



[2022] JMSC Civ. 50

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV04907**

<b>BETWEEN</b>	<b>FIONA KADESHA ALFRED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MARIO RAPHAEL ALFRED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Dameta Franklin and Mrs. Denise Senior-Smith instructed by the Law offices of Gayle Franklin & Company for the Claimant

Mr. Anthony Williams instructed by Messrs. Usim, Williams & Company for the Defendant

Heard on September 28, October 1 and 29, November 5, 2021 and February 18, 2022.

**Husband and wife purchased property – Property (Rights of Spouses) Act - Adverse possession - Whether the property is the family home – Whether the property is matrimonial property – Whether it would be unjust to give each spouse a 50% share in the property.**

**REID, ICOLIN J.**

### **BACKGROUND**

[1] This is an application for division of property under the Property (Rights of Spouses) Act (PROSA) located at Exchange, Lot 907, Bogue Village, Phase 3, P.O. Box 7020, Reading, Montego Bay in the parish of Saint James (the Bogue property). It was filed by Mrs. Fiona Kadesha Alfred (the Claimant) against Mr. Mario Raphael Alfred (the Defendant). The Claimant sought, among other things,

a declaration that both parties are entitled to a 50% share in the property. However, the Defendant claims that he is the sole owner of the property by virtue of adverse possession in accordance with the Limitations of Actions Act (LAA).

## **THE EVIDENCE**

- [2]** Both parties filed affidavits in these proceedings and gave sworn testimony. The evidence presented is summarised as follows: The parties were married on September 9, 2000. They first resided at a house owned by the Defendant and his mother in the parish of St. Catherine. The Defendant worked with Sandals International and lived on the hotel compound as part of his contractual arrangements. He usually visited his home on weekends. The Claimant subsequently got transferred to work in the parish of St. James and moved there with their two infant children. The Defendant, thereafter, lived with his family at West Gate Hills, St. James.
- [3]** After paying rent for several months, the parties pooled their funds from their savings and made a payment of \$1,000,000.00 as a deposit towards purchasing a house at Lot 907 Bogue Village, Phase 3, P.O. Box 7020 Reading Montego Bay St. James. The purchase price was \$3,250,000.00. The Claimant obtained a mortgage at the employee rate from her employer, Capital and Credit Merchant Bank, for \$2,000,000.00, which she serviced via salary deduction. Both parties were registered as tenants in common on the Certificate of Title.
- [4]** When the property was purchased, it was a one-storey residence with two bedrooms, a bathroom, a living room and a kitchen. They both pooled their funds for the expansion of the house, and the Defendant claimed that he obtained a loan from his mother to assist with the development of the premises. With the pooled funds, they improved the property to a two-storey dwelling-house consisting of 4 bedrooms, 3 ½ bathrooms, a kitchen, living, dining and a family room.
- [5]** After substantial completion of the premises, the family moved in with their two children in February 2006. They lived there together until 2007 when the Claimant

migrated to the United States of America (USA) to take a job at Chase Manhattan Bank. The two children later joined their mother in 2008. The Defendant would frequently travel to visit and spend time with them. During that period, the Claimant was filing a petition for the Defendant to become a resident in the USA so that he could live with the rest of the family. The Defendant finally left Jamaica in December 2009 but regularly returned until he obtained a full-time job in the USA in May 2013.

- [6]** While the Claimant worked at Capital and Credit Bank, the loan was at the employee's rate. However, within three months of her resignation, it was converted to the customer/commercial rate. Her last three salaries and monies owed to her from the Capital and Credit Merchant Bank were used to service the loan for that period. Thereafter, the Defendant took over the repayment of the loan. He later obtained a more favourable loan from the Bank of Nova Scotia (BNS) and transferred the loan from Capital and Credit Merchant Bank. The Defendant stated that for over three years, he bore sole responsibility for the repayment of the mortgage until it was ultimately discharged.
- [7]** The Claimant insists that the property was purchased and lived in as the family home. She refuted the Defendant's allegations and declared that she never abandoned her family, property, or financial obligations.
- [8]** The Claimant further stated that her moving to the USA was a mutual decision and a means of paving the way for the family's transition. She asserted that to seek residency for the Defendant, the Immigration Department required proof that she had sufficient finances to maintain a family of four when they arrived in the USA. She exhibited tax returns as proof of her filing to support this assertion. She explained that she was never forced to seek residency in the USA for the Defendant, or she would have stopped the process and moved on with her life. She said that she sponsored both the Defendant and her mother-in-law.
- [9]** The Claimant highlighted that before she left Jamaica, she asked her mother-in-law, Mrs. Holdene Alfred, to assist her son with taking care of the children. The

children came to her only a year later, in the summer of 2008. Additionally, the Defendant made several trips to the USA to be with the family. An email sent by the Defendant to the USA embassy on November 23, 2008, was admitted into evidence to substantiate her claim that they had good relations as he stated that he “*would love to spend time with his family*”. The Defendant was also with her on the first day she went to work in the USA.

- [10] It is the Claimant’s case that she had an agreement with the Defendant that he would take care of the financial responsibilities in Jamaica. She would work and use the money earned to take care of the financial side of things in the USA to pave the way for the accommodation of the children and, later, the Defendant. She had discussions with the Defendant, and it was agreed that he would rent a portion of the house, and the funds earned would be put towards the payment of the mortgage and maintenance of the premises. It should be noted that the Claimant initially asserted that they decided to share the rental proceeds equally, but she received none. In her later affidavits and after being pressed in cross-examination, she changed her evidence and stated that the rent was to pay the loan and maintain the premises.
- [11] The Claimant stated that she had used her own money to purchase household furniture, pay utility bills and take care of the children after they migrated to live with her. She bore sole responsibility for the rent for the house in which she lived with the children in the USA as the children migrated at short notice, at the insistence of the Defendant and she had to relocate from her mother’s house to accommodate them adequately. She also sent money to Jamaica to invest but lost it in the Olint scheme. She worked as a team with the Defendant, and they shared responsibility as a couple. She relied on the Defendant to handle their affairs. She, however, disagrees that the loan that the Defendant had obtained from his mother is related to her as she deemed it a transaction between him and his mother.
- [12] The Claimant contended that she maintained her interest in the property and had never abandoned it. She had constant communication about the matrimonial home

with the Defendant and was updated. She also knew of the change of the loan to the Bank of Nova Scotia for a lower interest rate and that the previous loan was discharged in 2010. She spoke of discussions she had with the Defendant as he would keep her informed about the tenants and issues regarding the property. An email sent to Claimant by the Defendant dated November 18, 2013, about a problematic tenant, was further proof of their discussions. Another email dated January 3, 2019, concerning the application for a replacement title was also admitted into evidence. Furthermore, she stated that over the years, whenever she returned to Jamaica, she would visit the premises. She visited the property after her father's passing in 2007 and later in 2008 and 2012 when she prepared the property for incoming tenants.

- [13]** The Defendant asserted that after they were married, the Claimant made the unilateral decision to change her job and relocate to Montego Bay with the children. He said he visited them at the rented premises at West Gate Hills on the weekends but did not live there with them. He also stated that the Claimant again unilaterally decided to resign her job and migrate to the USA, thereby abandoning her family and the house they bought together.
- [14]** He said the property at Bogue was never purchased as a family home but rather as an investment for himself. He defined investment property in cross-examination as "something you buy into". He insisted that there was no discussion between the Claimant and himself about the property becoming the matrimonial home. He further elaborated that there was no agreement, indication or intention that the property was matrimonial property but was to "honour our obligations jointly". He said that the matrimonial home was in New Jersey, USA, purchased in 2012.
- [15]** The Defendant asserted that the Claimant abandoned her family in July 2007 when she left for the USA, leaving him with two children and all the financial obligations. The Claimant only lived in the house for approximately one and a half years before moving to the USA. She left without telling him of her plans, nor did she communicate with the family for some time after moving. He had to demand that

she get the children into school by September 2008 and that she files his immigration petition.

**[16]** The Defendant further declared that after the Claimant's abandonment, he was left with servicing the loan for the house until January 2016. He did not advise her of securing a Bank of Nova Scotia loan after the initial mortgage was discharged. He later conceded during cross-examination that he informed her that he had obtained a loan during a telephone conversation. He pointed out, however, that he alone discharged that loan.

**[17]** The Defendant asserted that he rented a part of the premises, paid the taxes, and saw to the property's maintenance and improvements since the Claimant abandoned it. He said that the Claimant had never asked anything about the premises, and neither did he account to her in any way about anything concerning the property since she abandoned it in August 2007. He was never put in charge of renting the property. Instead, he rented the property as he was the only family member left in Jamaica. For that, he incurred several expenses. He further stated that the Claimant's evidence about the amounts charged for rent was an indication that she knew nothing about the property, as only the original section was rented and it was never rented for \$40,000.00.

**[18]** The Defendant gave evidence that he regularly sent monies to the Claimant to help maintain his family overseas. In contrast, she, on the contrary, did not send him any funds to assist with taking care of the property. The Defendant declared that expenses in the USA were shared between both parties whilst he was solely responsible for the Jamaican expenses. He argued that the Claimant was not being truthful about her being responsible for expenses in USA and him for the Jamaican expenses. He testified that in 2012 he had sent US\$35,000.00 to purchase the matrimonial home in New Jersey.

**[19]** The Defendant also contended that even while he lived in the USA, he would visit the property at least twice annually to effect repairs and ensure the property's safety and security. He could not say the same for the Claimant. He said that since

the Claimant left the premises in August 2007, she has never returned to it. Until the present claim, she has shown no interest in the property, never contributed, knew nothing about the property, never visited, never made inquiries, and made no demand of him to hand over rent.

- [20]** The Defendant further stated that the Claimant had visited Jamaica several times on vacation and on sick leave but had never volunteered her time to the property nor visited. She has never paid property taxes, spent no time cleaning or preparing the house for new tenants and left no belongings at home. The Claimant had sent money (the Defendant recalls US\$10,000), but he gave it to her friend and was later told that they lost money in Olint. Such sums sent were never for the house.
- [21]** Mrs. Holdene Alfred also gave evidence that once the Claimant left in 2007, she never returned to the property on her several visits to the island, even when she was in the company of the children. The children would have travelled to the Bogue property with their father, but the Claimant would not go with them.
- [22]** The Defendant stated that he has been in exclusive occupation of the property since 2007. He claimed to have used the property as his business office and indicated that he used the property's address as his business address. He said he had also changed the locks and gates without the Claimant's knowledge, and she no longer had any access to the premises. He also changed the locks to ensure she could not enter or interfere with his tenants or with his exclusive possession.
- [23]** The Defendant said that he sent the Claimant an email about a problem tenant to inform her of the occurrence. Still, she was not a party to the resolution and neither did she involve herself in resolving it. He also sent an email in 2020 concerning the property, but he said his focus was on the loan owing to his mother. He said that the purpose of his other email about selling the property and giving the Claimant her half was not an admission because he had no intention of selling but rather wanted dialogue about the property and the loan to his mother.

- [24] The Defendant gave evidence that the title for the disputed property could not be found, and as a result, a lost title application had to be made. He claimed that the Claimant hid the title for the property, so he had to obtain a replacement title. He signed the relevant documents on her behalf as she was overseas and unavailable, as it was their custom to sign for each other. The replacement title was issued on June 4, 2018.
- [25] The Claimant denied having any such agreement or custom with the Defendant and had never signed any document on his behalf. She said she was unaware that the Defendant was applying for a replacement title. She further stated that it was because he had forged her signature and obtained the replacement title that she had no confidence in the Defendant proceeding with the sale of the house and dealing with her justly, so she had sought the court's intervention in the division of the matrimonial home.
- [26] The Defendant, in cross-examination, testified that he did not know whether the Claimant trusted him. In response to the suggestion of the Claimant trusting him to handle their affairs honestly, he stated that they both had an interest, and so both had a responsibility. He also noted that it was not prudent for him alone to handle all the expenses of the Bogue Property, and he would not say they were partners in marriage because the responsibility was not shared. When asked whether the Claimant had an interest in the property, he responded, *"I recognise that she should have shared responsibility. I'm not going to say yes, exactly. But I'm not particularly saying yes to 50%, not sure of what percent"*.
- [27] The parties lived together after he migrated in December 2009 until 2019, when they separated, and the Defendant filed a petition for the dissolution of their marriage on 6 January 2020. In his divorce petition, the Defendant stated that the date of their separation was December 2017. However, in cross-examination, he stated that they separated in September or October 2017. The Claimant on the other hand, stated that they had been living separate and apart since May 2019, when the Defendant left the matrimonial property.

## **SUBMISSIONS**

### **For the Claimant**

- [28]** Mrs. Dameta Franklin, attorney-at-law for the Claimant, stated that the areas of dispute were:
- (a) whether the property is the matrimonial home;
  - (b) whether the Claimant is entitled to 50% interest in the property or whether any factors stated in section 7 of PROSA exist to displace the equal share rule;
  - (c) whether the Claimant abandoned her beneficial interest in the property; and
  - (d) whether the Claimant is entitled to occupational rent, and if the answer is affirmative, in what amount?
- [29]** No evidence was led, nor was the issue of occupational rent pursued in the later written and oral submissions. So, I considered that this remedy was abandoned for all intents and purposes.
- [30]** Counsel highlighted several aspects of the evidence to show that the house was purchased and occupied as the family home. The court was also asked to consider the course of conduct of the parties when they acquired the property.
- [31]** The Claimant moved to a rented property with the children, and later, the Defendant resided with them on the weekends rather than returning to the house that he had owned with his mother in St. Catherine. The parties bought the property together and made substantial improvements before moving in as a family. The entire family resided there, and although the Defendant has said that he purchased the property as an investment, he did agree that as a husband, he was making a home for his family.
- [32]** Mrs. Franklin argued that based on its usage, the property was indeed the family home and, therefore, the Claimant is entitled, by law, to a 50% share of the legal

and beneficial interest. She pointed out that no section 7 factor existed to cause the court to vary the equal share rule.

- [33] Counsel asked the court to find that the Claimant did not discontinue possession, nor was she dispossessed. Counsel argued that, at all times, the couple acted together as a unit for the benefit of the family. She submitted that the parties agreed that the Defendant would take care of the family's financial obligations in Jamaica. At the same time, the Claimant would deal with the cost of living and finances to care for the family in the USA while also making provisions for his resident status application. This led to the eventual reunification of the family in the USA.
- [34] Mrs. Franklin urged the court to reject the Defendant's evidence and that of his mother that the Claimant had never visited the house after she left in 2007. Counsel also asked the court to consider that the parties had lived together since 2000. She however conceded that although both parties lived in the same house they lived separate lives from May 2017 as indicated by the Defendant.
- [35] With respect to the Defendant's claim of adverse possession, Mrs. Franklin submitted that to prove a claim in adverse possession; the Defendant is required to establish open, undisturbed and exclusive possession of the property to the exclusion of the Claimant. She argued that the evidence was pointing in the opposite direction as the Defendant would be in a subsisting marriage while acting in secrecy. In other words, the defence's claim of adverse possession meant that the Defendant would be scheming to deprive the Claimant of her interest in the property while they were still married, living together and acting as a unit and even having amicable communications about important issues relevant to the property.
- [36] Counsel relied on **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47; **Jacqueline Elmay Christian v Octavious Christian** [2012] JMSC Civ 36; **Patricka Wiggan-Chambers v Anthony Delroy Chambers** [2014] JMSC Civ 18; **Donna Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court, Jamaica, Claim No 2006HCV03158, judgment delivered April 8, 2008; **Pansy**

**O'Connor Reid v Evan Reid** [2014] JMSC Civ 110; **Wills v Wills** [2003] UKPC 84; and **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37.

### **For the Defendant**

**[37]** Mr. Anthony Williams, counsel for the Defendant, argued that PROSA is irrelevant as the LAA supersedes it. He submitted that the main issue was whether the legal title of the Claimant had been extinguished by virtue of the provisions of sections 3 and 30 of the LAA. Counsel stated that the court would have to consider the following sub-issues:

- (a) whether the Claimant abandoned the property from July 2007 to December 2019;
- (b) whether the Defendant had factual possession and the intention to take possession of the property from July 2007 to December 2019;
- (c) whether there was an agreement between the parties that the Claimant would take care of the family expenses in the USA while the Defendant would take care of the expenses in Jamaica as alleged by the Claimant; and
- (d) what are the consequences when a joint proprietor of a paper title is deemed to have abandoned the subject property?

**[38]** Counsel asserted that there was clearly factual possession on the part of the Defendant, who also intended to assume full ownership in his own name and exclude the Claimant as title owner. He submitted that this was obvious as the Defendant single-handedly paid the mortgage, taxes and maintenance and had the sole responsibility of renting, changing locks and converting the premises for his business.

**[39]** Counsel further submitted that there was no agreement about paying expenses because the Defendant financed both the US and Jamaican debt, and nothing was shown by the Claimant to disclose expenditures incurred nor how she financed them.

- [40] He added that it was significant that Mrs. Holdene Alfred was never cross-examined about her assertion that had she never seen her daughter-in-law, the Claimant, at the property after the funeral in 2007.
- [41] Mr. Williams urged the court not to interpret the fact of the Defendant obtaining the replacement title with the Claimant's name thereon as an indication that she was not dispossessed. He argued that this should not be seen as "the slightest of action taken by the Claimant" because the Defendant initiated the process. He added that the Claimant could only have asserted that she was not dispossessed or discontinued possession if she had personally generated the discussion or taken steps to replace the title.
- [42] Counsel argued that the Defendant was never an agent for the Claimant. He stated that there was no discussion on that subject or any such agreement between the parties. Additionally, Counsel highlighted that the February 2020 email message was irrelevant because the Claimant's rights had already been extinguished by that time, and the Defendant was "just talking about what was on the title". He also asserted that the court should look at the circumstances of the email, which spoke to the sale of the property and the Claimant owning a 50% interest and find that it was not an admission of her rights to the property as the Defendant was not accounting to her. Counsel reasoned that the Defendant was simply returning to Jamaica and wanted to inform the Claimant about the loan owed to his mother and the financial outgoings of the property.
- [43] Counsel relied on **Buckinghamshire County Council v Moran** [1989] 2 All ER 225; **Goomti Ramnarace v Harrypersad Lutchman** [2001] 59 WIR 511; **Recreational Holdings 1 (Jamaica) Ltd v Lazarus** [2016] UKPC 22; **J A Pye (Oxford) Ltd and Another v Graham and Another** [2002] UKHL 30; **Powell v McFarlene and Another** [1979] 38 P & CR 452; **Wills v Wills**; **Valerie Patricia Freckleton v Winston Earle Freckleton** (unreported), Supreme Court, Jamaica, Claim No. HCV 01694 of 2005, judgment delivered 25 July 2006; **Dawn Davis v Delrose Gray** [2018] JMSC Civ 145; **Paradise Beach & Transportation**

**Company Ltd and Others v Cyril Price-Robinson and Others [1968] UKPC 1;  
and Winnifred Fullwood v Paulette Curchar.**

## **ISSUES**

**[44]** I have considered the submissions and the authorities that were advanced and relied on by the parties. I have reduced these to the undermentioned main issues. I have also referred to several authorities that they both relied on. My failure to mention all their authorities in my analysis does not indicate that I did not consider them essential but rather that I found those highlighted of greater importance to my decision. I am grateful to both sides for their erudite submissions.

**[45]** I find that the relevant issues to be decided on are:

1. whether PROSA is applicable where the opposing spouse is claiming a right by virtue of adverse possession;
2. whether the Claimant discontinued possession;
3. whether the Claimant has been dispossessed;
4. whether the property is the family home; and
5. whether the interest of the parties in the property should be adjusted, taking into account section 14(2) of PROSA.

## **LAW AND ANALYSIS**

### **Issue 1: Whether PROSA is applicable where the opposing spouse is claiming a right by virtue of adverse possession?**

**[46]** The Claimant brought the action under the PROSA. This legislation was enacted to take effect in place of rules and presumptions of the common law and equity concerning transactions between spouses in respect of their property rights (section 4 of PROSA). In recognition of the importance of the family home in a union, PROSA has separated the family home from other matrimonial property. Section 2 states that the family home is:

*'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'*

**[47]** Property is defined as:

*'any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled'*

**[48]** Notably, the definition of family home and property is not limited to whether both parties are registered title owners. In fact, PROSA does not limit ownership or an interest in property to whether there is a registered title. This is because a spouse may apply to the court under section 13 for division of property, and such right is not confined to whether their name is on the title. The only prerequisite is that one spouse is the owner or has an interest in the property. The application is made within 12 months of separation or dissolution of marriage or such a longer period as the court permits. That means a person may claim an interest or entitlement in the family home or other matrimonial property without ever being a registered title owner simply by virtue of being a spouse. The court is then at liberty to act pursuant to section 14 of PROSA.

**[49]** In the case at bar, the Claimant filed the action on the basis that the parties have separated and there was no likelihood of reconciliation. The date of separation was found to be May 2017. The Claimant sought and was granted permission by the court for an extension of time for the application to be made. As such, the matter is properly before the court.

**[50]** Sections 3, 4(a) and 30 of the LAA bars any person from entering or bringing any suit after 12 years from the time that person discontinued possession or was dispossessed and his or her title is extinguished. Section 14 clarifies that the LAA

also applies to co-tenants because the possession of one is not the possession of all.

[51] Section 3 provides that:

*“No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”*

[52] Section 4 states that:

*“The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-*

*(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;*

*(b) ...”*

[53] Section 14 provides that:

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

[54] Section 30 states that:

*“At the determination of the period limited by this Part to any person for making an entry., or bringing any action or suit, the right and title of such*

*person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.”*

[55] Dispossession refers to a person “coming in and putting another out of possession, while discontinuance refers to the case where the person in possession abandons possession and another then takes it” (**Powell v McFarlane** at page 468). At common law, possession entailed both factual possession and *animus possidendi*. Lord Browne-Wilkinson in **J A Pye** at paragraph [40] defined these to be:

*“1. a sufficient degree of physical custody and control (‘factual possession’);*

*2. an intention to exercise such custody and control on one's own behalf and for one's own benefit (‘intention to possess).”*

[56] Where the acts being relied upon are equivocal, the court will find that the person claiming to have dispossessed another did not have the requisite *animus possidendi* (**Powell v McFarlane** at pages 472 and 475). The intention is that of the person in possession (**J A Pye**). It is a question of fact in determining when the period of separate possession commenced. There is no general presumption of a fiduciary duty between husband and wife. However, such a relationship might become material if pleaded and proved on the particular facts (**Wills v Wills** at paragraph 27).

[57] The case at bar raises a unique issue of whether a husband not separated from his wife may claim adverse possession for a property registered in both their names during the subsistence of their marriage. If the Defendant is to be believed, the Claimant’s title was extinguished at the latest July 2019, which is one year six months after their separation (according to the date stated in the petition). Such a situation was alluded to by the Langrin JA (Ag) in his Court of Appeal judgment in **Wills v Wills** when he stated-

*“A dishonest spouse who remains on the property while the other spouse goes abroad to increase the family welfare could easily claim an interest under the Limitation Act after a lapse of 12 years.”*

[58] Since **Wills v Wills**, there have been several cases concerning the extinguishment of the title of spouses. They primarily concern recovery of possession involving separated spouses or the new partner of a deceased spouse who is in possession. However, the case of **Fay Veronica Wint-Smith v Donald Anthony Smith** [2018] JMSC Civ 62 is similar to the case at bar, as the wife claimed adverse possession of a property after she was solely in possession and was also solely responsible for paying the mortgage. Her husband allegedly told her that he no longer had any interest in the property, and the husband, in turn, sought a repayment of funds he had contributed towards the deposit. Mrs. Smith-Wint's counsel argued that Mr. Smith no longer had an interest in the property because of that agreement. His wife had assumed all the responsibilities relating to the care and maintenance of the property, and, as a result, she was entitled to the entire interest. Counsel also argued that Mr. Smith had not made an entry upon the land since 2003 or had taken any action or made any claim to assert his legal interest in the property. She, too, relied on sections 3 and 30 of the LAA.

[59] Pettigrew-Collins J (Ag) (as she then was) had this to say at paragraph [80]:

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

[60] The fact that marriage, at least a subsisting marriage, is a partnership of equals cannot be minimised. Lord Nicholls of Birkenhead in **Miller v Miller; MacFarlane v MacFarlane** [2006] 2 AC 618 at 633 stated that because marriage is a partnership of equals with the parties committing themselves to share their lives

and living and working together for the benefit of the union when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary: fairness requires no less.

[61] However, the concept of marriage being a partnership does not hold when the parties have separated, even if not legally divorced. As such, I believe that the principle expounded in **Wills v Wills** and subsequent cases concern instances of spouses being separated so that the accrual of time for the purposes of LAA commences at the date of separation. This view is strengthened by the fact that under PROSA, spouses' interest in the property is to be determined at the date of separation or, if still living together, at the date of the application to the court (section 12(2) PROSA).

[62] I, therefore, find that PROSA applies to the case at bar as the parties both contributed to the acquisition and improvement of the property, were living together for over 15 years and were separated for more than 12 months prior to the making of the application. I will, however, endeavour to address the issue raised by the Defendant of whether the Claimant's rights have been extinguished by virtue of the LAA.

## **Issue 2: Whether the Claimant had abandoned possession of the property?**

[63] The concept of possession in its fullest and legal sense consists of two constituent elements: (1) factual possession, which is a sufficient degree of physical custody and control over the property in question, and (2) the intention to exercise such custody and control over the property on one's own behalf and for one's own benefit ('the *animus possidendi*') (per **Fullwood v Cuchar** paragraph [51]). Thus, if the law attributes possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess. The requisite intention is to possess and not necessarily the intention to own (see **J A Pye**).

- [64]** The circumstances should show sole and undisturbed possession, user and enjoyment deliberately, adversely and exclusively exercised for the limitation period to prove factual possession. For the purpose of the LAA, possession of a co-tenant is not presumed to be the possession of any of the other co-tenant as it is at common law. The co-tenant in possession is not in a different position from a stranger in possession of a separate property so far as regards the undivided interest of his co-tenant.
- [65]** The court has to look at all the circumstances to determine whether the Claimant had discontinued possession of the property. I meticulously perused the evidence of both parties to determine wherein lies the truth of this relationship and the interactions of the parties. I also had the opportunity to observe all three witnesses as they gave evidence. It is important to the determination of the evidence to consider how the parties conducted themselves to determine whether there was an abandonment of the family and the house.
- [66]** The Defendant vigorously maintained that the Claimant abandoned her family and the house at Bogue. He has challenged her evidence in this regard, contending that since she left the house in August 2007, she has never returned and, as such, has abandoned her interest therein. Counsel, Mr. Williams, argued that the Claimant, having not visited the property and has displayed a total disinterest in the operations and maintenance of the property, represents proof that she had abandoned her share.
- [67]** The Claimant was candid and admitted that it was not on every occasion that she visited the island that she went to the property in Bogue. It is her evidence that she came back to Jamaica in 2007 for her father's funeral in Harbour View, and she insisted that she travelled with the Defendant, his mother and their two children to the property at Bogue and spent some time there. She also came back to Jamaica in May 2008, and she visited the property. In December 2008, she returned but did not visit the property.

- [68]** The Claimant said that she returned to the island in 2012 with The Defendant and the children on vacation. They spent a few days in St. Thomas, spent one night at his mother's house, and from there, they went to the house at Bogue and spent one night. She said that the entire family returned to the home to clean and prepare the premises with the help of additional personnel employed by the Defendant to make the property ready for incoming tenants. They completed their vacation and all travelled back to the USA as a family on September 2, 2012. She returned to Jamaica in 2017 and 2019 for her brothers' weddings but did not visit the property on those occasions. She came with the two children on both those occasions, and they all stayed at her mother's house in St. Thomas.
- [69]** The Claimant has also stated that the agreement she had with the Defendant was that he would take care of the house and all the dealings with it while she concentrated on building a life for the family in the USA. She said he kept her informed of his dealings involving the property. They agreed that only a portion of the property would be rented, and the rent would be used to offset the mortgage.
- [70]** The Claimant denied that the Defendant had purchased furniture for the family while she was working in the USA. She said that she had purchased all the furniture for the apartment with her credit card, and so when the Defendant migrated, he was welcomed into a furnished home. She, however, admitted that the Defendant had sent her money from Jamaica, but it was not on a monthly basis.
- [71]** I believe the Defendant when he said that the Claimant did not pay any property taxes. The Claimant did not recall spending any monies on the repair of the house nor for maintenance. I believe that she did not recall any such events because they did not happen. She also did not communicate with any of the tenants. She was not even aware of the sum collected for the rental of the property over the years. She did not recall the actual sum of the mortgage. I find that the Claimant did not know several pieces of information that could be considered very important in relation to the property. The defence argues that these pieces of information were

incidents of ownership, and a property owner ought to have knowledge of these if they were interested in maintaining ownership of the property.

- [72]** The Claimant, when pressed by Counsel, Mr. Williams, in respect of her lack of knowledge concerning the property, responded that when she and the Defendant made the decision for her to seek work in the USA they spoke at great length about how the household in the USA would be taken care of. She said they did not go into specifics about the amount of money for rent, but they knew that whatever was collected would go towards the mortgage. She emphasised that the decision was for her to pave the way for his USA citizenship and that of his mother.
- [73]** Mr. Williams challenged the Claimant's assertions and suggested to her that there was never any discussion between the parties about the property. He contended that changing the gate and the locks meant that the Defendant was effectively excluding the Claimant from possession of the property, thereby giving himself exclusive possession. The Claimant strenuously denied this.
- [74]** The parties seemed to have had a normal relationship where they were partners working towards the common goal of caring for their family. I find the Claimant to be more credible in regard to how they managed their affairs, including the Bogue property. On a balance of probabilities, I find that they structured their lives so that the Claimant would concentrate her efforts (financial and otherwise) in the USA by providing the framework to facilitate the reception of her family permanently in the USA. I believe that it was the agreement between the parties that she would concentrate her financial resources to establish a life in the USA for the family while the Defendant would be responsible for the assets in Jamaica for the benefit of the entire family.
- [75]** Based on the evidence of a common agreement, I do not find favour with the Defendant's submission that there was an abandonment of the property by the Claimant. In my view, the Claimant's actions indicated a wife who was working to improve her family. Based on the evidence, I find that the parties were working as

one unit and, as such, would have had a joint purpose as was asserted by the Claimant.

**[76]** The evidence elicited reveals that the Claimant was a mother and wife going ahead of her family in the USA, as thousands of Jamaican females do, seeking a better life for their families. Her evidence is that she left her family, here in Jamaica, in the house at Bogue, to go overseas to work and put things in place so that it would later facilitate their smooth reception in the USA. It would allow her to work and be financially able to provide for them when they later migrated to live with her. She was able to accept the children within one year of her departure and later applied for residency for the Defendant and his mother to become citizens of the USA. I find that the defence has not presented any cogent evidence of the abandonment of the family.

**[77]** I bear in mind that the Defendant and his mother have stated that it was because of his insistence that the children migrated as early as they did. I believe both of them on this issue because it is the Claimant's evidence that the children's early arrival caused her additional problems with finding new accommodations. I am of the view that she was not yet ready to receive them at that time, and things were not in place for them to come and live with her.

**[78]** I considered the demeanour of the witnesses and I found that the Defendant has not been forthright. I am inclined to accept the Claimant's evidence that she visited the property between July 2007 and 2012. I also accept that she had discussions with the Defendant about the property, as shown by the email of November 18, 2013, where the Defendant spoke of a "problematic tenant". If the Claimant had, in fact, discontinued possession and abandoned the family and property in July 2007, it would have been highly improbable that the Defendant would have sought to inform her of any issues with a tenant or any issue touching and concerning the property.

**[79]** I also accept that the Claimant left items at the property after she moved to the USA in July 2007. It would similarly be doubtful that she would have taken all her

personal belongings to reside at her mother's house in the USA, especially as the Bogue property was still her home where her children and the Defendant continued to live. When the Claimant left the property in 2007, I do not believe that she took all her personal belongings with her.

[80] Therefore, in all these circumstances, I find that the Claimant did not discontinue possession of the property.

### **Issue 3: Whether the Claimant has been dispossessed?**

[81] Mr. Williams maintained that the Defendant had dispossessed the Claimant and that her title had been extinguished before she filed this action for division of property. Therefore, she does not have any right to the said property. He further argued that PROSA was subject to the LAA. The thrust of this argument is that if the Claimant's rights have been extinguished because of the LAA, then PROSA will not assist her in either resuscitating or extending those rights because they have been permanently extinguished. He relied on **Valerie Freckleton v Winston Freckleton** at paragraph 18 where Sykes J (as he then was) opined;

*"The person who is claiming that the title of the paper owner has been extinguished has to establish that there was (a) occupation or physical control of the land and (b) an intention to possess. Intention to possess here means the statement of mind which says that the dispossessor has it in mind to possess the land in question in his own name or on his own behalf to exclude the world at large including the paper title owner, so far as this is possible."*

[82] Mr. Williams also relied on **Fullwood v Curchar**, where it was further cited that "where the person against whom the claimant has brought the action pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute: The Laws of England, The Earl of Halsbury, Volume 24 paragraph 606 and **Dawkins v Penrhyn (Lord)** (1878) 4 App Cas 51" ( see para [39]). He further relied on Lord Penzance's statement in **Dawkins v Penrhyn** that "... the Statute of Limitations applying to real property, ... goes to the root of the Plaintiff's title". Mr. Williams has maintained that the Claimant has not proven that she has a legal title to possession that has not been barred by LAA.

- [83] It is therefore important to examine the Defendant 's dealings with the property to determine whether he had the requisite intention to dispossess the Claimant. It is not an issue that he held the property jointly with the Claimant. Neither is it an issue that he had factual possession of the property. I also bear in mind that the possession of one joint tenant is not the possession of the other. It is, however, uncertain whether he had the requisite intention to take control and custody for his own benefit and in his own name for 12 years, as most of the acts relied on by him are equivocal in these circumstances.
- [84] The Defendant's payment of taxes, maintenance and the mortgage may signify his intention to preserve and protect the property for himself and or his family, including the Claimant. His renting the premises may also show an intent to acquire funds that could assist with expenses, whether to maintain the property for himself or the family or preserve some of his income that could be sent to his family.
- [85] The Defendant changing the gate and the locks and not giving the Claimant a key could be viewed as him excluding her and the rest of the world from the property. In converting the property to do business without informing the Claimant, his actions displayed the requisite intention to use the property for his own benefit and in his own name. These acts, taken together, could be viewed as him having sole possession of the property for his own benefit and thereby excluding the world at large.
- [86] The court considered the cases relied on by the defence to support their contention that the Defendant had dispossessed the Claimant. The case at bar is distinguishable from **Wills v Wills**, **Fullwood v Curchar**, **Lois Hawkins (Administratrix of the Estate of William Walter Hawkins) v Linette Hawkins McIniss** [2016] JMSC Civ 14, as, in those cases, the intention of the other party were evident, as they had moved in new partners onto the properties. In **Hawkins v Hawkins**, the wife was not allowed onto the property. In both **Wills v Wills** and **Fullwood v Curchar**, the wives were separated from their husbands, they had never visited the property after leaving home, and their husbands resided thereon

with new partners. On the other hand, the Defendant denied any allegation of infidelity and maintained that the date of their separation was September or October 2017.

**[87]** The law is very clear that the dispossessor must have the intention to dispossess the co-tenant or the owner of the land. A careful analysis of the email messages sent to the Claimant by the Defendant clarifies that he had no intention to dispossess her, nor did he consider himself to be abandoned by her. I considered the following:

1. Email of November 18, 2013

**[88]** The conclusion derived from reading this email is that the Defendant was informing the Claimant about the tenant who was not paying the rent for the property. This is evidence of the Defendant keeping the Claimant informed of the happenings in respect of the property. It does not show an intention to dispossess the Claimant. I believe that if the Defendant had the requisite intention to assert exclusive possession of the property for his sole benefit, then he would never have sent this email.

2. Emails dated May 10, 2017, and November 22, and 28, 2017

**[89]** The Defendant sent these to the Claimant to discuss issues touching and concerning the property. I believe the content of the email of November 22, 2017, is important to the issue of whether he had dispossessed the Claimant. As such, I will reproduce the contents of that email in its entirety (with the errors as is):

*“Fiona,*

*My tip (sic) to Jamaica, as was briefly discussed several weeks ago involve the following;*

*1. Arrangements previously made to have the gate replaced at bogue village; cost not yet confirmed*

*2. Replacement (sic) of side door to tv room-arranged for Saturday morning-peter Stuart*

3. *Repairs to back fence-arranged for Saturday morning – Garnett*
  4. *Repairs to roof leaks at bogue village – arranged for Saturday (sic) – Steve*
  5. *Repairs at the entry; raising the level of the entry driveway to stop water from coming into the yard-Steve*
  6. *JIQS INDUCTION/ member registration*
  7. *Update of will*
  8. *Meeting with lawyer in relation to replacement of title; scheduled for Friday*
  9. *Meeting with new/potential tenant at Portmore (sic) and arrangement of plumbing repairs to house; estimated cost \$30,000*
  10. *Collected registered letter*
  11. *Meeting with CLAD Construction –business proposal – Thursday pm*
  12. *Registration with the banking sector as a licensed Quantity Surveyor to do business-scheduled for Friday NCB; BNS ETC.*
- The rest I can't recall now."*

**[90]** The Defendant also sent the Claimant several other emails informing her about the application for the replacement of the lost title. When it was replaced, he made sure to inform her and send her a copy of the title.

**[91]** All these emails are cogent evidence that the Defendant did not consider himself the sole owner of the property nor did he exhibit the necessary intention to possess the property for himself alone and to exclude the Claimant as a title owner. I believe that if he intended to exclusively possess the property, he would not have taken the time to keep the Claimant informed, giving such specific details of matters touching the property, which only a title owner should be concerned with.

**[92]** Mr. Williams argued that the Defendant did not inform the Claimant of any action that he took since she abandoned the property because he saw himself as the owner of the entire legal estate. Mr. Williams contended that the Defendant had the intention to dispossess the Claimant and thus did not account to her for anything done since she migrated. He said that the court should not construe the

discussions about the tenant as an admission by the Defendant that he was acting as the Claimant's agent.

**[93]** I note too, that the Defendant denied keeping the Claimant informed of matters relating to the property. I also observed that the Claimant was vigorously cross-examined in order to prove that she did not have any knowledge of the maintenance nor of the tenants of the property since she abandoned it. Counsel, Mr. Williams, asserted that she was unaware that the gate and locks were changed and that any repairs were done on the property.

**[94]** I find that the evidence given by his client contradicts Mr. Williams' contentions. It is pellucid that the Defendant was in detailed discussions with the Claimant, keeping her up to date on the happening with their property in Bogue. Furthermore, in his affidavit filed on January 28, 2021, the Defendant admitted that he had discussions with the Claimant about the possibility of taking legal actions against a tenant with whom he was having difficulties. In cross-examination, he explained that his reason for sending her the correspondence was to inform her of what was taking place at the property, but she was not a part of the resolution of that matter.

**[95]** The Defendant's evidence is replete with discrepancies relating to his assertions that the Claimant had abandoned the property and that he had occupied it for his own use and benefit thereby excluding her. There is an abundance of evidence which indicates that over the years the Defendant was accounting to the Claimant for his dealings with the property.

### 3. Emails dated February 2, 2020, and February 12, 2020

**[96]** The Defendant informed the Claimant that he had already started getting the subject property sold to honour her entitlement of 50% of the sale proceeds. He added that there would be an expense for the valuation of the property. He would also provide her with a statement outlining the expenses incurred for the upkeep and maintenance of the property from January 2008 up to the present day. He also

wrote that expenses were still being incurred and taxes were due, and there was a loan from his mother that was also to be considered.

[97] From the tone of these emails, it was obvious that the Defendant intended to withdraw the cost of these items from the Claimant's portion of the 50% sale of the property and wanted her to pay for the years of maintenance and repair works to which she had not made any contributions. He also expected her to assist in the repayment of the loan he had received from his mother for the home improvement.

[98] The Defendant's expectations run contrary to the position being argued by Mr. Williams. It certainly would be against fairness and justice to ask the Claimant to pay expenses for a property for which she has no rights of ownership.

[99] I considered the case of **Raymond Lincoln Oliver Johnson v Angela Eunice Johnson** [2015] JMSC Civ 112. The court was also tasked to determine whether Mrs. Johnson had dispossessed her husband. In that case, the wife had filed a fixed date claim form seeking orders to include a declaration that she had acquired title by possession to all the interest in property registered in both her husband and her name. Like the Defendant in the instant case, Mrs. Johnson argued that her husband was not entitled to share in the said property because of his abandonment. She asked the court to declare that she was legally and beneficially entitled to all the interest in the said property.

[100] The evidence adduced in that case revealed that Mr. Johnson had not lived on the property for over 12 years. The property had been occupied by Mrs. Johnson, her children and her extended family, and she also rented out a part of the property. Mr. Johnson also did not benefit from the rental monies. Shelly-Williams J (Ag) (as she then was) found that Mrs. Johnson had been in sole occupation and had exercised control since 1999. The court, however, looked at all the circumstances of the evidence that was presented. Consideration was given to the fact that Mrs. Johnson would occasionally ask her husband for a contribution towards the mortgage for the property and even asked him to source a loan from his mother to build a perimeter fence for the said property. She also solicited funds from him to

pay for expenses in relation to the improvement and maintenance of the property. The evidence revealed that Mrs. Johnson continuously complained that Mr. Johnson had failed to help her with the property.

**[101]** The court found that these actions, when taken together, did not indicate that Mrs. Johnson intended to possess the property in her own right and in her own name to the exclusion of her husband and the world at large. There was evidence that implied that Mrs. Johnson had acknowledged that her husband had an obligation to maintain the property and, therefore, an interest in the property. The court found that there was no intention on the part of Mrs. Johnson to dispossess her husband.

**[102]** Mr. Williams asserted that these emails were not to be taken as an admission by the Defendant that the Claimant still had an interest in the property or that he was accounting to her. Instead, he argued that the Claimant's interest had already been extinguished by the time the emails were sent. As such, these communications should be seen as the Defendant merely sending her information. I am unable to agree with Counsel's contentions.

**[103]** It is illogical to describe the content of the emails as simply the passing on of information to the Claimant. At the heart of these emails is the recognition by the Defendant that the Claimant had an interest in the property, and I do believe that he gave her assurances that she would get her fair share after he had deducted the cost of maintenance and upkeep for the many years he alone paid those bills. It certainly was not an admission that he alone, in 2020, owned the property.

**[104]** I find all these emails from the Defendant to the Claimant to be compelling evidence that suggested that he was taking care of the property for the benefit of both parties and that he had no intention to dispossess the Claimant. In these out of court communications which predated the filing of the claim he had the opportunity to deny her having any right to the property. Instead, he acknowledged her interest and also declared that after the property was sold, her entitlement of 50% of the sale proceeds would be honoured. Therefore, I do not accept the Defendant's evidence that he had no intention of selling and only wanted dialogue.

He even went as far as informing her that a statement would be provided of the expenses which she owed. That, to my mind, is the evidence of his admission that he was not the only owner of the property but was also accountable to the Claimant, his wife and co-owner, as to the proposed future dealings with the property. I, therefore, reject defence Counsel's submission that the email was simply about the Defendant moving to Jamaica and passing on information about how things were progressing.

#### 4. Forging the Claimant's signature

[105] I believe that the circumstances surrounding this incident showed that the Defendant thought he was an agent of the Claimant, acknowledged her interest in the property, and did not have the intention to assert possession of the property for his sole benefit and in his own name.

[106] The Defendant stated that he and the Claimant had the habit of signing for each other over the years in the absence of the other party. The Claimant denied this and stated that she has never forged the Defendant's signature on any document. He pointed to the Claimant signing his signature on the 2010 IRS Tax Returns & Homeland Security Biometric form she filed in his absence. I took note of the signature on the form as highlighted by the Defendant. However, it was never explicitly drawn to the Claimant's attention to ascertain whether that was the Defendant's signature or whether she had signed on his behalf.

[107] Mr. Williams argued that once there is an agreement between the parties for such signing to occur, it becomes a custom and would be perfectly lawful for the Defendant to act in that fashion. Such an argument implies that the law of agency arises to be considered as to whether the Defendant was an agent for the Claimant.

[108] I cannot agree with Counsel's restatement of the law as it relates to custom. According to **Black's Law Dictionary, 9<sup>th</sup> edition**, a custom is a practice that by its common adoption and long, unvarying habits has come to have the force of law.

In the context of marital relationship, a custom is an acceptable norm/behaviour that is mutually accepted between both parties as the norm in their relationship. Mr. Williams, in claiming that a custom had developed between the parties in executing documents on behalf of each other, was inadvertently raising the issue of agency/principal. In considering this issue one must examine whether there can exist in the situation of a marriage an agency/principal relationship. Agency between a husband and wife does not exist unless it has been expressly or implicitly agreed that either of them would do specific acts or transactions as the agent of the other; and in the absence of any such agreement a relationship of agent/principal cannot arise on its own. The Claimant has denied any such agreement and I note that the Defendant did not have a power of attorney from her giving him the requisite authorisation to sign her signature on the document.

**[109]** I must say that the Defendant's act of signing the Claimant's signature in the presence of a Justice of the Peace and the attorney-at-law who represented him at the time, without a duly executed power of attorney is quite alarming, to say the least. It is a criminal act being supported by his attorney-at-law and deliberately aided and abetted by the Justice of the Peace. This raises issues that are best dealt with in the criminal arena, so for my decision, I will not distract myself with the legal implications of the forgery. I will focus instead on why the Defendant felt it was acceptable for him to sign for the Claimant.

**[110]** The Defendant's behaviour in signing for the Claimant is an indication that he purported to act as her agent. Based on his evidence, it is obvious that he believed he had her permission, and he was acting on her behalf. I believe that the Defendant did have discussions with the Claimant about the lost title application but I do not believe that he had her permission to sign on her behalf.

**[111]** Counsel, Mr. Williams, made heavy weather of the issue that the Defendant was not and never acted as the Claimant's agent. I disagree. I believe there is compelling evidence of the Defendant acting as the Claimant's agent. His conduct was not consistent with that of a man who believed that his wife had abandoned

him. The act of signing on behalf of his wife is, I think, cogent evidence that the Defendant had accepted and believed that he was an agent of the Claimant, especially in matters concerning the Bogue property.

[112] I find it incredulous that the Defendant vigorously refuted being an agent for the Claimant whilst confessing, under oath, of acting on her behalf while forging her signature on a legal document submitted to the National Land Agency to obtain a replacement title in respect of the property which, he said, she had abandoned. The Defendant claims this was a custom that he and the Claimant had adopted from the inception of their marriage. Yet, he does not accept that he was an agent entrusted by the Claimant to be responsible for renting and maintaining the Bogue property for the benefit of his family.

[113] Based on the evidence, it does appear that the Defendant has selectively decided that he would instead take the benefit of being an agent for the Claimant when it is convenient and to his advantage but would not be willing to adopt the burden of the said agency when it is to his financial disadvantage. The court finds it difficult to accept this level of reasoning and rejects the assertion that the Defendant was not acting as the Claimant's agent during the marriage in relation to the Bogue property.

[114] The evidence in its totality has shown that the Defendant had acknowledged the Claimant's interest and did not intend to have custody and control of the property for his own benefit and in his own name for the requisite limitation period. I, therefore, find that he had not dispossessed the Claimant.

#### **Issue 4: Whether the Bogue property is a family home?**

[115] Section 6 of PROSA states the presumption that each spouse is entitled to one-half share of the family home. Section 2 of the Act defines the family home as indicated at para [45] herein:

[116] Sykes J (as he then was) elaborated on the term "used habitually or from time to time by the spouses as the only or principal family residence" in **Peaches Annette**

**Shirley Stewart v Rupert Augustus Stewart** (unreported), Supreme Court, Jamaica, Claim No 2007HCV0327, judgment delivered November 6, 2007, at paragraph 23-

*“It should be noted that the adjective only and principal are ordinary English words and there is nothing in the entire statute that suggest 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 ones 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.”*

[117] The Claimant maintained that the Bogue property was the family home while the Defendant insisted that it was an investment for him and, as such, PROSA has no relevance. Both parties agreed that they have never lived together as a family at the Bogue property since 2013. The Claimant left permanently in 2007, the children in 2008 and the Defendant followed in 2013. The property, therefore, cannot be classified as the family’s permanent or usual residence. In 2012, they both acquired and moved into their New Jersey property which they classified as the ‘New Jersey family home’. An analysis of the evidence reveals that by the latest 2012, the Bogue property ceased to be the ‘only or principal family residence’. Therefore, the Bogue property falls to be considered under section 14 of PROSA.

**Issue 5: Whether the interest of the parties in the property should be adjusted, taking into account section 14(2) of PROSA?**

Section 14 of PROSA provides -

*“(1) Where under section 13, a spouse applies to the Court for a division of property the Court may-*

*(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*

- (b) *subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),*

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

(2) *The factors referred to in subsection (1) are-*

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

(3) *In subsection (2)(a), "contribution" means-*

- (a) *the acquisition or creation of property including the payment of money for that purpose;*
- (b) *the care of any relevant child or any aged or infirm relative or dependant of a spouse;*
- (c) *the giving up of a higher standard of living than would otherwise have been available;*
- (d) *the giving of assistance or support by one spouse to the other, whether or not a material kind, including the giving of assistance or support which-*
  - (i) *enables the other spouse to acquire qualifications;*  
*or*
  - (ii) *aids the other spouse in the carrying on of that spouse's occupation of business,*
- (e) *the management of the household and the performance of household duties;*

- (f) *the payment of money to maintain or increase the value of the property or any part thereof;*
  - (g) *the performance of work or services in respect of the property or part thereof;*
  - (h) *the provision of money, ,including the earning of income for the purposes of the marriage or cohabitation;*
  - (i) *the effect of any proposed order upon the earning capacity of either spouse.*
- (4) *For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than non-monetary contribution.”*

**[118]** There is no equal share rule concerning property other than the family home. The court is therefore at liberty to divide such property as it thinks fit (section 14(1)(b)). I bear in mind that both parties purchased the property. They both contributed to the improvement of the property before they moved into it in 2005. What began as a family home was later converted to the family property by operation of law because the parties no longer lived in Jamaica. They have since acquired a family home in the USA. They were married for 17 years before separation. They are both registered on the Certificate of Title as tenants in common in equal shares. The Claimant contributed for a short time towards the mortgage payments. By foregoing half of the rental proceeds, she indirectly contributed to the maintenance and conservation of the property.

**[119]** The court considers the payment of the loan for nine years by the Defendant as well as his contribution towards the expenses of the family in the USA. This is not to be minimised as it is clear that he cared for his family to the best of his ability. It is, however, a normal part of marriages that a spouse may bear a more significant financial burden because he has a greater earning capacity. History has shown that one partner usually earns more than the other in many family units and makes a more significant financial contribution to the family. In the context of marriage, one party is not making a tally of how much they have spent on any outgoings because the marriage is a partnership of equals. They both shared the responsibilities.

**[120]** Both parties submitted financial proof to substantiate their assertions of financial contributions: bills, receipts, invoices, remittances etc. However, it should be noted that there is no presumption that monetary contribution is greater than non-monetary contribution.

**[121]** On the other hand, the Claimant would have made a greater non-monetary contribution to the family. She had the primary responsibility of caring for the children until the Defendant could relocate permanently to the USA. I also bear in mind the Defendant's evidence that he spent a lot of time in Jamaica throughout the years of the marriage because he was unable to secure a job in the USA. During those periods of him travelling back and forth to Jamaica, the Claimant had the care and responsibility of their two children and the home in the USA.

**[122]** There is no doubt that the Defendant had the greater financial power in the relationship, and I also bear in mind that the property was the matrimonial home for a number of years. I considered that the Defendant had obtained greater physical benefit from the property over the years. It is his evidence that he had registered the property address as his business address. This allowed him not to pay for rental space for his business.

**[123]** The Defendant gave evidence that they obtained a loan from his mother, which he used in construction on the property before they moved in. The Claimant said that her mother-in-law had spoken to her about this loan, but she (the Claimant) was not a party to it. From all indications, I believe that Mrs. Holdene Alfred gave her son a loan to assist in expanding the property. The court, however, does not have any documentary proof as to the sum of the loan and how much, if any, is still outstanding. It is Mrs. Holdene Alfred's evidence that it was her son who borrowed the money. The court, therefore, finds that the Claimant would not be liable to pay back any outstanding amount to her mother-in-law.

**[124]** Interestingly, in cross-examination, the Defendant acknowledged that the Claimant had an interest in the property, but he was not sure of the portion as their responsibility was not shared. In weighing both sides, I find that on a balance of

probabilities, it is just in having the parties share equally in both the legal and beneficial interest in the property as was their initial intention, as evidenced by the endorsement on the Certificate of Title.

## **CONCLUSION**

**[125]** On the totality of the declarations being sought by the parties, I make the following orders:

1. That the property known as lands part of Exchange, Lot 907 Bogue Village, Phase 3, P.O. Box 7020 Reading, Montego Bay in the parish of St. James (the subject property) is not the family home.
2. That the subject property is declared the matrimonial property of the Claimant, Fiona Kadesha Alfred and the Defendant, Mario Raphael Alfred.
3. That the Defendant is not the sole owner of the subject property.
4. That the Claimant and the Defendant are both entitled to one half legal and beneficial interest in the subject property pursuant to section 14 of the PROSA.
5. That the subject property be valued by a reputable valuator to be agreed by the parties within twenty-eight days of this Order. The cost of the said valuation to be borne equally by the parties.
6. If no valuator can be agreed within the stipulated period then the valuator shall be appointed by the Registrar of the Supreme Court.
7. That the Defendant be given the first option to purchase the Claimant's 50% interest in the property, at the value outlined by the valuator and must, within 60 days after receipt of the report pay a 10% deposit towards the purchase of the Claimant's interest in the subject property.

8. The time for the completion of the agreement for sale is 120 days after the execution of the contract.
9. If the Defendant fails to exercise his option to purchase the property within the stipulated time, it is ordered that the said property be sold on the open market and the net proceeds of sale are divided equally between the parties.
10. That the law offices of Dameta Gayle, Attorney-at-Law, is to have carriage of the sale in respect of the subject property.
11. All costs incurred in the transfer of the property are to be borne equally between the Claimant and the Defendant.
12. In the event that either party fails and/or refuses to sign the agreement for sale and the instrument of transfer, the registrar of the Supreme Court is authorised to sign for the defaulting party.
13. Cost of the Claimant.
14. Liberty to apply.
15. The Claimant's attorneys-at-law is to prepare file and serve the order.