



[2018] JMSC Civ 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV04025

BETWEEN ILEEN OLIPHANT WILLIAMS CLAIMANT
AND BERNARD WILLIAMS DEFENDANT

**Matrimonial property – Family home acquired before the marriage by one party –
Family home registered in the name of one party – Division of family home –
Variation of the equal share rule – The Property (Rights of Spouses) Act sections
6, 7 and 14**

**Maintenance – Spousal maintenance – Whether threshold finding can be made –
The Matrimonial Causes Act section 23 – The Maintenance Act sections 3(2), 4
and 14(4)**

IN CHAMBERS

Mr. Mikhail H. R. Williams instructed by Taylor, Deacon & James for the Claimant

Ms Tamiko Smith instructed by Frater, Ennis & Gordon for the Defendant

Heard: 5th and 6th of February, 15th of March and 25th of May 2018

COR: V. HARRIS J

[1] By way of her Fixed Date Claim Form ('FDCF') filed on the 31st of July 2009, the claimant, Mrs. Ileen Oliphant Williams, is seeking the following relief:

1. That Ileen Oliphant Williams be added as joint tenant of all that property known as Lot 13, 2 Retreat Avenue in the parish of St. Andrew registered at Volume 1018 Folio 110 ('the Retreat Property');
2. That should Bernard Williams the Defendant fail or refuse to sign the Transfer, the Registrar of the Supreme Court be authorised to sign the relevant transfer of the property to the Claimant;
3. That the Defendant pay maintenance of One Hundred and Twenty Thousand Dollars (\$120,000.00) monthly to the Claimant; and
4. Such other relief as may be just.

The Claim

[2] The parties to this claim are former spouses. They were married on the 9th of August 1998 and divorced on the 21st of April 2011. According to the petition¹ that was filed by the defendant Mr. Bernard Williams, the parties separated on the 15th of November 2008. As would be observed from the relief being sought, Mrs. Oliphant Williams' claim is two-fold. Firstly, she is claiming an interest in the Retreat Property and secondly, she is seeking maintenance. For clarity, each will be addressed in turn.

(1) The Retreat Property

[3] Approximately four years prior to their marriage, Mr. Williams acquired the Retreat Property. His name was registered on the title on the 21st of July 1994.

¹ Filed on the 1st of December 2009

[4] In essence, Mrs. Oliphant Williams alleges that when she married Mr. Williams there was a verbal agreement that she would have a legal interest in the Retreat Property. She further contends that during their marriage, he assured her that he would take steps to register her name on the title as a joint tenant. This was never done.

[5] In reliance on this agreement, Mrs. Oliphant Williams claims that she expended approximately One Million Dollars (\$1,000,000.00) to upgrade and maintain the said property. In support of this, she has provided some receipts totalling \$154,633.70. As to the other receipts, Mrs. Oliphant Williams states that some were destroyed and she is unable to locate others.

(2) Maintenance

[6] Mrs. Oliphant Williams contends that it was Mr. Williams' usual practice to provide her with maintenance. She claims that he is obligated to pay a total of \$120,000.00 monthly and has itemised her expenses.

The Defence

(1) The Retreat Property

[7] In relation to the Retreat Property, Mr. Williams denies that there was ever an agreement between himself and his former wife, that she should have an interest. He contends that she has no legal or equitable interest in the Retreat Property and it was always made clear to her that it was and remains his intention to devise the said property to his children from a previous marriage. Further, he denies that he made any assurances to her that he intended to have her name registered on the title.

[8] Mr. Williams also denies that Mrs. Oliphant Williams contributed \$1,000,000.00 or any sum of money towards upgrading and maintaining the said property. He further contends that when she left the Retreat Property, which he refers to as

the 'matrimonial home', on the 12th of February 2009, she removed furniture valued at \$1,500,000.00 as well as \$90,000.00 in cash.

- [9] It is Mr. Williams' evidence that in 1992 he gave Mrs. Oliphant Williams \$60,000.00 to make a down payment on a house in Portmore, St. Catherine. He states that she never purchased the house but retained the money.
- [10] Further he states that in 2004, after they agreed that the Retreat Property was to be left for his children, he provided her with \$250,000.00 to be put towards the purchase of property in Coopers Hill, St. Andrew ('the Coopers Hill Property'). Mr. Williams indicated that Mrs. Oliphant Williams wanted to build a house for herself and her son, Frederick Hibbert. Both their names (that of the claimant and her son) were registered on the title on the 14th of October 2004.
- [11] Additionally, Mr. Williams states that in 2001 he spent more than \$1,500,000.00 to build a house in Top Lister, St. Mary for Mrs. Oliphant Williams' mother.

(2) Maintenance

- [12] Mr. Williams contends that he has no obligation to maintain Mrs. Oliphant Williams. He further asserts that the parties had an arrangement whereby she was permitted to operate her business at premises which he owned, and that she was not required to pay rent or any of the utility bills. The result, according to him, is that she kept 100% of the returns of the business and that on most occasions she earned more than he did.
- [13] Mr. Williams also states that he turned over a company (Major Distributors Limited) to Mrs. Oliphant Williams for her sole ownership and benefit. He states that she replaced this company with another company (T-Nahpilo Distribution Limited), which she operated at three locations.
- [14] After Mrs. Oliphant Williams left the matrimonial home in 2009, Mr. Williams states that she has had control of the various businesses and has not shared any

of the returns with him. He also states that she has not accounted to him for the profits made.

Counterclaim

[15] By way of his affidavit filed the 18th of January 2010, Mr. Williams has indicated that he is seeking the following relief:

1. A Declaration that the Claimant is not entitled to have her name endorsed on Certificate of Title registered at Volume 1018 Folio 110 as an owner.
2. A Declaration that the Claimant has no legal or equitable interest on the Certificate of Title [sic] registered at Volume 1018 Folio 110
3. An Order that the Claimant render a true account of all Profit and Income made from the business entities listed herein for the period 2004 to 2009.

[16] The first two orders sought by Mr. Williams are in essence that the court ought to refuse the relief sought by Mrs. Oliphant Williams in relation to the Retreat Property. The third is somewhat different. An order for an account ought to have complied with Part 41 of the **Civil Procedure Rules** ('CPR'). In particular **CPR 41.2(1)** which states "*where a ... counterclaim is made for an account or requires the taking of an account, an application for directions relating to the taking of the account must be made at the case management conference or the first hearing.*" There does not appear to be compliance with this rule.

[17] In any event, Mrs. Oliphant Williams has disclosed the financial statements of T-Nahpilo Distributors Limited from 2004 to 2006 and Mr. Williams does not seem to be seriously pursuing this as no submissions were made in respect of the account, nor were any consequential orders sought.

The Law and Analysis

[18] I am grateful for counsel's assistance to the court and it should be known that all the submissions and authorities in this matter were considered whether they have been referred to or not.

[19] Mrs. Oliphant Williams' FDCF does not state that it is being made under any enactment, as required by **CPR 8.8(c)**. However, by virtue of the submissions the court understands that the claim in relation to the Retreat Property is being brought pursuant to the provisions of **The Property Rights of Spouses Act** ('the **PROSA**') and the maintenance claim is being made in accordance with **The Maintenance Act**. In fairness to learned counsel for Mrs. Oliphant Williams, it should be noted that he did not originally appear on her behalf and there have been a number of changes in representation.

(1) The Retreat Property

[20] Although there was no reference to the **PROSA** in Mrs. Oliphant Williams' FDCF, this court has taken the view that the claim can be properly treated as a division of property application pursuant to the **PROSA**. I accept the submission that has been made on behalf of Mrs. Oliphant Williams that there would be no need for an extension of time² since the claim was made within the 12 months of the parties' separation³.

Was the Retreat Property the family home?

[21] Mr. Williams conceded that during the course of their marriage, they lived at the Retreat Property as man and wife and he has referred to it as the "matrimonial

² Pursuant to section 13(2) of the **PROSA**

³ Claim filed on the 31st of July 2009, date of separation per the Defendant's Petition is the 15th of November 2008.

home”⁴. As such, there is no dispute that the Retreat Property falls within the statutory definition of the “family home”:

*"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 purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;*⁵

Whether the court should vary the equal share rule

[22] Having determined that the Retreat Property is the family home, the relevant sections of the **PROSA** are sections 6 and 7. Section 6(1) is the equal share rule which states that spouses (which includes former spouses) are presumed to be entitled to one-half share of the family home (also referred to as the 50/50 presumption). As is common to most rules, there are exceptions. These exceptions are contained in sections 6(2) and 7.

[23] Interestingly, in the case at bar neither spouse is in favour of the equal share rule, both are seeking a variation. Mrs. Oliphant Williams is seeking an exception which is recognised in section 6(2) of the **PROSA**, whereas Mr. Williams is seeking an exception under section 7.

[24] Section 6(2) is relevant insofar that the relief sought by Mrs. Oliphant Williams involves the concept of joint tenancy. Section 6(2) states:

“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.”

[25] Although the parties are now divorced, if the court were to grant the order in the terms sought by her it would in effect be giving effect to an exception to the 50/50

⁴ Paragraph 22 of the Affidavit of Bernard Williams filed on the 18th of January 2010

⁵ Section 2 of the **PROSA**

presumption. It is to be noted that the **PROSA** only contemplates this exception where the marriage is terminated by death.

[26] To my mind such an order would be problematic and inequitable. I say this for a number of reasons. Firstly, the parties are no longer married. Secondly, joint tenancy gives rise to the rule of survivorship which would operate so as to vest the entire property in the spouse that survives the other. This in effect would take away both parties' testamentary freedom. This is particularly relevant bearing in mind that Mr. Williams is older than Mrs. Oliphant Williams by 17 years (based on the evidence and submissions of the parties which I accept), he is also not in the best of health and both parties have children from previous relationships. Mr. Williams has also indicated his desire for his biological children to inherit the Retreat Property. I find the maxim 'equity leans against joint tenancies' to be apt.

[27] For the foregoing reasons, I would refuse to grant a Declaration that Mrs. Oliphant Williams be added as a joint tenant of the Retreat Property. Instead, I will go on to consider (pursuant to the **PROSA**) whether or not she should be granted a 50% interest in the Retreat Property and make such consequential orders to give effect to her interest, if any.

[28] I now turn to Mr. Williams' bid to vary the equal share rule. Notwithstanding his concession that the Retreat Property was the family home, he contends that having regard to all the circumstances it would be appropriate to vary the equal share rule⁶ to the extent that the court should find that Mrs. Oliphant Williams has no interest in the Retreat Property. In particular, the court is being asked to consider that Mr. Williams already owned the family home at the time of the marriage.⁷ This is one of the relevant factors prescribed by section 7(1) of the **PROSA**, and it is perhaps useful to set out this provision in its entirety:

⁶ Section 7 of the **PROSA**

⁷ Section 7(1)(b) of the **PROSA**

“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 the 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.” (emphasis added)

[29] Counsel for both parties have commended for the court’s consideration the factors contained in section 14(2) and the definition of contribution in section 14(3). It was acknowledged that these sections are clearly applicable to instances where the court is dividing property other than the family home. However, it was submitted by learned counsel for Mr. Williams, Ms Smith, that they can serve as useful guides. She also submitted that the court has traditionally accepted that the financial and non-financial factors are useful in making a determination.

[30] Ms Smith, placed reliance on the dicta of McDonald-Bishop J (as she then was) in ***Graham v Graham***⁸ for the contention that, *‘the overriding consideration in matrimonial property adjustment is fairness, that is, the need to achieve an equitable and just result.’*⁹ I would adopt this, as well as, the approach set out in paragraph [25] of ***Graham v Graham*** which I find to be equally instructive to the case at bar:

“The equal share rule stands in aid of the claimant. The law allows for an exception to its application where, in the court’s opinion, the circumstances are such that it would be unjust or unreasonable to apply it. The rule can be displaced. This has formal implications for the burden of proof. The defendant has asserted that the circumstances in this case are such that would warrant an exception to the rule. He asserts

⁸ (unreported), Supreme Court, Jamaica, Claim No. 2006HCV03158, judgment delivered 8 April 2008

⁹ *Ibid* at paragraph [19]

*it, he must prove it. He must bring himself within the exception. **The burden of proof is, therefore, on the defendant to place himself outside the application of the rule that stands in aid of the claimant.***"
(emphasis added)

- [31] In his effort to place himself outside the application of the equal share rule, Mr. Williams relies primarily on the consideration in section 7(1) (b), that is, the Retreat Property was owned by him prior to the marriage.
- [32] Additionally, he relies on the undisputed fact that he acquired the property without any contribution from Mrs. Oliphant Williams. She admitted that it was Mr. Williams who paid the mortgage for the Retreat Property but has sought to demonstrate that she contributed to its upgrade and maintenance. Mr. Williams admitted, in cross-examination, that Mrs. Oliphant Williams at times contributed to the household. What he denies is her assertion that she spent any money towards the upgrading or maintenance of the Retreat Property. Mrs. Oliphant Williams states that when the Retreat Property was acquired, the bordering fence was a 'bush edging' and due to her fear of lizards they agreed that a concrete wall would be built. She further states that she paid for the construction of the wall alone as Mr. Williams indicated that he had no money. She also states that she bought and planted all the plants and flowers.¹⁰
- [33] Counsel, Ms Smith has asked the court to disregard the receipts exhibited by Mrs. Oliphant Williams on the basis that they are unreliable. Firstly, it was contended that the receipts dated 1999 were unrelated to the Retreat Property. In cross-examination when Mrs. Oliphant Williams was asked if the receipts related to the construction of her mother's house in Top Lister St. Mary, she responded in the negative and said that she fixed the Retreat Property in 2000.

¹⁰ Paragraph 3(a) of the Affidavit of Ileen Oliphant Williams filed the 10th of May 2017.

- [34] Secondly, it was argued in respect of the receipts which were dated in 2000 ('the 2000 receipts') that she failed to provide details of how the items in the receipts were connected with her contribution to the improvement of the Retreat Property.
- [35] Thirdly, it was asserted that some of the 2000 receipts were made out to persons other Mrs. Oliphant Williams. These persons included a Miss Crooks¹¹, Major Distributors¹² (the defendant's company) and an A. Williams¹³. It was submitted that even the 2000 receipts that were in her name are unreliable since they do not necessarily represent *'the use of her personal funds; they only indicated that it was she who carried out the transaction.'*¹⁴
- [36] Mr. Williams states that Mrs. Oliphant Williams made no expenditure on the Retreat Property, she was asked to purchase items on his behalf and he provided her with the required sums. He also asserts that the receipts were in her name because she made the purchases for him.¹⁵
- [37] I have observed that Mrs. Oliphant Williams provided details of the improvements. She gave evidence that the improvements involved knocking down a wall of the master bedroom and extending it by eight feet; expanding the patio; tiling the entire house with ceramic tiles; installing ceiling fans and a chandelier, and placing light scones. She also states that she extended the master bathroom and changed the toilet fixtures.¹⁶
- [38] As previously stated the receipts provided by her when totalled are \$154,633.70. She states the others could not be located and some were destroyed. Counsel

¹¹ Invoice dated the 21st of January 2000 from Derrick Haulage Contractors for an illegible amount

¹² Invoice dated the 21st of November 2000 from CMP Electric Limited for \$11,502.65

¹³ Invoice dated the 12th of December 2000 from Active Traders Limited for \$1,138.50

¹⁴ Per Brooks J (as he then was) at pages 6 -7 of ***Nelsie Robinson v Bartley Robinson*** (unreported), Supreme Court, Jamaica, Claim No. 2009HCV6127, judgment delivered 24 February 2011

¹⁵ Paragraph 4 of the Affidavit of Bernard Williams in reply to the Supplemental Affidavit of Ileen Oliphant Williams filed on the 10th of February 2010

¹⁶ Paragraph 4 of the Affidavit of Ileen Oliphant Williams in Response to Affidavit of Bernard Williams filed the 4th of February 2010.

Mr. Williams submits that no adverse finding should be ascribed to the paucity of documentary evidence in relation to her financial contributions as she has proffered a reasonable explanation.

- [39]** While some of the receipts do appear to correspond with some of the improvements mentioned, I agree with Ms Smith's submission that the receipts must be treated with some amount of caution. I also accept that the name on a receipt is not always indicative of the party supplying the funds, but rather of the party who carried out the transaction. However, I find the receipts to be relevant in so far as they show that Mrs. Oliphant Williams had some involvement in the conservation and improvement of the Retreat Property. Mr. Williams does not deny that improvements were done to the Retreat Property. He admits that he asked her to purchase items on his behalf.
- [40]** Therefore, it seems that Mrs. Oliphant Williams, at the very least, made an indirect contribution to the conservation and/or improvement of the Retreat Property. I regard her contributions to the household, which Mr. Williams admitted included caring for his daughter, maintaining the household, supplementing Mr. Williams' sources of income and her efforts in sourcing and purchasing items for home improvement projects to be a material consideration.
- [41]** Additionally, It was not challenged (and much of this evidence is agreed) that during the marriage Mrs. Oliphant Williams worked as the Operations Manager at Azan Discount Fabric at three locations. She then worked exclusively at Major Distributors Ltd (the defendant's company) as a manager from 2000 to 2004. She registered T-Nahpilo in 2003 and commenced trading in 2004 and she also established and carried on business at Shops 15 and 17 Mannings Plaza in St. Mary.
- [42]** It is clear to me that before and during the marriage Mrs. Oliphant Williams was an enterprising, industrious and hardworking person (as was Mr. Williams) who was financially independent. She appeared to be quite forthright in her testimony

as it relates to the financial contributions she made towards the upgrading and maintenance of the Retreat Property and I am prepared to accept this aspect of her evidence. I have also accepted that she assisted with the payment of some of the utility bills for the family home and that the parties shared the expenses for food. I regard these financial contributions as significant.

[43] Mr. Williams is also seeking to rebut the agreement that Mrs. Oliphant Williams contends they made, that is, to register her name on title to give effect to her interest. He states that it was at all times made known to her of his intention for his children to inherit the Retreat Property.

[44] I am reluctant to place reliance on the parties' intention. It is clear that the parties have diametrically opposing recollections of their agreement with respect to the Retreat Property. In support of his contention, Mr. Williams relies on Mrs. Oliphant Williams' acquisition of the Coopers Hill Property in 2004 that was registered in her name and that of her son. It is in dispute as to whether he contributed \$250,000.00 towards its purchase. Conversely, Mrs. Oliphant Williams states that Mr. Williams did not assist her with the acquisition of the Coopers Hill Property and he only became aware of its acquisition due to an unauthorised disclosure to him by her previous attorney-at-law.

[45] Ms Smith submitted that whether or not the court accepts that Mr. Williams assisted Mrs. Oliphant Williams with the down payment, the court should accept at a minimum that he directly or indirectly contributed the acquisition of the Coopers Hill property by virtue of the financial freedom afforded to her by him. Ms Smith submits that Mrs. Oliphant Williams' ability to afford the Coopers Hill Property while simultaneously starting her business was because of Mr. Williams. I am inclined to agree with this submission.

[46] Ms Smith further submits that Mrs. Oliphant Williams' explanation for not registering Mr. Williams' name on the title for the Coopers Hill Property is telling as it supports Mr. Williams' contention. In cross-examination Mrs. Oliphant

Williams stated that she did not place her former husband's name on the title because he was supposed to put her name on the title for the Retreat Property when they were married and he failed to do so. Ms Smith argues that the natural conclusion from this evidence is that Mrs. Oliphant Williams believed that the Coopers Hill Property was in lieu of an interest in the Retreat Property. However, even if this were so, she would not be precluded from claiming an interest in the family home.

[47] There is no evidence that the parties had an agreement in the form contemplated by section 10 of the **PROSA**. Section 10(1) recognises that in contemplation of marriage parties may wish to contract out of the provisions of the legislation. For instance, they may wish to exclude the applicability of the equal share rule. Unless it would result in an unjust outcome, parties are generally free to agree with respect to the ownership and division of their property (including future property) as they think fit. In the absence of such an agreement and having regard to the relevant circumstances, I would refuse to grant the Declaration sought by Mr. Williams that Mrs. Oliphant Williams has no legal or equitable interest in the Retreat Property.

[48] It is my view that Mr. Williams has displaced the equal share rule. In arriving at this decision I have taken into account the fact that the Retreat Property was owned by him prior to the parties' marriage, he paid the mortgage, the majority of the utility bills and purchased food (which I have found to be a shared expense).

[49] However, in light of the fact that the parties' marriage of over a decade was not one of short duration and Mrs. Oliphant William's direct and indirect contributions towards the conservation and improvement of the Retreat Property as discussed

above¹⁷, I find that it would be appropriate to award her a 20% interest. The division should therefore be 80:20 in Mr. Williams' favour.

(2) Maintenance

[50] Counsel for Mrs. Oliphant Williams submitted that the claim in respect of maintenance is to be decided pursuant to **The Maintenance Act**. In particular, he cites section 6(1) of the legislation, which states:

“6. –(1) In the case of cohabiting parties and subject to the provisions of this section, after the termination of cohabitation each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to-

(a) the circumstances specified in section 14(4); and

(b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.”

[51] Regrettably, this section appears to be inapplicable to the case at bar. The parties were married. This section clearly contemplates obligations that may arise when cohabiting parties cease to live together in a conjugal relationship outside of marriage.

[52] It seems that for **The Maintenance Act** to be applicable to the case at bar, reliance would have to be placed on another enactment which confers this court with jurisdiction to make an order for maintenance, namely **The Matrimonial Causes Act** or the **PROSA**. Section 3(2) of **The Maintenance Act** states:

“(2) In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act.”

¹⁷ See paragraphs [40] – [42]

[53] Similarly, it is section 23 of **The Matrimonial Causes Act** which confers this court with jurisdiction and refers to **The Maintenance Act**. Section 23 of **The Matrimonial Causes Act** states:

“23. -- (1) The Court may make such order as it thinks just ... for the maintenance of a spouse –

(a) ... in any proceedings under section 10, or in any proceedings for dissolution or nullity of marriage before, by or after the final decree;

(b) ...

...

(2) An order under subsection (1) ... for the maintenance of a spouse shall be in accordance with the provisions of the Maintenance Act.”

[54] Counsel Mr. Williams relied on the decision of the Privy Council in **Bromfield v Bromfield**¹⁸ and made reference to paragraph [23] wherein it was accepted that:

“(a) section 23(1) of the Matrimonial Causes Act conferred on Brooks J jurisdiction to make an order for the “maintenance” of the wife;

(b) section 23(2) requires the order to have been in accordance with the provisions of the Maintenance Act; and

(c) section 15(1)(b) of the Maintenance Act makes clear that an order for payment of a lump sum is a species of an order for “maintenance.”

[55] Mr. Williams’ reliance appeared to be solely focused on the point made at (c), which confirms that the court has the power to make lump sum maintenance orders. For clarity and comprehension, it should be noted that at the time when Mrs. Oliphant Williams filed the claim, she was seeking maintenance for \$120,000.00 monthly. More than eight years have passed from the date of filing to the trial date and Mr. Williams submitted that it would be reasonable for the court to make a lump sum payment as it would facilitate a “clean break”. The

¹⁸ [2015] UKPC 19

lump sum payment being sought amounts to \$4,320,000.00 which represents three years of maintenance at the monthly rate claimed.

[56] Apart from the maintenance claim being incorrectly grounded, there is another difficulty. Neither party has placed before this court any credible information in relation to their income and expenditure together with any supporting documentary evidence. A considerable amount of time was spent on disputing the payment of expenses in relation to their respective businesses and the contributions each party claims they made to the other's businesses.

[57] Mrs. Oliphant Williams has expressed her view that she was financially ruined because of the separation and divorce. However, all that has been placed before this court is an itemised list of monthly expenses from 2009 and her evidence that she makes about \$60,000.00 monthly. Her expenses, as listed, are:

Electricity	\$5,000.00
Rent	\$35,000.00
Domestic Helper	\$18,000.00
Car Maintenance	\$24,000.00
Water	\$2,700.00
Food	\$24,000.00
Cable & Phone	\$5,500.00
Miscellaneous Costs	\$5,800.00
Total	\$120,000.00

[58] I bear in mind that Mrs. Oliphant Williams is claiming that Mr. Williams has failed to meet his obligation with regard to maintenance, which has been his usual practice¹⁹. In response, Mr. Williams denies that he has a duty to pay her maintenance²⁰. He stated that, *‘the arrangements in place for me to maintain the Claimant is one whereby she is given a number of businesses which she operates at my premises free of utility bills, that is, electricity, water and free of any rent. She keeps 100% of the returns of these businesses and I verily believe that on most occasions she earns for [sic] more than I earn.’*²¹

[59] Counsel for Mr. Williams, Ms Smith, correctly submitted that there is no general duty for a husband to maintain a wife without more and reference was made to section 4 of **The Maintenance Act**, as well as, to the dicta of Edwards J from **Gardner v Gardner**²², wherein it was stated, *‘maintenance of a spouse is not automatic. It involves necessity, capacity and reasonability.’*²³

[60] In resolving the maintenance claim I find it useful to adopt the following statement of law and ratiocination from my brother E. Brown J²⁴:

*“[17] An application for an order of spousal maintenance is governed in the first place by section 4 of the **Maintenance Act**. It is both convenient and instructive to set out section 4 in full:*

Each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to-

(a) the circumstances specified in section 14 (4); and

¹⁹ Paragraph 12 of the Affidavit of Ileen Oliphant filed the 31st of July 2009.

²⁰ Paragraph 21 of the Affidavit of Bernard Williams filed on the 18th of January 2010

²¹ Paragraph 13 of the Affidavit of Bernard Williams filed on the 18th of January 2010

²² [2012] JMSC Civ. 54

²³ Ibid at paragraph [110]

²⁴ **Alfred Robb v Beverley Robb** (unreported), Supreme Court, Jamaica, Claim No. D01148/2005, judgment delivered 11 December 2009

(b) *any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.*

[18] *The obligation to maintain the other spouse is, in the first instance, latent. It is activated by the inability of the other spouse to maintain himself or herself. So, the court has to make, as a condition precedent to a maintenance order, a threshold finding that the dependant spouse cannot practicably meet the whole or part of her reasonable needs. The maintenance order reflects that assessment, together with the respondent's capability to maintain the applicant to the extent that is necessary to meet her reasonable needs.*" (emphasis added)

Whether a threshold finding can be made

[61] Mrs. Oliphant Williams asserts that in 2009 her business (at 14 Beckford Street, Kingston) was closed as a result of Mr. Williams removing her merchandise and her being unable to access the premises. She says that this resulted in great financial constraints as she was unable to pay her bills, credit card, loan and rent for the property where she was living at the time. She also gave evidence that the Coopers Hill Property was foreclosed upon and her motor vehicle was repossessed.

[62] Despite these assertions, she has provided no supporting documentary evidence. Counsel Mr. Williams submitted that it is accepted by Mrs. Oliphant Williams that her evidence in this regard lacks documentary evidence, as she could have produced copies of her outstanding bills, credit card statements, loan schedules or statements of account to buttress her oral evidence. However, he submits that the court should not make any adverse finding in this regard. He has asked the court to consider her evidence that she has changed representation; she has not received the file from her previous attorneys-at-law and she was at one point unrepresented. He has also pointed out that this aspect of her evidence has not been challenged.

[63] The court is unable to accept Mr. Williams' submission on this point. In the round, Mrs. Oliphant Williams has failed to demonstrate, with reference to any time

periods, that she cannot practicably meet the whole or part of her reasonable needs. Accordingly, this court is unable to properly make a threshold finding.

- [64]** Even if the court were to act upon the bare evidence, her evidence is contradictory. Mrs. Oliphant Williams' evidence in relation to the Retreat Property was that she contributed to the household financially (including its upgrade and maintenance), and that she acquired the Coopers Hill Property without any financial contribution from Mr. Williams. She has painted a portrait of being financially self-sufficient (which I have already accepted). I bear in mind that it was her evidence that she singlehandedly undertook the construction of a concrete wall as Mr. Williams claimed that he had no money.
- [65]** While being mindful of the change in her circumstances after the separation and divorce, that is, not being able to continue the operation of her business at Beckford Street, Mrs. Oliphant Williams stated that she was the one who paid the rent for the shops the parties had in St. Mary. The failure to provide clear timelines has also made it difficult to ascertain her true financial position. I would accept Ms Smith's submission that Mrs. Oliphant Williams' claim in respect of maintenance for her entire monthly expenses would be unreasonable where she had an income, albeit unsteady, which could potentially meet half of her expenses.
- [66]** For the foregoing reasons, the court refuses to grant a declaration that Mr. Williams pay maintenance to Mrs. Oliphant Williams whether by way of lump sum or monthly instalments.
- [67]** While it is not necessary to delve into Mr. Williams' ability, I would make the following observations. Like Mrs. Oliphant Williams, he too has not assisted the court with credible information in relation to his income and expenditure. However, had the threshold finding been made the court is mindful that the failure could not have been accepted and further steps would have been

necessary (see: the criticism of the Board in ***Bromfield v Bromfield*** at subparagraph (1) of paragraph [26] *supra*).

[68] As an aside, I note that Mr. Williams, who is in his seventies, gave evidence that he is currently without an income and not in the best of health (having suffered a stroke and been involved in two accidents). This evidence was not challenged. Mrs. Oliphant Williams herself acknowledged that he was hospitalised in 2011 and as a result, she thought it appropriate to delay the pursuit of the claim.

[69] It seems reasonable to infer that if she was of the view that the case should be delayed to accommodate his recovery, then she could not have been substantially unable to meet her needs. At least not at the time that she took such a position, that is, in or around 2011. This would also undermine her claim for maintenance which now appears to be confined to three years, presumably from 2009 – 2011. It is noted, however, that it was not until counsel Mr. Williams' closing submissions that it was made apparent that only three years of maintenance was being claimed, as no amendments were made to her pleadings.

Disposal

[70] Based on the foregoing reasons, it is hereby ordered:

- 1) The Counterclaim is refused;
- 2) The Claimant's claim for maintenance is refused;
- 3) The Claimant is entitled to a twenty percent (20%) interest in the Retreat Property which is registered at Volume 1018 Folio 110 of the Register Book of Titles;
- 4) The parties shall secure a valuation of the said property within three months of the date hereof. In the event they shall fail to agree on a valuator, the

Registrar of the Supreme Court shall be empowered to appoint a valuator. The cost of the valuation is to be borne equally by both parties;

- 5) The Defendant shall have the first option to purchase the Claimant's interest within ninety (90) days of receiving the valuation. If he fails to exercise this option, the Claimant shall be entitled within sixty (60) days thereafter to enter into an agreement to purchase the Defendant's interest in the property, failing which the property is to be sold on the open market. Both parties are to bear the cost of the sale equally;
- 6) The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the orders made should any of the parties be unable or unwilling to do so within fourteen (14) days of being notified in writing;
- 7) Each party to bear their own cost; and
- 8) The Claimant's Attorneys-at-Law are to prepare, file and serve the orders made.