



[2022] JMSC Civ 231

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV02614

BETWEEN	AUTHURINE BOWEN	CLAIMANT
AND	MICHAEL WILLIAMS	DEFENDANT

IN CHAMBERS

Ms. Monique McLeod instructed by Rogers and Associates for the Claimant

Mr. Lennox Gayle instructed by Lennox A. Gayle & Co. for the defendant

Heard: October 11, 2022, November 16, 2022 and December 6, 2022.

PROSA Declaration of interest - Definition of Spouse – Definition of family home

O. SMITH, J (Ag.)

- [1] Ms. Authurine Bowen is the Claimant and former partner of the Defendant Mr. Michael Williams. In or around 2003 she met the Defendant and a relationship ensued. This relationship produced one child, Kaleb Williams who was born on December 27, 2005. This relationship ended in or around December 2016.
- [2] On April 14, 2017 Ms. Bowen filed a Fixed Date Claim Form pursuant to the **Property (Rights of Spouses) Act, PROSA** and an Amended Fixed Date Claim Form on April 22, 2022 seeking several declarations. The more immediate declarations are:

1. That the Claimant and the Defendant are each is entitled to one half legal and beneficial interest in the matrimonial home being ALL THAT parcel of land part of Frankfield, called Cow Pen in the parish of Clarendon..., or alternatively;
2. A declaration as to the full extent of the Claimants share in the matrimonial home...
3. An order that said matrimonial home...be valued by a Valuator agreed on by the parties or failing such agreement within 21 days of the date of this order by a valuator so appointed by the Registrar of the Supreme Court of Judicature...”

There are twelve substantial orders all pertaining to how the Court should treat with the said land.

Case for the Claimant

[3] Three affidavits were filed on behalf of Ms. Bowen. In order of date they were filed on August 14, 2017, December 7, 2018 and April 22, 2022. I will summarize her evidence. In 2003, while residing in Bull Bay in the parish of St. Andrew, she met Mr. Williams. He expressed an interest in having a relationship with her. As she was single and he indicated that he was single, they began a visiting relationship. She would visit him at the unfinished property in Cow Pen and he would visit her in St. Andrew.

[4] Sometime in April 2005 she became pregnant and on December 27, 2005 their son was born. In about 2007 Kaleb went to live with his father in Cow Pen as her work as a bartender made her hours unpredictable, whereas Mr. Williams ran his own cook shop and as such had more flexible hours. Consequently, her visits to Cow Pen became more frequent. She would then travel from Cow Pen to work at the Spanish Town Prison Oval.

[5] After much insistence from Mr. Williams, combined with her “yearning to live” with her child and partner she moved in completely with Mr. Williams and Kaleb in 2007.

At that time the house was incomplete. According to Ms. Bowen it had a long way to go, with raw unpainted blocks as walls, the roof needed to be done as such zinc was placed haphazardly over the portion of the structure they inhabited. The house had no windows, instead board was used to cover up the openings. There was no kitchen at the time so the Respondent would supply food from his cook shop or his mother would assist. She described the bathroom as being incomplete and said that during that time an outside latrine had to be used.

[6] From then, Mr. Williams promised that they would work together to complete the house. They lived together as man and wife in a common law union and both of them worked together to improve the home. As such the decision was made to put all their earnings towards completing the house. All her money, salary and tips were put towards the roof, walls and equipment after which she had no money to buy clothes or personal items. She moved in a stove, television, deep freeze and other items, all in an effort for the family to be comfortable.

[7] At this time her combined intake proved to be more than Mr. Williams earned from his cook shop so she was also responsible for paying the utility bills and purchasing food items for the home.

[8] She explained that she borrowed and joined partners all in an effort to accumulate funds geared towards completing the house. She also contributed in terms of manual labour and paying the workmen. She purchased the toilet for the bathroom, the kitchen sink, tiles and other fixtures. She washed and cleaned and would at times even go to the river to wash the clothes when there was a water shortage.

[9] Although Mr. Williams owned the incomplete house when they met, it became hers and they continued to build together until it was completed. However, in 2016 the relationship began to deteriorate until it ended in December 2016 when she moved out of the house.

- [10] Ms. Bowen explained that she lived away from Cow Pen after 2007 but not with any permanency in mind. In 2008, a few months after her adult son died, she starting staying at her family home in Bull Bay during the week as it was easier to travel to work from there rather than from Clarendon. Mr. Williams and Kaleb began to spend three nights out of each week with her in St. Andrew until sometime in 2010 when Mr. Williams went to St. Ann to help his sister for a very brief period.
- [11] After the Defendant returned home in 2010 she and Kaleb also moved back into the Cow Pen property.
- [12] She denied ever leaving Kaleb with the Respondent when he was born, stating that he had a lung infection and in order to supervise him closely he remained with her.
- [13] She denied having a relationship with anyone else during that period stating that Mr. Williams would not have allowed it.
- [14] In October 2022, she obtained a Surveyors Report. A copy of same is exhibited in her last affidavit.

Evidence of the Defendant

- [15] Mr. Williams swore to one affidavit which was filed on July 9, 2018. He agrees that they met in about 2003 in Saint Andrew and commenced a visiting relationship in 2004. However, the visiting relationship never changed to a permanent one. At no time between 2004 and 2016 did he live with the Claimant as man and wife.
- [16] The relationship was an intermittent one where they would see each other two weeks on two weeks off based on her job at the Spanish Town Prison Oval.
- [17] He acknowledges the birth of his son Kaleb in 2005 but says that six months after giving birth Ms. Bowen brought Kaleb to Cow Pen and left him there with him. In about 2007 she brought a bed, a whatnot and a fridge to his house but says that notwithstanding this, she never stayed at his home in excess of two weeks. To the

best of his knowledge Ms. Bowen lived elsewhere with another man and that at no time during this visiting relationship did she cook, clean or wash for the family.

- [18] It is Mr. William's evidence that throughout the duration of the visiting relationship she contributed only one door, one window and 15 bags of cement towards the Cow Pen property and it was him, not her, who solely provided for Kaleb and paid all the utility bills and taxes. In the circumstances her share in the Cow Pen property would be miniscule.

Submissions on behalf of the Claimant

- [19] Counsel identified four issues which are similar to those identified by the defendant. I have therefore adopted them. They are outlined below. She relied on the definition of spouse and family home as stated in the **Property Rights of Spouse Act (PROSA)**. In addition, she relied on the case of ***Peaches Annette Shirley-Stewart v Rupert Augustus Stewart Claim No. 2007HCV0327, (Stewart v Stewart)*** for its treatment of the definition of family home. The case of ***Paulette Treasure v Randolph Treasure*** [2016] JMSC Civ. 153 (***Treasure v Treasure***) was highlighted as far as it was stated in that case, that living "outside of the family home for economic reasons does not negate that the parties cohabited in the family home."
- [20] Counsel brought the case of ***Tricia Carter v Lloyd Parnell*** [2014] JMSC Civ to the attention of the Court. She submitted that the case "held, that the provisions of **PROSA** were applicable to parties in a common law union once their union fell within the definition of spouse."
- [21] In her analysis of the evidence counsel pointed out that certain aspects of the evidence were not in dispute. For example, that the relationship began as a visiting relationship. She also indicated that the determination of the matter was largely dependent on the credibility of the parties. She however, asked the court to dismiss the Defendant's allegations of infidelity on the part of the Claimant as a figment of his imagination. She acknowledged that during the course of the

relationship Ms. Williams at times lived outside of the family home for work but argued, on the strength of *Treasure v Treasure*, that that would not affect Ms. Bowen's status as a spouse. The evidence presented demonstrated that the parties cohabited at the property for more than five years prior to the termination of the relationship. Further, the Defendant accepted that he was single when they met. In those circumstances she asked the court to accept that Ms. Bowen fulfilled the requirement of a spouse.

[22] Based on her submissions counsel argued that in light of the evidence that the property was wholly owned by the defendant' and that there were no competing properties, the court should find that the property was the family home. In so finding the presumption of equality would automatically arise. This presumption could only be displaced by evidence in rebuttal from the defendant. This in turn, if successful would lead to the court making a determination under section 7 of **PROSA**.

[23] Counsel submitted that no such evidence was provided by the Defendant and the fact that he purchased the property himself did not displace the Claimant's entitlement to half share.

Submissions on behalf of the Defendant

[24] Counsel for the Defendant also identified agreed facts based on the affidavit evidence. He submitted that the parties were not in dispute in relation to when and where they met in 2003. That at the time they met the defendant lived alone in his unfinished house in Frankfield Clarendon. That the relationship produced a child and that the Claimant worked as a Bartender at the Spanish Town Prison Oval, while he operated his own cook shop in Frankfield Clarendon. He also indicated that the claimant made some contribution to the construction of the house in the form of a window, a door and fifteen bags of cement.

[25] The main focus of the Defendants submission was that the parties never cohabited as man and wife. They only had a visiting relationship. In addition, she contributed next to nothing as she was financially challenged earning a mere \$7000.00 per

week in circumstances where she worked two weeks on and two weeks off. It was submitted that her earnings fell below the Minimum Wage. In so arguing he relied on the National Minimum Wage Order 1975 to point out the minimum wage in 2009 and 2013, sums of \$4070.00 and \$5,740.60 per week respectively, to underscore his position that she could not have been earning \$7000.00 per week as that amount become the minimum wage in 2018. Counsel submitted that she inflated her earnings to support her contention that she contributed extensively.

[26] In relation to the issue of cohabitation, it was argued that the only reason she only stayed over was because they enjoyed a sufficiently good relationship. However, she stayed for five days at the most. In the circumstances, the Claimant is not a spouse and consequently **PROSA** is not applicable.

[27] In light of her not being a spouse then the Court could consider the principles of equity as expressed in *Azan v Azan* 25 JLR 301. Based on those principles she would be entitled to an interest equivalent to her contribution unless there is a common intention to the contrary. However, the Claimant's contribution is minimal and was made in the interest of their son. In his estimation she would be entitled to a 1% interest.

[28] The issues identified by the defendant as previously stated are similar to those identified by the Claimant and have been adopted by the court.

Preliminary Issue

[29] In my preparation of this judgment an issue arose. On my perusal of the commencing document I noticed that the Amended Fixed Date although signed by both the Claimant and her Attorney-at-Law did not contain a Certificate of Truth. In the circumstances I asked both attorneys to file submissions on the issue. I thank both attorneys for their submissions.

[30] The Civil Procedure Rules, 2002 sets out the requirements for every statement of case. Rule 3.12 states;

“(1) Every statement of case must be verified by a certificate of truth.

(2) The general rule is that the certificate of truth must be signed by the lay party personally.

(3) Where it is impracticable for the lay party personally to sign the certificate required by paragraph (1) it may be given by that person’s attorney-at-law.

(4) A certificate of truth given by the attorney-at-law must also certify-

(a) the reasons why it is impractical for the lay party to give the certificate; and

(b) that the certificate is given on the lay party’s instructions.

(5) Where a statement of case is changed under Part 20 the amended statement of case must be verified by a certificate of truth.

(6) ...

Failure to give certificate of truth

3.13 (1) The court may strike out any statement of case which has not been verified by a certificate of truth.

(2) Any party may apply for an order under paragraph (1)

[31] Both parties relied on the case of ***Shakira Dixon (by her next friend Norine Bennett v Donald Jackson*** SCCA No. 120/2002, in support of their submissions. In that case the defence, being a statement of case, was not verified by a certificate of truth. In recognition of the fact that Rule 3.13 provides a sanction, Harrison JA found that Rule 26.3 did not apply. However, in applying the line of cases which speak to striking out being a sanction of last resort, Harrison JA held that a court must always give effect to the overriding objective to deal with cases justly. This includes ensuring the fair and expeditious disposal of cases for all the parties. In the circumstances of that case, the Defence filed was not verified by a Certificate of truth. However, the Court considers that the Respondent was the sole eyewitness and had verified his witness statement with a certificate of truth. Further, the defence filed was not inconsistent with his statement of facts, as such Harrison JA found that the learned first instance judge was not wrong in finding that the “failure to verify the defence was not fatal.” The Court of appeal made

orders for the verified defence to be filed within 14 days. (See page 3 of the judgment.)

- [32] In the case of ***James Wyllie, Lorna Wyllie and Richard Wint v David West, Christopher West, Douglas West, Marshaleen Forsythe, Jerome Smith and Richard Smith***, SCCA No. 120/2007, (***Wyllie v West***), the Court of Appeal had to consider the validity of a Fixed Date Claim Form (FDCF) where neither the Claimant nor her attorney had signed the Certificate of Truth. The FDCF had in fact been signed by a person without lawful authority. The Attorney representing the Respondents sought an adjournment during which time he filed an Amended FDCF correcting the issue. Sinclair-Haynes J, as she then was, held, that the FDCF was not a nullity and could be remedied at the courts discretion. As such, she held that the Amended FDCF should stand.
- [33] The Appeal which was filed as a procedural appeal was dealt with by Morrison J.A., as he then was. He found, that Sinclair-Haynes J was correct in finding that the non-compliance with Rule 22.1 was an irregularity that did not render the proceedings a nullity. Consequently, he dismissed the appeal.
- [34] The Appellants then applied to have the order of Morrison JA dismissed. In interpreting the effect of the non-compliance with Rule 22.1, Smith JA began by examining Rules 8.1, 3.6 (3) (d) and 3.12. He found, that the unauthorized signing of the FDCF was so fundamental as to render the proceedings a nullity not curable by any order of the court since *ex nihilo nihil fit*. However, he also found that the fact that the Claimants attorney signed the Notice to the Defendant, which is a part of the Claim Form, meant that they were acting on behalf of the Claimant. The unauthorised signing of the Certificate of Truth was not to be taken as the signing of the Claim Form. Consequently, he concluded that the proceedings were properly commenced as the Claim Form was signed by the Claimants Attorney and filed by them. At paragraph 37 he said;

“We have seen that proceedings are started when the claim form is filed – Rule 8.1 (2). We have also seen that the person who files the claim must

also sign it – Rule 3.6 (3) (d). Therefore, in the light of Rule 22.1, proceedings were properly commenced on behalf of the claimants when the claim form signed by their attorneys-at-law was filed by the attorneys. Thus the proceedings...were in my view, properly commenced even though the certificate of truth was admittedly defective.”

- [35] In relation to the defective Certificate of Truth he found that Rule 26.9 did not apply because Rule 13.3 provides the repercussions for failure to comply. He however, considered that the word “may” made striking out the statement of case discretionary, not mandatory. He continued at paragraph 30:

“Thus the failure to comply with Rule 3.12 must be treated as an irregularity and will not nullify the proceedings or any step taken in them. Indeed, the statement of case will stand unless otherwise ordered by the court. As to whether the claim may be prosecuted without a certificate of truth is another matter.”

*The effect of this, is that such a defect is an irregularity and does not render the proceedings a nullity. Therefore, in applying Rule 20.1, a FDCF can be amended at any time before the first hearing without permission. The inference being that after the first hearing the courts permission was required. Robert Daley, *Thermutis Grant-Cunningham v China Motors Limited* [2012] JMSC Civ. 131, Campbell, J*

- [36] Finally, the case of ***Kenrick Layton v The Island Traffic Authority, The Attorney General and The Transport Authority*** [2021] JMCA Civ 46 was also commended to the court by both attorneys. In that case the appellant was illiterate and gave evidence that he had read over his witness statement and verified its contents, when it was not true in light of his illiteracy. His witness statement was also not certified as required by Rule 29.4(2) of the Civil Procedure Rules, 2002.
- [37] On an application to strike out his witness statement, the judge adjourned the trial for the appellant to file an application for relief from sanctions. She then refused his application, as such his statement of case was struck out.
- [38] On appeal, like the cases preceding it, the court found that the absence of the certificate of truth did not render the statement of case a nullity, it was an irregularity which may be cured.

Analysis

[39] The cases highlight that the purpose of the certificate of truth “is to bind a party to confine himself to facts within his knowledge and to obviate contentions of fact in which a party could argue that he had no honest belief”. (See *Shakira Dixon.*) In the circumstances, the absence of a certificate of truth should not automatically lead to the statement of case being struck out. It is dependent on the circumstances of each case. In this case Ms. Bowen is the only witness in her case, she swore to an affidavit in support of her case and she also gave sworn evidence. I took the time to examine her Claim Form and I observed that her affidavit evidence and sworn testimony did not depart from the Fixed Date Claim Form which merely sought declarations. I also bore in mind that both Ms. Bowen and her attorney signed the Amended Fixed Date Claim Form which to my mind is a reflection that both Ms. Bowen and her attorney endorsed the contents of the AFDCF. In the circumstances, it is a matter in which the court can exercise its discretion to make matter right.

[40] I made the following orders and adjourned my ruling on the substantive matter,

- (1) The Claimants Attorney is to file and serve a Further Amended Fixed Date Claim Form on or before December 14, 2022.
- (2) The Claimants Attorney is permitted to serve the AFDCF by way of email.
- (3) Judgment on the substantive matter is further reserved to December 16, 2022 at 12MD
- (4) Cost for today to be determined then.

In relation to the substantive matter, the issues I adopted from the parties are as follows:

1. **Whether the parties were spouses as defined in the Property (Rights of Spouses) Act?**
2. **Whether the property at Cow Pen in the parish of Clarendon was the family home?**
3. **Whether the Defendant has rebutted the equal entitlement presumption pursuant to section 13 of the Property (Rights of Spouses) Act?**
4. **If so, what is the Claimant's entitlement in the property at Cow Pen in the parish of Clarendon?**

Defendants Submissions

THE LAW AND ANALYSIS

[41] **PROSA** was created to specifically address issues concerning the division of property between spouses, as defined under the Act. In relation to this matter the relevant sections are, section 2 (1), 6,7 and 13.

1. **Whether the parties were spouses as defined in the Property (Rights of Spouses) Act?**

[42] By virtue of section 2 (1) of PROSA;

"spouse" includes-

(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;

(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years, immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be."

[43] Section 2 (1) also provides a definition for cohabit. It states that;

"cohabit" means to live together in a conjugal relationship outside of marriage and "cohabitation" shall be construed accordingly."

- [44] The main words have all been defined with the exception of the word 'conjugal'. In keeping with the rules of statutory interpretation, that words should be given their natural ordinary meaning unless it leads to an absurdity, I sought assistance from the *Concise Oxford Dictionary* for the definition of conjugal. Conjugal is defined as '...of marriage or the relation between husband and wife, and conjugal rights as those rights (especially to sexual relations) regarded as exercisable in law by each partner in a marriage'.
- [45] Although cohabit has been defined, I am of the view that the words "cohabited with... as if she/he were in law his wife/husband", connote more than just a sexual relationship but extends to the sharing of a life together, essentially, working together as a unit.
- [46] I believe that the words need no further interpretation as they speak for themselves. As such, taken all together, in order to qualify as a spouse, both parties must be single and live together, as a man and woman would in a traditional marriage. However, as is commonly the case in matters of this nature, the determination of the issues is largely dependent on the credibility of the parties.
- [47] It seems to me that in order to satisfy the definition of spouse there is no requirement for the parties to be residing together in the same house 365 days of the year. Couples, married or not are forced, due to the exigencies of life, to live away from the main home in the pursuit of a better life. What is necessary is an analysis of the relationship itself.
- [48] Ms. Bowen gave evidence that she was single at the time the parties met and entered into a relationship. Mr. Williams gave evidence under cross examination that he was not married when the parties started their relationship. They also agree that they had a son together in 2005. It is noted that the birth of Kaleb precedes the period that Ms. Bowen says the parties lived together and man and wife. However, the evidence presented by Ms. Bowen is that she sent Kaleb to live in Cow Pen with his father when he was just over one-year-old. A decision they made

together. As a consequence, her visits became more frequent until she also moved to Cow Pen home in 2007 and lived there until 2016 when the relationship ended. The only break was in 2008 when her older son died and she returned to Bull Bay. Even then, on her evidence, she only stayed in Bull Bay on her alternate work week and was visited by Mr. Williams and Kaleb until 2010 when she returned to Cow Pen. In her words, "I fully moved in with him from 2010..." her clothes and all her household items remained in Cow Pen during that period.

[49] Mr. Williams on the other hand denied that they ever lived together. However, his evidence is riddled with inconsistencies. I found that the inconsistencies went to the very root of the issue as such his credibility was undermined. In his affidavit, he averred that they were engaged in a visiting relationship which ended in 2016. However, under cross examination he said the relationship ended in 2010. No explanation was provided for this discrepancy. It did not stop there, another inconsistency surrounding the heart of this issue, arose under cross examination where, in answer to counsel's suggestion that it was only when he found someone else that he told Ms. Bowen to move out, his immediate and spontaneous answer was, "...she take up her things and come out in 2016." This should be viewed in the context of him insisting that she did not and had never lived with him but with another man in Kingston. I accept Ms. Bowen's evidence in relation to how the parties operated together as a family between 2010 and 2016. I am satisfied on the evidence before me that the parties were spouses as defined by **PROSA**.

2. **Whether the property at Cow Pen in the parish of Clarendon was the family home?**

[50] Based on section 6(1) and (2) of **PROSA** a spouse is entitled to one half of the family home once that spouse satisfies any of the criteria listed in the section.

Section 6 (1) provides:

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

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

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

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

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

[51] Family home is defined by section 2 of PROSA as:

“...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;”

[52] In **Stewart v Stewart** Sykes J, in defining family home said, “

“22. It is well known that when words are used in a statute and those words are ordinary words used in everyday discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended...”

23. ...Thus it is not any kind of residence but the property must be the family residence. The noun residence means one’s permanent or usual abode. Thus family residence means the family’s permanent or usual abode. Therefore, the statutory definition of family home means the permanent or usual abode of the spouses.”

He did not end there. In keeping with the requirements of Section 2 of PROSA Sykes J went further to state at paragraph 24,

“...It is important to note that in this definition of family home it is vital that the property is used habitually or from time to time by the spouses as the only or principal place of residence... . The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, “Is this the dwelling house where the parties lived?” In answering this question, which is clearly a fact sensitive one, the court looks things such as (a) sleeping and eating arrangements; (b) location of

clothes and other personal items; (c) if there are children, where to they eat. Sleep and get dressed for school and (d) receiving correspondence...”

- [53] In order to qualify as a family home, the Cow Pen property had to be the only or principal place of residence during the relationship. The property should have been used wholly for the purposes of the household. ***Thelma May Whilby-Cunningham v Leroy Augustus Cunningham*** Claim No. 2009HCV02358, delivered on September 16, 2011.
- [54] Having considered the cases, I am of the view that the first requirement to be satisfied is ownership of the Cow Pen property. In order for the home to qualify under the presumption, the home must be owned by either one or both of the parties. Although neither party exhibited a Certificate of Title, I accept that the property was solely owned by Mr. Williams. It is agreed by the parties that Mr. Williams purchased the land and commenced construction of the house before he met Ms. Bowen. I therefore find that the home was wholly owned by Mr. Williams. The first limb of the definition of family home is therefore satisfied.
- [55] In order to determine whether the home was the habitual or principal place of residence of the parties, the living arrangements and daily life of the parties have to be examined. It is the evidence of Ms. Bowen as has been previously discussed, that she lived in Cow Pen with Mr. Williams and their son from at least 2010 to 2016. The Cow Pen home then became the base of operations. She travelled from Cow Pen to work at the Spanish Town Prison Oval. It is the home where she placed the furniture and appliances she bought. She cooked, cleaned and laundered their clothes. Mr. Williams, before the kitchen was finished, would take food to the home for Ms. Bowen and Kaleb. His mother also assisted with providing them with food. It is also the home that she invested in financially to bring it to completion.
- [56] In an attempt to establish that Ms. Bowen had no knowledge of the Cow Pen community and its people, counsel for the Defendant sought to test her veracity. He asked her; if she ever attended church with Kaleb, if she knew the names of

the neighbours or a Justice of the Peace in the area. All questions, which answers, in my view only assisted the Claimant in establishing her credibility and her case. She told counsel that she attended Frankfield Baptist with Mr. Williams's mother and Kaleb. She was able to give the names of the proximate neighbours and where they each lived in relation to the house in Cow Pen. Her familiarity with the geography of the area and names of the neighbours demonstrated that she was far more entrenched in the area than was disclosed by Mr. Williams. This evidence remains unchallenged. As it relates to knowing a Justice of the Peace in a particular area in order to establish ties or habitual residence in a community, that, is in my view not a requirement. However, her explanation in that regard is wholly acceptable. Her aunt is a Justice of the Peace. She did not require the services of one in Cow Pen, particularly when she worked in Spanish Town at the time and her aunt resided in Portmore.

[57] Mr. Williams on the other hand gave evidence that in 2010 they were no longer in a relationship. Prior to that his evidence is that the longest period she ever stayed in the Cow Pen home was two weeks, while his attorney suggested to her that the longest she ever stayed at the home was three to five days. It is instructive that the Defendant is in agreement that Ms. Bowen took furniture to the house in 2007. The items of furniture and or appliances are telling, a bed, a whatnot and a refrigerator. Implicit in this admission that she brought the items of furniture and the appliance to the house is an acknowledgement that the house needed the items and therefore was not fully furnished as asserted by the Defendant. His explanation is that she brought those things there for Caleb's benefit, however at the time Kaleb was a baby and had no need of refrigerator or a whatnot. I do not accept his evidence that she did not contribute to the household and that he did everything for himself and Kaleb.

[58] In relation to the settee which Ms. Bowen bought, Mr. Williams insists that he gave her the money to purchase it. However, I considered his evidence that they were no longer in a relationship, that she did not and had never lived in Cow Pen and in fact lived in St. Andrew, yet despite this, according to Mr. Williams, she bought it

for him because he was busy. He on the other hand lived and worked for himself in Clarendon and was in another relationship. The Court is being asked to accept that Ms. Bowen, in the circumstances, left her home in St. Andrew to go to Clarendon to collect money from Mr. Williams to purchase a settee for a house she did not live in. I do not find his evidence capable of belief and I reject it. It is unlikely that Ms. Bowen would travel all the way from Kingston to purchase a settee for 'his' house. Regardless of whether the settee was for the benefit of Kaleb. I find it impractical and unlikely. The evidence of Ms. Bowen is preferable, in that, she and Mr. Williams were intent on furnishing the home together and towards that end they both contributed to the cost of the settee which she physically purchased. It seems to me that Ms. Bowen was in the position and took on the responsibility of purchasing the sofa because they were building a home together.

[59] Mr. Williams in his affidavit averred that when Ms. Bowen lost her job at the Prison Oval "she refused to live permanently with me." Under cross examination he gave evidence that she lost her job at the Prison Oval in 2016. This could only mean, that in order for the issue of living together to arise in 2016, the parties would have had to have been in a relationship. Although he denies extending an invitation to her, her refusal, on his evidence, presupposes that she was asked. He has provided no explanation to clarify what he meant. Nothing above however, means that this Court accepts his evidence. The opposite is true. I prefer the evidence of Ms. Bowen which was straight forward and logical. Ms. Bowen in her affidavit averred that the relationship deteriorated and finally ended with her moving out of the home in December 2016. Mr. Williams has said that she packed up her things and moved out in 2016. So inspite of all insistence to the contrary, I accept 2016 as the end of the relationship.

[60] The details of what she says was the condition of the house when they moved in are outlined (supra). She paints the picture of a family living and working together for the advancement of the family unit. Mr. Williams, I am satisfied lived nowhere else, except for the period of time he stayed in St. Ann for the purpose of work and even then, on the accepted evidence of Ms Bowen, he would travel back to be with

them as often as he could. The work situation of Ms. Bowen between 2008 and 2010 has already been discussed. That type of living arrangement, Laing J, as he then was, pointed out in *Treasure v Treasure*, is not uncommon and is in fact the reality of many families living in this country. In order to save on time and money family members will spend the week days living in the city and travel home on weekends. I do not regard the situation described by Mr. Williams as being different. He had to relocate for work but Cow Pen remained the habitual place of residence and consequently, the family home.

[61] I find on the evidence that the home in Cow Pen was used habitually by the parties as their home. There was no other house owned by either party. The members of this family may have intermittently lived away from the home for short periods of time but I accept that it was all part and parcel of them working together as a unit and striving to make a life together. They lived nowhere else together as a family.

Whether the Defendant has rebutted the equal entitlement presumption pursuant to section 13 of the Property (Rights of Spouses) Act?

[62] By virtue of section 13 (1) of PROSA a spouse is entitled to apply to the court for division of property upon the occurrence of certain things:

- a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
- b) on the grant of a decree of nullity of marriage; or
- c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.”

[63] This application must be made within 12 months of any of the events listed under subsections (a) to (c). Section 13 (2) makes it clear however, that an application of this nature must be filed within 12 months of the termination of cohabitation. Once an application is made under section 13, section 14 directs how a court may treat with the property. Specifically, 14(1) which states;

“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;

[64] The presumption that each spouse is entitled to one-half share of the family home can be rebutted by certain circumstances or a written agreement to the contrary. However, where the circumstances of a particular case make it unreasonable for each spouse to be entitled to half share the court under section 7 (1) allows an interested party to make an application to the Court to make orders it thinks reasonable taking into consideration:

(a) that the family home was inherited by one spouse;

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration.

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

(a) a spouse;

(b) a relevant child; or

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

[65] In ***Stewart v Stewart*** Sykes J considered the application of section 7. At paragraphs 32 to 34. He stated:

[32] Another aspect of section 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in section 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the Court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that these may be considered.

[33] It is true that the first two factors, (a) and (b) mentioned in section 7(1), contain the common element that there was no initial contribution from one of the spouses to the acquisition of the family home. The third factor, (c), does not, however, include such an element. It is conceivable that, despite the marriage being a short one, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses.

[34] The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration.

[66] In ***Stewart v Stewart***, Sykes J at paragraph 33 said, that it is possible that, although the marriage was short, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses. Similarly, I am of the view that although the land or a house was partially built before the union does not obviate the possibility that the spouse actively participated in the building of the house on the land or the completion of the house.

Analysis

[67] Mr. Williams has sought to invoke section 7 of PROSA by saying that if Ms. Williams is entitled to anything it is miniscule. It should be noted that in order to properly invoke section 7, the interested party, in this case, Mr. Williams, should have made an application to this court. He did not. I will nevertheless examine his evidence on the point.

- [68] At the very least on the accepted evidence the parties lived together as man and wife between 2010 to 2016. That is a period of six years. This must be viewed in the context of Ms. Bowen's evidence that she moved into the Cow Pen home in 2007. At its longest the parties lived together as spouses for nine years and the evidence at its shortest six years. The period of cohabitation was therefore, in my opinion, not short.
- [69] The Cow Pen Property was not inherited by any of the spouses. As such subsection 7 (1) (a) does not apply. The parties agree that the Cow Pen property is solely owned by Mr. Williams, he having purchased it before they met. However, the Court may, having found that one of the factors is proven examine other factors. See **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ. 47. In **Peaches Stewart v Rupert Stewart** Sykes J also stated that the factors listed under section 7 are not exhaustive. Other factors can be taken into consideration by the court. Whether I accept that the house was an incomplete house when Ms. Bowen moved in and that she made significant contributions towards making it into a home would assist with a determination in relation to the division of the property.
- [70] The house in Cow Pen now consists of 4 bedrooms and three bathrooms. Ms. Bowen's evidence is that not only did she give of her time and energy towards the building of the Cow Pen home but that she also made significant monetary contribution to same. She bought construction items, fittings and at times paid the construction workers. She also on occasion, paid utility bills and bought personal care items for Kaleb. Mr. Williams argues that the only interest Ms. Bowen has in the property is limited to 15 bags of cement, one door and one window. He says at the time Kaleb was born the house was partly completed meaning the structure was built up, the rendering was done, windows and doors were in with the exception of one door and one window that Ms. Bowen bought. Contrary to what she says the house had on a slab roof which he says was done from 2001. She also did nothing for them. She never, cooked, cleaned or washed.

[71] Counsel focused on Ms. Bowen's earning capacity during the relevant period to argue that because she was earning minimum wage she did not have the financial wherewithal to make any meaningful contribution to the construction of the house or the running of the household. Ms. Bowen on the other hand says she did what thousands of mothers do in Jamaica in order to make ends meet, she joined partners and took out loans. It is her evidence that she bought a toilet, kitchen sink and helped to complete the walls of the house while the roof and flooring they did together. Ms. Bowen was not able to produce any receipts to substantiate her assertions that she contributed significantly to the building of the house and to the maintenance of the family unit. In this case, it is my view that, that fact is determinative of nothing as Mr. Williams was also not able to provide proof of his financial efforts. I also take into consideration the explanation given by Ms. Bowen, that she did not retain the receipts or other proof of her contribution because she never thought of putting them down as she did not think they were relevant. I do not think her explanation is unreasonable. In our everyday lives receipts and invoices are rarely kept unless they are required for a specific purpose. Further, in this culture when work men are paid there is no paper trail, no receipts are issued and books are seldomly maintained with signatures. In the circumstances, I take into account the written and oral evidence before me and any explanation given for the absence of receipts.

[72] I have also examined Mr. Williams's evidence that although, they were never in a relationship and she never lived at the house, Ms. Bowen purchased one window, one door and 15 bags of cement for a house that she had no interest in. She also moved in items of furniture into the house but according to Mr. Williams, she did it for the benefit of Kaleb. However, since he insists that he built the home and furnished it solely from his funds that assertion is unlikely to be true. I also bear in mind the evidence in relation to the purchase of the settee which has already been discussed. I also considered Mr. William's insistence that Ms. Bowen did nothing for him and Kaleb against the backdrop of her, on his evidence, travelling from Kingston to Clarendon, just to buy a sofa for his house because he was busy. It

seems to me that if she was willing to go the extra mile and do that, it is difficult to accept, and I do not, that she did not also cook, wash and clean.

[73] Having considered the evidence, I am of the view that Mr. Williams has not presented anything to this court to displace the 50/50 presumption. It would be unreasonable and unjust in the circumstances of this case. As such Ms. Bowen is entitled to one half interest in the Cow Pen Property.

[74] Accordingly, Application granted in terms of paragraphs 1, 3, 4, 6 to 12 of the Further Amended Fixed Date Claim Form filed on December 14, 2022.

[75] Costs to be taxed, if not agreed

[76] Claimant's Attorney to prepare, file and serve the orders herein.