IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 06298

BETWEEN	**GERALD BELNAVIS**	**CLAIMANT**
A N D	**LAVERNE BELNAVIS**	**DEFENDANT**

Ms. Tameka Jordan for Claimant.

Mr. Gordon Steer instructed by Chambers Bunny and Steer for Defendant.

Written submissions ordered by 2nd March 2012 received 21st August, 2012

Heard on: 31st January, 2012 & 27th March 2013

HUSBAND AND WIFE – PROPERTY (RIGHTS OF SPOUSE) ACT – WHETHER HOME FAMILY HOME – WHETHER CLAIMANT ENTITLED TO EQUAL SHARE IN FAMILY HOME – PARTITION ACT – WHETHER APPLICABLE

CORAM: MORRISON, J

[1] The saying that "marriage is grounds for divorce", the provenance of which is unknown, reflects a type of cynicism that would have made Samuel Johnson 18th Century English lexicographer, writer, critic and conversationalist, blush in admiration of its cynicism. After all, it was Johnson who, when told about a man who, shortly after being divorced and who decided to remarry remarked that it was the triumph of hope over experience. Unfortunately, this negative undertow continues to manifest itself and threaten to upheave one of the very institutional edifices of a stable society.

[2] In the case at bar the parties were married on the 24th November 1996. The union produced one child, Leya Belnavis, who was born on the 22nd day of September 1997.

[3] However, the hallowed hymeneal bond was severed as on 3rd September 2010, the court granted to the claimant a Decree Absolute.

[4] Following closely on the heels of the dissolution of their union, the claimant, by way of a Fixed Date Claim Form, filed on 17th October, 2010, sought the following orders:-

(a) A declaration that both parties are entitled to equal shares of property at 3 Hall Crescent, Kingston 8, St. Andrew.

(b) That the said property be appraised, sold and the proceeds of sale divided equally between the parties pursuant to section 3 of the Partitions Act; and

(c) That he be credited half of the mortgage paid by him from the date of separation until the order is granted.

SUBMISSIONS BY THE CLAIMANT

[5] The cast of the submissions in argumentation resolves into asking and answering four questions:-

1. Whether or not 3 Hall Crescent was the family the family as defined by The Property (Rights of Spouses) Act?
2. Whether or not its sale is to be deferred?
3. Whether or not the claimant can unilaterally sever the joint tenancy and request a sale of the said property?
4. Whether or not the claimant is to be credited for his half of his mortgage payments?

[6] The Claimant answered all the above issues in the affirmative. A number of case law authorities in support were supplied, viz:-

a) **Narine Lewis v Anthony Lewis**, HCV 035544 of 2007

b) **Aubrey Forrest v Dorothy Forrest** (1995) 32 JLR 128

c) **Gordon v Gordon** 26 JLR 359

d) **Byall v Byall** (1942) 3 DLR 594

e) **Hawksley v May and Others** (1955) 3 All ER 353

f) **Re Draper's Conveyance; Nihan v Porter and Another** (1967) 3 All ER 853

g) **Leake v Bruzzi** (1974) 2 All ER 1196

h) **Burgess v Rawnesley** (1974) 3 All ER 142

i) **Suttill v Graham** (1977) 3 All ER 1117

j) **Dennis v McDonald** (1982) 1 All ER 590

k) **Martin v Martin** 1 NZLR 97

l) **Brenda Byford v David Butler** (2003) EWHC 1267 (Ch)

SUBMISSIONS BY THE DEFENDANT

[7] With economy of effort the defendant presents five issues for resolution. They are:-

i) Whether the property is family home

ii) Whether the claimant is entitled to 50% interest in the property

iii) Whether in the circumstances section 3 of the Partition Act entitles the claimant to seek an order for sale by the property

iv) Whether the claimant is entitled to a refund of one half of the amount he contributed towards the mortgage payments.

[8] The defendant has answered all the issues which she has raised in the negative. The supplied list of authorities include:-

a) **Kimber v Kimber [2000] 1 FLR**

(b) **MInott v Minott [1991] 2 JLR, 466**

(c) **Alva Melford Heron-Muir v. Maureen Veronica Heron-Muir [2004 FD 00144]**

(d) **Dorothy Boswell v. Kenneth Boswell and Teino Bosell [2006 HCV02453]**

(e) **Millicent Bowes v. Keith Taylor [2006 HCV 05107]**

(f) **Paula Ann Sterling v. Wayne Sterling [2007 HCV 00069]**

Still, I have only to say I will not submit regard to all the cited cases. However, where appropriate, I will attempt to mine the relevant principles and then apply them to the relevant facts.

[9] As I see them the issues for the Courts determination are:-

1. When were the parties separated?
2. Whether the Claimant made any contribution towards the acquisition of No. 3 Hall Crescent;
3. Whether No. 3 Hall Crescent is in law to be regarded as the family home;
4. If so regarded, what are the parties respective shares in it; and
5. Whether the Partitions Act is of any applicability to the circumstances of this case.

[10] As will be gleaned from the posed questions the factual basis of the claim and its rebuttal are pivotal to its determination.

The Evidence

[11] In support of his claim, Mr. Belnavis relied on two affidavits the first of which was filed on October 10, 2012 and the other was filed on September 14, 2011.

[12] The defendant did not sit by "like patience on a monument smiling at grief." She activated her response by way of the filing of an Affidavit dated June 10, 2011 and later another filed on December 2, 2011. Interestingly, the defendant invited this Court to say "should the Claimant b e given an interest in the house, that the sale be postponed until Leya attains the age of twenty-three years or she sooner starts to work and that a sum of $8,000,000.00 be deducted from the proceeds of sale of the house towards her credit."

Gerald Belnavis

[13] This Claimant who now resides in the United States of America depones that it was the defendant who had identified the subject property of 3 Hall

Crescent, Kingston 8, St. Andrew and that on being taken to see it, “We decided to purchase the family home.” Accordingly, they both provided the funds for the down-payment. He secured a loan from Jamaica National Building Society (JNBS) for $3,200,000.000 and together they secured $1,000,000.000 each from the National Housing Trust (NHT). Both sums of money, he avers, were used to pay the balance of the purchase price.

[14] There was apparent conjugal congress, he contends, until November 2004 when the parties separated. However, the Claimant recanted this date of separation. This came on his being cross-examined. He asserts that they had in fact separated in the year 2008. The difference in the dates of separation came about, he explained, and which the court accepts, as a result of a misconception on his part of the technical meaning of the forensic word, ‘separation’. During the period of their separation the parties experienced communication problems so much so that conjugal felicity ceased. Thereafter, the modus vivendi of separate households was established.

[15] In the period prior to their separation this deponent maintains that he alone paid the monthly mortgage on the family home, that is to say, $50,000.00 to JNBS and $24,000.00 to the NHT. In the course of those happier days he paid all the school fees of Leya, contributed towards food, utilities and other household expenses and undertook several renovative efforts to the family home at his expense.

[16] Included in these achievements were the painting and tiling of the house on the occasion of their moving in; repairs to the roof and remodelling of the bedroom. The total expenditure borne by him amounted to $680,000.00.

[17] Indeed, says he, after their separation, he continued to pay $62,000.00 towards the mortgage for over (6) years “until recently” when his business operations folded. This was in 2009. Since that time he has been languishing

in the jobless market place. Even so, as he continued to pay the mortgage installments for the family home, the defendant as between them, continued to enjoy the singular pleasure of their joint four bedroom acquisition.

Laverne Belnavis

[18] Having read the affidavit of her erstwhile husband the defendant sought to establish some distance between the Claimant's contentions and her own declarations. She rather defiantly asserts that, "I saw the property and insisted that I wanted to purchase somewhere of my own." Formerly, they had been living in rented premises at Manor Park and were asked to quit that arrangement. She had owned property at Oakland Court St. Andrew.

[19] She had owned property at Oakland Court St. Andrew which she sold in June 2003 and from which she obtained the sum of $2,612,216.00 She attached documentary proof in support. An amount representing $1,442,250.00 which was deducted from the proceeds of sale of the Oakland Court apartment was used to pay down as the deposit on 3 Hall Crescent. She categorically refuted the Claimant's assertion that it was through their joint efforts that the down payment was realized.

[20] "It is therefore not true to say that he contributed any money towards the deposit," she protests. Rather, she says, the deposit sum was the result of her sole enterprise and industry. However, she admitted that they both borrowed the mortgage sums, adverted to from JNBS and the NHT and that in so doing and taking the deposit into consideration, there emerged a shortfall of $2,754,050.00, according to a Statement of Account dated September 15, 2003. Again, she attached documentary proof in support.

[21] To address that shortfall she recruited and got the assistance of a loan from her uncle in tandem with the balance of the proceeds of sale of the Oakland apartment. She was able to meet the outstanding sum. No proof for that avuncular transaction was forthcoming. Having thus fulfilled their obligations

pursuant to the purchase of 3 Hall Crescent, they were both put in possession in December 2003 but had separated, “one year prior to possession” with the Claimant occupying one bedroom and she another.

[22] There were further dissents from the assertions of the Claimant. First, “the Claimant only paid two out of the three mortgages on the house”, she declares. She insisted that she paid the sum of $11,000.00 per month on the mortgage to the NHT by way of salary deductions.

[23] Excepting for the mortgages which she granted as duly paid by the Claimant and of him paying the school fees of Leya, all other household expenses were borne by her.

[24] Second, that all the expenses of $2,700,000.00 for repairs and painting that were done to 3 Hall Crescent were met by her, excepting the cost of repairs to the roof.

[25] Of the $151,700.00 incurred as the living expense of Leya since 2004 the Claimant failed to yield his palm. In fact, she avers that the Claimant stopped contributing to the mortgage payments from July 2009 whereupon she has been paying all three mortgages since.

[26] To the above (36) paragraph affidavit Mr. Belnavis was defiant in refuting the several assertions of Mrs. Belnavis. He had wired US $12,374.39 to JNBS in respect of the shortfall referred to; he paid two sums of money to attorney-at-law Ms. Debra McDonald and for which receipts were issued; he denied the assertion by the defendant about being separated one year prior to the parties being given possession of 2 Hall Crescent; that given the ebb and flow of accord between them, “we were occupying separate bedrooms at the time … whenever we had a fuss and we did return to the same bedroom once these differences were resolved but never stopped living as husband and wife”; that he did

contribute towards food as well as occasionally paying the electricity bill, paying the gardener, cable and various workmen such as plumbers and electricians as the need arose"; that he assisted with Leya's personal expenses including school fees, health insurance, transportation costs and her personal necessities. In short, he maintained his child.

Evaluation of the Evidence

[27] I find the defendant to be untrustworthy and unreliable. It seems to me that in an effort to project her claim and to rebut that of the Claimant's the Defendant engaged in delivering either half-truths or was solicitous of downright factual inaccuracies. In fact one may characterize her evidence, as I now do, as an attempt at truth obfuscation. Contrarily, the evidence of the Claimant carries upon its face the highest certificate of truth. It will suffice to say, therefore, where there is conflict on the evidence between them, and there are, and they are not of insignificant import, I prefer the evidence of the Claimant to that of the defendant. I go further in saying that I was unimpressed with the demeanour of the defendant if only because, but not restricted to, her hesitancy in answering questions in cross-examination, her vacillation and her self-betrayal as is exemplified by exhibit 3.

[28] It is clear as crystal that the Claimant made a significant down payment together with that made by the defendant in order to secure the lot at 3 Hall Crescent and that the parties did not separate until 2008.

[29] The labored attempts by the Defendant to subvert stark facts in maintaining that 3 Hall Crescent should not be regarded as the family home is uncompelling. The reasons as advanced by the Defendant flatly failed to scintillate and are not in concert with the evidence.

[30] I cannot bring myself to accept that they both liquidated fixed assets, pooled their individual resources while being married at that, if it was not

intended that the down payment on 3 Hall Crescent was not be taken as a deposit on the family home.

[31] Paragraph 9 of the defendant's affidavit unmasks and sets at defiance the likelihood of the defendant's assertion which is at variance with that at paragraph 4 of her said affidavit. That by itself, I daresay, summons the willing suspension of disbelief. As to the assertion by the defendant that the claimant did not contribute to the maintenance of the household I am restrained in saying that it is palpably untrue. When one looks at the monthly expenditure on Leya, let alone that of Leya and herself, it defies arithmetical calculus how she was able to do so on a monthly shoestring salary of $49,000.00. Even more incredulous is the assertion by the defendant that she spent $2,710,000.00 on improvements of the home. On what demonstrable basis was this achieved?

[32] I feel obliged to say, at this juncture, that to highlight the instances of the defendant's lack of veracity would only serve to superadd to an already unreliable and unredeemed view of her credibility.

[33] Despite all that I am persuaded to invite attention to the following:

From her affidavit the defendant asserts, at paragraph 7, that she received $12,612,216.00 after all expenses were paid from the proceeds of sale of the Oakland apartment. Yet, at paragraph 8 she proclaims that "I did not receive the full amount as $1,442,250.00 was paid out of the proceeds of sale as deposit on 3 Hall Crescent."

[34] What the annexure to the defendant's affidavit show that is the Vendor's statement of account addressed to Mrs. Laverne Belnavis dated 13th June 2003, is that after the deposit of $1,442,250.00 that was paid on 3 Hall Crescent the "Net proceeds due to you" was $1,169,699.00. From the annexed "Purchasers" 'Statement of Account' addressed to Mr. and Mrs. Gerald Belnavis, dated 15th

September 2003, it shows that, as at that date, after taking into account the mortgage sums from JNBS and the NHT a sum of $2,754,050.000 became due.

[35] She then glibly descants, at paragraph 11, that, “this shortfall was met by the balance of the proceeds of sale of my apartment and a loan from my uncle.”

[36] Absolutely not one jot or tittle of documentary evidence in support was supplied in the like manner as regards the supplied statements of accounts earlier adverted to.

[37] In contrast, the Claimant repudiated paragraph 11 of the defendant’s affidavit: he had wired US$12,374.39 from his account in the United States of America to JNBS in Jamaica. This sum represented the proceeds of sale of property in Florida that the owned. At paragraph 6 of his affidavit he declares, “I personally delivered the funds to the offices of Debra McDonald the attorney-at-law who was handling the purchase of 3 Hall Crescent”. In proof of his contention, documentary support was annexed to his affidavit. What the annexures show is that on September 24, 2003 a sum representing $1,841,741.61 was paid by Gerald Belnavis as final payment of purchase 3 Hall Crescent to the office of Debra E. McDonald, attorney-at-law for the Purchasers, Mr. And Mrs. Gerald Belnavis; $870,000.00 on the said day and $42,320.00.00 on the same day to the said attorney-at-law totaling $2,754.061.61 which is approximate to the sum due as per Purchasers’ Statement of Account as supplied by the said attorney-at-law (See annexure).

[38] From the evaluation of the affidavit evidence overleaf it is a fact without a shadow of turning, that No. 3 Hall Crescent was indeed the family home. I need only refer to Exhibit 3 to show that the Defendant was duplicitous in proclaiming that it was not. Exhibit 3 is a self-revealing letter, dated September 22, 2009, and addressed to Mrs. D. Bailey of Jamaica National Building Society under the signature of Laverne Belnavis This I think is the Rosetta Stone which serves to

answer the main points in dispute. In this letter the defendant's concern with the mortgage account had to do with the Claimant's failure to service it.

The relevant part of the letter reads:

> "Earlier this year, my husband and I separated. We are currently in the process of divorcing. While married, our arrangement was that he paid the mortgage while I paid the other bills. It was not until I received the late notice that I learned that he had not been paying the mortgage. I have advised my attorney who has subsequently written to his attorney."

[39] On that seemingly overlooked excerpt was the defendant's defiance set at nought. That being the case I need only add that the defendant cannot approbate and reprobate at the same time. Her letter to JNBS lays bare her purblind attempt to deceive the court what with her reliance on pivotal and factual inaccuracies in deflection of the Claimant's case.

The Law

[40] Issues #1 and #2 have both been factually determined in favour of the Claimant. That being the case I now cast attention upon the third and fourth issues as formulated.

Issues #3 and 4

[41] In answering these conflated issues, recourse to the Property (Rights of Spouses) Act commends and commands scrutiny.

[42] According to Section 2 of the referenced Act, "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 spouse, 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……"

[43] Section 6, supra, states that each spouse shall be entitled to one half share of the family home, where relevant, that is, on the grant of a decree of dissolution of a marriage or the termination of cohabitation and where a husband and wife have separated and there is no likelihood of reconciliation.

[44] However, despite the strictures sketched above the court is empowered to vary the equal share rule if it is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one half the family home: See Section 7 of the Act, supra.

[45] What factors ought then to trump the equal share rule? Again, Section 7 supplies the answers. They are:-

a. That the family home was inherited by one spouse
b. That the family home was already owned by one spouse a the time of marriage or the beginning of cohabitation
c. That the marriage is a short duration.

In passing, Section 13 of the Act, addresses the time when an application is to be made to the Court for the division of the property in dispute. This occurs on the grant of a decree of dissolution of a marriage or termination of cohabitation or where a husband and wife have separated and there is no reasonable likelihood of reconciliation.

Any such application shall be made within twelve months of the dissolution of the marriage, termination of cohabitation or separation.

[46] Mr. Steer in his written submissions to the Court asserts that the Court has no power under the property (Rights of Spouses) Act to determine the value and shares of persons separated prior to the acquisition of property and that the Partitions Act cannot apply as the Court has been asked to declare the interest of the parties in the property.

[47] From my findings of fact, since the acquisition of the property was not anterior to the parties' separation, it then follows that the Court has to determine the value and shares of the parties' interest in the family home. That I have already done. The authority of ***Paula Ann Tracy Sterling v. Wayne Fabian Sterling, supra,*** cannot avail the defendant, it being distinguishable from the case at bar on its peculiar facts.

Issue #5

[48] This issue subsumes the questions as posed by the Claimant, that is, whether or not the Claimant can unilaterally sever the joint tenancy and request a sale of the said property and, whether or not the sale of the said property is to be deferred. The answer to this issue is resolved by looking to see whether the Partitions Act is applicable.

[49] I agree with the submission of counsel for the claimant that in engaging this issue one looks to see whether or not the Court can have recourse to separate legislation. In **Paul Campbell v Dihann Campbell** SC 2000/E 528 Brooks, J, as he then was stated: "It cannot be that this court is hamstrung in fulfilling its mandate because of the heading which the applicant chooses to use in filing his or her claim." He dilated by drawing on the words of Forte, JA in **Goodinson v Goodinson,** SCCA 95/94 which in turn found its impetus on the words of Ormrod, LJ in **Ward v Ward and Green** (1980) 1 All.E.R. 176. In distillation it comes to this: what matters is whether the circumstances are such as to bring the case within one or other of those Acts which give the necessary power to the court to order the sale of the property.

From that unassailable authority it seems to me that the application of the Partitions Act to the facts of the current case is compellingly apposite.

[50] It is the law that one joint tenant can unilaterally sever a joint tenancy so long as the intention is conveyed to the other joint tenant. In **Re Draper's Conveyance; Nihan v Porter and Another** [1967] 3 All E.R. 853, is authority for

the stated principle. The facts are as follows: dwelling-house was conveyed to a husband and wife in fee simple as joint tenants. The house formed their matrimonial house. Be it what it may, the wife obtained a decree absolute of divorce, however, she had applied by way of summons under the Married Women's Property Act, before the grant of the absolute, for an order that the dwelling-house to be sold and the proceeds of sale be distributed between her and her husband. On the subsequent death of her husband the question arose as to whether the husband's estate was entitled to half the net proceeds of sale of the dwelling-house on the basis that the joint tenancy had been severed in his lifetime.

[51] The court had little difficulty in pronouncing that the joint tenancy had been severed by the issue of the summons by the wife along with her affidavit in support thereof. In the course of his judgment, Plowman, J placed reliance on **Hawkesley v May** [1955] 3 All. E.R. 356 in which Havers,J said that a joint tenancy may be severed in three ways. First by an act by one of the joint tenants operating upon his or her share founded upon the liberty to dispose of that interest to sever from the joint fund. Second, it may be severed by mutual agreement. Third, it may be severed by any course of dealing sufficient to intimate that the interests of all were mutually tranted as constituting a tenancy in common.

[52] According to the Interpretation section of the Partitions Act, "an action for partition shall include an action for sale and distribution of the proceeds; and in an action for partition, it shall be sufficient to claim a sale and distribution of the proceeds and it shall not be necessary to claim a partition."

[53] Indeed, one of the orders sought by the Claimant in the instance case is that the said property be appraised, sold and the proceeds of sale divided equally between the parties pursuant to Section 3 of the Partitions Act.

[54] Mr. Steer, while maintaining the non-applicability of the Act to the facts of this case, suggest that, if the Court were to find in favour of the Claimant that he has a share in the family house, then the Court ought to postpone the sale of the house as to do so at this time would prove to be disruptive of the life of Leya. To dilate, the sale should be postponed until Leya attains the age of 23 years or she sooner starts to work.

[55] It is an obvious fact that Leya will attain adulthood on her eighteenth birthday, that is, on the 22nd September 2015.

It is trite law that a man is obliged to maintain his child until then. He may be required to continue doing so if after attaining adulthood, his child is pursuing tertiary level education. However, that fact does not appear to me to preclude the application of Section 23 of the Property (Rights of Spouses) Act. Act.

[56] Under Section 23(i) of the property (Rights of Spouses) Act, the Court is empowered to make "other orders." They are, inter alia:-

a) for the sale of property or part thereof and for the division, vesting or settlement of the proceeds thereof;
b) ….
c) for the vesting of property or part thereof in either spouse
d) for postponing the vesting of any share or part hereof in the property until such future sale contingent on such future happening as may be specified in the order
e) for the partition or vesting of any property
f) ……
g) ….
h) ….
i) for the payment of the sum of money by one spouse to the other
j) …
k) …
l) …

m) …

n) …

[57] Section 23 (2) states that “where the Court makes an order directing one spouse to pay to the other spouse a sum of money, the Court may direct that payment be a lump sum payment or by installments in such manner and subject to such conditions as the Court thinks fit.”

[58] According to Section 23(3), “the Court may make an order granting to either spouse for such period and on such terms and conditions as it thinks fit, the right to personally occupy the family home ….”, and Section 23 (4) grants that “the person in whose favour such an order is made under subsection 3, shall be entitled, to the exclusion of the other spouse, to personally occupy the family home…”.

[59] As Section 23 contemplates ‘partition’ as one of a number of viable options open to the Court it seems to me that the Partitions Act is relevant and applicable.

According to Section 3 of the Partitions Act -

> “In a suit of partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or by the number of parties interested or presumptively interested therein… a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested that a division of the property between them or among them, the court may, if it thinks fit on the request of any of the parties interested and notwithstanding to the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential orders.”

[60] Clearly, then, Mr. Steer's submission that the Partitions Act does not apply to the facts of this case is not maintainable. The more urgent consideration is, ought the sale to be deferred for Leya's sake? What the court has to balance here are the interests of the child as opposed to the interest of the parent.

[61] For the defendant to say that Leya will be adversely affected should a sale of the questioned property be ordered is to state a conclusion without giving any basis for saying so. In any event, the matter of the maintenance of Leya, in my view should have been given separate consideration. As such it is a matter which commands attention.

It appears to me that by the use of the words, "The Court may, if it thinks fit", in Section 3 of the Act, incorporates the principle of discretion. However, the authority of ***Byall v Byall [1942] 3 DLR 594,*** from the Commonwealth Jurisdiction of Canada is strongly applicable in saying that a judgment of partition and sale is a matter of right and not dependent upon the discretion of the court. The facts of Byall in brief will suffice.

Mr. Byall filed a motion against his wife for partition or sale of a house and lot of which he and his wife were joint tenants. The property was acquired by the husband making the downpayment, with the balance purchase price secured by way of a mortgage. A deed to both husband and wife was taken. The husband paid the installments of principal out of his own pocket but when the mortgage was paid off the monies of both husband and wife were used.

For about three years they had neither cohabited nor spoken to each other with the wife failing to deliver on her conjugal expectations.

The husband, in those circumstances, became solicitous of partition or sale of the property suggesting that the time for doing so was propitious. The wife opposed the application on the ground that the court has discretion to refuse it and that, in the present state of housing asperities, the Court should not permit the husband to evict her from the common property.

[62] The operative rule of the Ontario Civil procedure rule – rule 615 (1) says:"An adult person entitled to compel partition of land or any estate or interest therein may, by originating notice… apply for partition or sale." The Partition Act of Ontario says in part that, "all joint tenants.. and all parties interested in, to or out of, any land in Ontario, may b e compelled to make or suffer partition or sale of the land…" Urquhart, J held that in an application by one or other of two joint tenants for partition on sale the Court ordinarily has no discretion under the Partitions Act but to make the order asked for, and this even though the joint tenants are husband and wife and the application is opposed by the wife.

[63] Indeed the facts and circumstances of that case is at some remove from the case under consideration. In the ***Byall*** case the judge said that were it a case of exercising his discretion he would have done so in favour of the husband as, first, it was largely, if not at all, the husband's money which was used to procure the house. Second, the wife had ceased to perform her conjugal duties. Third, the wife was well off and her requirements were not as such so as to put her in need. Further, the parties had no children.

[64] The present scenario is somewhat different. Tender-aged Leya makes a great deal of difference. In fact, the Claimant has stopped paying the mortgage since 2009, he having fallen on hard times. However, based on paragraphs 27 – 30 of his 9th September 2011 affidavit, which has not been refuted, it seems to me even at this stage that I have to decide whether, in view of S. 23(1)(d) of the Property Right of Spouses Act, this Court should postpone the vesting of any share or part in the property to the detriment and financial hurt of the Claimant.

[65] I answer the above by saying I have not been given the requisite expert assistance as to how this will adversely impact Leya. The defendant has merely stated an unsupported conclusion.

[66] As I have already indicated, I find that the separation date was in 2008. I note, with more than passing curiosity, that the defendant has asked for $8,000.000.00 to be deducted from the Claimant's share of the proceeds of sale of the property should the sale of the property be ordered in contemplation of the care and the upbringing of the child Leya.

[67] I am to say that I decline to make such an order as no objective basis has been provided to the court for so doing, and, in any event the Claimant's assertion that he has been maintaining his child has not been refuted. Nevertheless, based on the evidence, mortgage payments due from the Claimant from 2009 to the present ought to be tallied and then subtracted from the amount of the proceeds due to him at the time of sale of the matrimonial property.

[68] Accordingly, I grant the orders as sought as per paragraphs (a) and (b) of the Fixed Date claim form filed on 17th December, 2010, as amended.

IT IS DECLARED

1. That the Claimant and the Respondent are entitled to equal shares of the property located at 3 Hall Crescent, Kingston 8, in the parish of Saint Andrew registered at Volume 1071 Folio 182 of the Register Book of Titles.

IT IS ORDERED

2. That the said property located at 3 Hall Crescent, Kingston 8 in the parish of Saint Andrew registered at Volume 1071 Folio 182 of the Register Book of Titles be appraised, sold and the proceeds of sale be divided equally between the parties pursuant to Section 3 of the Partitions Act.

3. That the said property located at 3 Hall Crescent, Kingston 8, in the parish of Saint Andrew registered at Volume 1071 Folio 182 of the Register Book

of Titles be appraised by a reputable and agreed appraisal company within sixty (60) days as of the 27th March, 2013.

4. The Respondent be granted first option to purchase the Claimant's half interest in the said property located at 3 Hall Crescent, Kingston 8, in the parish of Saint Andrew registered at Volume 1071 Folio 182 of the Register Book of Titles, option to be exercised within forty five (45) days of production of the valuation report.

5. That the Claimant's half share of the mortgage payments due 2009 until completion of transfer, be tallied and subtracted from the amount of the proceeds payable to him from his half share interest in the property at the time of its sale.

6. That the Attorney-at-law with Carriage of Sale be Tameka Jordan, Attorney-at-law for the Claimant herein. Parties are to pay their own attorney's cost on transfer.

7. That the parties cooperate in all actions to facilitate the sale of the premises including but not limited to the advertisement of the property for sale.

8. All reasonable costs attendant upon the sale including but not limited to advertisement in the newspapers, realtors' commission, and discharge of any existing mortgage be borne by the parties equally.

9. The Registrar of the Court be empowered to sign all documents necessary to effectuate the court's order herein in the event that either party refuses or neglects to do so within fourteen days (14) of being requested to do so by the relevant Attorney-at-law.