various periods. This however in and of itself does not mean that the Property was not the family home for purposes of PROSA.

[14] The Claimant's evidence was that both herself and the Respondent left the house that they had rented from Mr. Byfield and they moved into the Property during the 2003 Christmas Holidays. The Claimant asserted that she remained there until 17th October 2010. She further asserted that the Property was the planned family home and was bought by herself and the Respondent specifically for that purpose. She also denied having expressed any interest in living in Moneague or Mandeville.

[15] I accept the Claimant's evidence, which is uncontroverted, that during the course of the marriage the Defendant did not spend any significant time with her in Kingston. As a consequence the bulk of and almost all the interaction between them took place at the Property.

[16] Examining all the circumstances in this case I find that there is overwhelming evidence that the Property was the family home. Up until 17th October 2010 when the Claimant removed her belongings, the Property was used habitually or from time to time by the spouses, as the only or principal family residence.

Can the equal share rule be dis-applied?

[17] It is necessary to examine the relevant portions of PROSA for purposes of this Claim, namely sections 6 and 7 which provide as follows:-

6. Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home- -

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

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

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

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

7.-(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.

(2) In subsection (1) "interested party" means-

(a) a spouse;

(b) a relevant child; or

(c) any other person with whom the Court is satisfied has sufficient interest in the matter

[18] In the case of **Stewart v Stewart** the Court of Appeal gave valuable guidance as to the approach that should be taken in relation to section 7. The Court acknowledged that the use of the word including implies that the Court is entitled to consider other factors other than those listed in section 7(1).

[19] The Court explored the issue further as follows:

> *"[32] Another aspect of section 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in section 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the Court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that these may be considered.*
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> *[33] It is true that the first two factors, (a) and (b) mentioned in section 7(1), contain the common element that there was no initial contribution from one of the spouses to the acquisition of the family home. The third factor, (c), does not, however, include such an element. It is conceivable that, despite the marriage being a short one, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses.*
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> *[34] The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration."*

[20] The onus of disproving the applicability of the section 6 presumption is on the person who alleges that it would be unreasonable or unjust to apply it. It is clear from **Stewart v Stewart** that the Court of Appeal views the existence of any one of the 7(1) factors as providing a gateway for the adjustment of the equal share rule (see paragraph 34 quoted above). In examining the circumstances of this case I will seek to first determine whether any of these factors are present.

Was the family home already owned by one spouse at the time of the marriage or the beginning of cohabitation?

[21] The Defendant spent a considerable portion of time in an attempt to demonstrate that the land on which the family home was constructed was already owned by him at the time of the marriage or the beginning of cohabitation. His evidence

was that he did have a discussion with the Claimant about purchasing land to build a family home but because of the claimant's insistence that she did not wish to live in a remote area such as Glasgow, St. D'Acre, he decided to press on and finalise the purchase of the Property. At paragraph 12 of the Defendant's Affidavit in Response to the Claimants Affidavit in support of the Fixed Date Claim Form ("the 20th June 2013 Affidavit ") he expressed the process of acquisition of the land as follows:

> *"That at any rate, I had decided to press on and finalise the land deal with my cousin for the purchase of the land in dispute. This over the strong protests of the Claimant, who did not like the property at all for the said reasons. I still went ahead with these plans. From as far back as in or about 1992, I had started to discuss buying the land from my cousin. This was before the Claimant and I had started to date. The land belonged to my cousin, and I knew she would be lenient with me regarding the terms and the payment for the same, and I felt it would be a good first investment."*

[22] This evidence that Defendant decided to "press on and finalise the land deal" is in my view clear indication that the property had not yet been acquired and consequently cannot be considered to have been acquired before the cohabitation of the parties or their marriage.

[23] The evidence of the Claimant contained in her affidavit filed 10th January 2012 is that in or about July 1999 both herself and the Defendant entered into an agreement to purchase the land from Linda Clarke for the sum of $160,000.00. In order to complete the purchase she contributed $20,000.00, the Defendant $40,000.00 and $100,000.00 was secured from Mr. Hector Dietrich, (the husband of the Claimant's Aunt) by way of a loan. She averred that on the day that she was to accompany the Defendant to finalise the purchase he left without her but returned with the Indenture in respect of the land which was given to her by the Defendant for safekeeping. She also gave evidence that in or about 2005 she became concerned that the vendor Ms. Linda Clarke was taking too long to deliver the title and so both herself and the Defendant decided to seek the assistance of another Lawyer.

[24] The Defendant in paragraph 14 of the 20th June 2013 Affidavit states that the Claimant did not contribute financially to the acquisition of the land as it was not their intention for it to become their family home. For this reason he did not place her name on the indenture and that she is lying when she says that he gave her the indenture for safekeeping. He averred that the Indenture was removed from the Property by the Claimant while he was on the farm work programme in 2010.

[25] I do not accept the evidence of the Defendant as to the reason for the Property not being conveyed in the joint names of the parties. The Indenture purports to be between the vendor Linda Clarke on the one part and Rudolph and Paulette Treasure of the other part, but rather curiously states that the land is conveyed to the Defendant only. If the Defendant's evidence were true one would not expect to see any mention of the Claimant's name on the Indenture.

[26] It is noteworthy that the Indenture is dated 22nd November 1999, which is subsequent to the marriage of the parties on 24th April 1999. The Claimant asserted that construction on the Property started in or about 2002 and in the second affidavit of the Defendant filed 9th April 2015, he admits this fact. The Indenture purports to have been witnessed by Mr. Derrick Frater, Justice of the Peace on 1st December 1999 but I do not accept the evidence of the Defendant that the Indenture was backdated and was prepared after the house was built. I come to this conclusion bearing in mind the absence of any reasonable explanation as to why this was done and why the Defendant did not get an Indenture in 1999 but instead only received the receipt which he alleged was removed from the Property by the Claimant.

[27] On the evidence before the Court, the Defendant has not established for purposes of these proceedings that the Property (consisting of land and building) was already owned by him at the time of the marriage or the beginning of cohabitation. It is helpful at this juncture to again refer to the definition of family home in PROSA and note that "family home" means the dwelling-house that is wholly owned by either or both of the spouses. The fact that the Property is

stated to be conveyed to the Defendant only does not materially affect the prime issue for the Court's determination which is the apportionment of each of the parties respective interest in the Property.

[28] Even if before the marriage he did own the land on which the dwelling was eventually constructed, that fact, by itself would not affect the Property falling within the definition of family home under PROSA. In any event, in view of the evidence accepted by the Court including the evidence of the Claimant and the Defendant as to the time the purchase of the land was finalised, I find that on a balance of probabilities the land was purchased after the marriage. There is therefore absolutely no basis for the assertion that the Family home was that the family home was already owned by the Defendant at the time of the marriage or the beginning of cohabitation.

Was the marriage one of short duration

[29] An additional limb of the Defendant's resistance to the application of the 50:50 rule was that the marriage was of short duration. PROSA does not define the period of time after which a marriage which has ended may be considered to be one of short duration. However in the Case **Margaret Gardner v Rivington Gardner** 2012 JMSC Civ 54 delivered 7th May 2012, Edwards J decided that in the context of Jamaica and for purposes of PROSA a marriage of short duration may be considered to be one of less than 5 years. This period has also been used in a number of other cases and I will adopt and use that 5 year period for this decision.

[30] For purposes of section 7(1) of PROSA the period of the marriage must be construed and be calculated up to the point when the marriage ended for all intents and purposes and not up to the time of the Petition for Divorce or grant of the Decree Nisi or Decree Absolute. Section 12(2) of PROSA provides as follows:

> *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.*

In **Stewart** the Court accepted that this section includes the family home.

[31] In paragraph 30 of the 20th June 2013 Affidavit, the Defendant avers that in or about 2004 there was no doubt in his mind that the marriage was over as the parties hardly communicated and the Claimant's visits were few and far between. There was no sexual intercourse beyond 2004 because the Claimant would refuse his requests for sexual intercourse and to avoid sexual intimacy she would sleep in a back room alone.

[32] The Claimant said that it was in 2010 that she stopped having sexual intercourse with the Defendant. She explained however that for a period of time in 2008 she was unable to do so because of a medical condition but that sexual relations resumed in November 2008 when the Defendant returned from one of his stints on the farm work programme and continued until June 2010.

[33] Much of the evidence in this case involved an incident which occurred on Sunday the 17th October 2010 when the Claimant visited the Property and removed a number of items belonging to her including a dresser, a double bed, a single bed, a fridge her clothes and a washing machine. The fact that the Claimant had so many items including clothes at the Property is also a factor which I have used in my determination that it was the family home. The Defendant was not then in Jamaica and the Claimant explained that having gone there and discovered that her key could not allow her access she used the services of a locksmith to gain entry. She denied having burnt any receipts or documents belonging to the Defendant but admitted that she did find female clothing there which was not hers and she did burn these as well as a quantity of bed linen.

[34] On the Claimant's evidence that sexual relations ended in June 2010, which the Court accepts, this could be considered the end of the marriage, but certainly the

17th October 2010 would be the absolute upper limit for purposes of determining the duration of the marriage. I do not accept the evidence of the Defendant that the parties separated and that the marriage ended sometime in 2004. I do not accept that if it did end then, that the cordial relationship between the parties would have continued until it culminated in the incident of the 17th October 2010.

[35] After 2004 the Defendant continued to keep the Claimant's son by a former union (Christophe) on the Defendant's evidence, until 2005. The Claimant clearly continued to visit and stay at the Property after 2004. The Defendant has not pointed to any particular incident or event in 2004 which may have caused him to finally come to the conclusion in his mind that the marriage was over. Perhaps following naturally from that, is the fact that the Defendant did not point to a particular date or period during 2004 which could be regarded as the end of the marriage. I do not accept this evidence on the termination of the marriage in 2004 and I do not find that the marriage was one of a short duration. The marriage having occurred on 24th April 1999, I find that this was a feeble attempt by him to try and shoehorn the marriage into a 5 year period so as to have it treated by this Court as a marriage of short duration.

Conclusion

[36] It is this Court's finding that the Property is the family home as defined by PROSA and was not acquired by the Defendant before the Marriage. I have also found that the marriage was not of a short duration. The Defendant has therefore failed to discharge the burden of disproving the applicability of the section 6 presumption.

[37] Counsel for the Claimant devoted a considerable portion of her presentation to trying to establish the amount of the Claimant's contribution to the acquisition of the Property and conversely Counsel for the Defendant spent almost the same amount of time in an attempt to counter the Claimant's evidence of her contribution. As pointed out earlier following **Stewart v Stewart**, It is only where

there is the existence of one of the three section 7(1) gateway provisions that the court may consider other elements of the relationship between the spouses, such as the level of contribution by each party to the matrimonial home, in order to decide whether to adjust the equal share rule. In the absence of any gateway provision then the issue of contribution becomes irrelevant. For that reason I have not demonstrated an analysis of the evidence dealing with contribution, nor have I sought to resolve the conflicting evidence in this regard by way of making any specific findings since in my opinion such an exercise would be academic and wholly unnecessary.

[38] In the premises the Court makes the following declarations and orders:

1. The Claimant is entitled to a 50% share in the Property.

2. The Defendant shall be permitted to purchase the fifty percent (50%) beneficial interest of the Claimant in the Property within (90) days of the date of the signing of an Agreement for Sale.

3. The Property is to be valued by an independent valuator agreed between the parties or in the absence of such agreement by one appointed by the Registrar of the Supreme Court.

4. In the event there is no agreement concluded between the parties within sixty (60) days of the date hereof, the Property is to be sold on the open market by public auction or private treaty and the net proceeds thereof be divided between the Claimant and the Defendant in the proportion 50:50.

5. In the event that either party fails to or refuses to execute the necessary Agreement For Sale and Instrument of Transfer for the said property or do any act required for the fulfilment of this Order, then the Registrar of the Supreme Court shall be empowered to execute the necessary Agreement For Sale and Instrument of Transfer or do such act.

6. Costs to the Claimant to be taxed if not agreed.