



[2022] JMSC Civ. 207

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00934

BETWEEN RO-YEN SIMONE CHIN-FORBES CLAIMANT
AND RICHARD HOWARD DELANO FORBES DEFENDANT

IN CHAMBERS

Mr Gordon Steer instructed by Chambers, Bunny & Steer for the Claimant

Ms. Stephanie A. Williams and Ronece S. S. Simpson instructed by Henlin Gibson Henlin for the Defendant

Heard: June 20, 2022 and November 23, 2022

Division of Matrimonial Property - Property Rights of Spouses Act - Section 2 (1), 6 (1) and a, 7 (1) of PROSA - Application for a declaration of entitlement to property - Claim for 50% share - Exceptions to the equal share rule - Considerations of the court when determining whether the equal share rule should be varied - Joint tenancy.

MASON, J (AG.)

BACKGROUND

[1] This matter was initiated by way of a Fixed Date Claim Form filed on March 10, 2021. In support of her claim, the Claimant referred to sections 6 and 7 of the Property Rights of Spouses Act 2004 (hereinafter PROSA) to seek several orders.

[2] The orders sought by the Claimant are:

1. *“The parties own the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew is the Family Home.*
2. *The parties own the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew, in equal shares of 50% each.*
3. *The said properties are to be valued by a valuator to be agreed by the parties. If the parties do not agree to a valuator within fourteen (14) days of this order then the properties shall be valued by a valuator. The cost of the valuation is to be borne equally.*
4. *The Claimant shall have the first option to purchase the Defendant’s interest in the said property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew. The said option must be exercised within sixty (60) days of the receipt of the valuation report failing which the property shall be put on the open market and sold.*
5. *Property at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew shall be put on the open market and sold by private treaty or public auction if the option is exercised.*
6. *The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of this Honourable Court if either party is unable or unwilling to do so.*
7. *Such further and other relief as this Honourable Court may deem just.*
8. *Such costs as are incidental to the proceedings.”*

[3] The Defendant acknowledged service on May 4, 2021 and filed an Affidavit in Response on May 21, 2021. Subsequently, the Claimant on October 27, 2021 filed an Affidavit in response to that Affidavit filed on May 21, 2021.

[4] At the first hearing on July 19, 2021 the parties were ordered to file their evidence or evidence other than their own which they intend to rely on by a certain date as the affidavit evidence would stand as the evidence in chief of the parties involved.

THE EVIDENCE

The Claimant's Evidence

Ro-Yen Chin-Forbes

- [5] The Claimant's evidence to support her claim for the orders sought in her Fixed Date Claim Form filed on March 10, 2021 was contained in her affidavit in support also filed on March 10, 2021. Her evidence is that she is a Manager who resides at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew. She met the Defendant around July 2010 and after commencing an intimate relationship he started living with her in January of 2011 at 17 East Kings House Road, Townhouse No. 2, Kingston 6 in the parish of St. Andrew. This townhouse belonged to her and her parents and during the time they resided there, she said they started searching for a family home.
- [6] The Claimant said she and the Defendant heard about the proposed construction at 2 Cherry Hill Drive and when they eventually saw it they selected lot 2 and made a down payment in May 2013. They got married on November 8, 2014 and moved into the home at 2 Cherry Hill Drive as joint tenants on June 4, 2015. Her evidence is that they were not pleased with the interior of the home and discussed and agreed upon changes which they suggested to the contractor and the both of them made site visits throughout the duration of the construction.
- [7] She said that they moved into the family home with her furniture taken from the East Kings House Road house and that the house at 2 Cherry Hill Drive was to be their family home from the start. The couple had a son in 2016 and separated on October 23, 2020 and have lived separate lives since then although still occupying the family home.
- [8] On October 27, 2021 the Claimant filed an "*Affidavit of Ro-Yen Chin- Forbes in Response to the Affidavit of Richard Delano Forbes*" filed on May 21, 2021. In

this affidavit she maintains that she was always included in the search for a family home and says they always had discussions about the property. She says contends that she was the one who told the Defendant about the development, and he became interested in the property as they wanted their own home. She also maintains that they separated on October 23, 2020. She admits that during the union the Defendant occasionally paid the helper and would purchase take out. Her evidence is that the transfer was registered after they got married as it was always the intention for them to own a home together. In this affidavit she relies on several email correspondence and screenshots of messages between her and the Defendant and other persons regarding the 2 Cherry Hill property.

- [9] The Claimant did not call anyone to give evidence on her behalf or by way of affidavit. As a result, she is solely relying on the evidence contained in her affidavits to support her claim for the orders sought in her Fixed Date Claim Form.

The Defendant's Evidence

Richard Delano Forbes

- [10] The Defendant's evidence is contained in his "*Affidavit of Richard Delano Forbes in Response to Affidavit of Ro-Yen Chin Forbes...*" filed on May 21, 2021. His evidence is that he is a Businessman who resides at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew. Mr Forbes says he did not move to the Claimant's home located at East Kings House Road until 2012. At that time, he only contributed to the household expenses by paying the helper and contributing towards food.
- [11] He denies that he and the Claimant made plans to purchase a home in 2012. In fact, it was Mr Forbes and his parents who were planning to purchase a home. At the time his father was ill and wanted to ensure that his son had his own home as

he had faced difficulty qualifying for a loan from the National Housing Trust on his own. He admits that the Claimant did accompany him on one occasion but she was not involved in the decision making process as it relates to the purchase of the house. His evidence is that all decisions were made by him and his mother while all three of them contributed the resources to purchase the property.

[12] The Defendant's evidence is that it was his mother who expressed interest in unit number 3 but it was not available so they decided to go with unit number 2 despite the short comings they had noticed with the latter. A down payment was made on unit number 2 in January 2013 from funds pooled together by Mr Forbes and his parents. The Claimant was not privy to the details of the transaction.

[13] Mr Forbes' evidence is that he proposed to the Claimant on her birthday on December 22, 2013 after she threatened to leave him. At that point he had already made substantial payments towards the unit. They got married on November 8, 2014 and the Claimant's name was added to the title upon a suggestion from Mr Forbes' mother as she did not want there to be any problems in her son's marriage. Although the Claimant's name is reflected on the title she was not a part of the decision making nor did she contribute financially to the purchase of the property. He did admit that he and the Claimant discussed changes to the unit which were done as discussed but those were funded solely by him.

[14] He denies that the Claimant took the majority of her furniture from her East Kings House Road and denies her contribution to the other furniture that was bought for the house. Some of the items he says he purchased include but are not limited to; refrigerator, washing machine, clothes dryer, water dispenser, 3-piece sofa set, 6-seater dining table, king size bed, chest of drawers and outdoor pergola and benches. He is relying on several invoices that are in his name to prove the extent of the furniture he purchased.

[15] In addition, he says he was the one who covered the majority of the expenses in the house and its environs such as landscaping, paying the gardener and housekeeper. Mr Forbes' evidence is that the Claimant states that they separated in December 2019 instead of October 23, 2020 as evidenced in her Affidavit in Support of her Fixed Date Claim Form. The Defendant is relying on this evidence along with the evidence of 2 other witnesses to seek a declaration that the Claimant is not entitled to any share in the property. However, if the court finds that she is entitled to any share then he should be given the first option to purchase her interest.

Hope M. Ramsay-Stewart

[16] The evidence of Hope Ramsay- Stewart is contained in her affidavit filed on December 1, 2021. She is an Attorney-at-Law and Partner at Ramsay Stimpson Attorneys-at-Law whose address for the purpose of the proceedings is 3 South Avenue, Swallowfield Office Park in St. Andrew.

[17] Her evidence is that in December of 2012 she was contacted by Mr Forbes, Jnr in relation to the purchase of 2 Cherry Hill Drive. On January 2, 2013 he emailed the application form along with the reservation deposit for her to complete as his attorney. Mrs. Ramsay Stewart made it clear that she only represented Mr Forbes in the transaction which was to be done by mortgage initially but ended up being changed to a cash sale. The deposit was paid by Mr. Forbes on June 27, 2013 and the Sales Agreement was returned on or about July 2nd, 2013. He also paid the half costs on July 3rd, 2013. Mrs. Ramsay- Stewart relied on emails confirming receipt of these payments to support her evidence.

[18] She says that as far as she is aware the purchase price for the property was paid by Mr. Forbes only and the instructions and correspondence received from the Vendor's attorney also indicated that it was Mr. Forbes who made payments throughout the duration of the purchase. It was in 2015 that the Defendant

informed her that he wanted to add the Claimant's name to the title of the property. At that point he also explained that he wanted to add the Claimant's name as they had just gotten married and he wanted to do the right thing so that if they were to have children they would be protected.

[19] It was on January 13, 2015 that she received the Claimant's details in order to add her to the transfer. This was also supported by an email thread between herself and Lydia Mair in relation to the statement to close. Her evidence is that on January 16, 2015 she sent the Claimant's information to the vendor's lawyer so that her name could be added to the title. On April 1, 2015 she received the amended transfer which contained the Claimant's name and she provided the transfer instrument and email thread to support her evidence. Mrs Ramsay-Stewart says that she explained to the Defendant the legal effect of being registered as joint tenants with the Claimant and he said that the purpose for doing it was in keeping with his intention to be a good husband and possibly father in the future. She also says that the Claimant contacted her on January 28, 2021 requesting all correspondence in relation to the purchase of the property. She responded to the Claimant the following day to inform her that she could not comply with her request.

[20] This is the evidence of Mrs. Ramsay- Stewart.

Marcia Forbes

[21] Marcia Forbes' evidence is contained in her affidavit that was filed on December 16, 2021. Her evidence is that she is a Businesswoman who resides at 5 Sharrow Drive, Estate House No. 4, Kingston 8 in the parish of St. Andrew. She says she is the Defendant's mother and that he is her only child that she shared with her late husband Mr Richard Forbes, Snr. She says they were a close-knit family and after her husband's diagnosis of multiple myeloma in early 2012 he wanted to purchase a house for their son. The Defendant had tried previously to

acquire a mortgage with the National Housing Trust but was unsuccessful so the three of them consolidated their finances to carry out the last wishes of her late husband.

[22] It was on December 4, 2012 that Delano forwarded an email from Allison Sheilds regarding the 2 Cherry Hill development and she provided the email thread to support her evidence. Her evidence is that in order to keep her informed in the process the Defendant always forwarded correspondence to her or copied her on them all the while keeping her sick husband updated on the process. She says that she and the Defendant were the decision makers in the purchase and that she often visited the property with him. She was interested in unit 3 but it was already taken so they eventually went with unit 2 although she had concerns. Subsequently in 2013 unit 3 became available and they settled on a cash sale in order to expedite the process as they all wanted the process to be completed before her husband died.

[23] She admits that she knew of the Defendant's relationship with the Claimant but denies that the Claimant was involved in the decision-making process. Her evidence is that she was the one who told the Defendant to include the Claimant in meetings with Matalon Homes in relation to the purchase after they were engaged. However, she maintains that she was fully involved in the purchase up until they got married as she, her late husband and the Defendant were the ones who financed the purchase. It was in 2015 that she encouraged the Defendant to include the Claimant in the decision making and to add her name to the title as well as to add her name since she also funded the purchase. Unfortunately, she did not insist on her name being added although she had brought it to the attention of the attorney and the Defendant.

[24] She maintains that the purchase of the house was her husband's last gift to their son and that the claimant's name was only added to the title for mere

convenience and planning for eventualities. As a result, Mrs Marcia Forbes is asking that the court to refuse the orders sought by the Claimant.

THE SUBMISSIONS

The Claimant's Submissions

- [25] The Claimant submits that there are two issues that arise in this matter. The first issue is whether the property situated at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew is the family home.
- [26] In relation to this issue counsel referred to section 2 of the Property Rights of Spouses Act to define the family home as a dwelling – house wholly owned by either or both parties and is used habitually or from time to time by the spouses as the only or principal dwelling. Counsel also referred to section 6 of the Act to emphasize that each spouse is entitled to one-half share of the family home. Counsel emphasized here that section 6 of the Act is silent on whether both parties need to have contributed and that the absence of such contribution does not affect the one-half share. However, she did acknowledge that this section was subject to sections 7 and 10 of the Act. Counsel also referred to ***Stewart v Stewart*** [2013] JMCA Civ 47 and ***Margaret Gardner v Rivington Gardner*** [2010] HCV 02594 and the evidence contained in the affidavits such as the fact that the transfer was completed in the Claimant's and Defendant's names as joint tenant to support her submission that the 2 Cherry Hill property is indeed a dwelling house that was owned by both parties as joint-tenants as is evidenced by the Instrument of Transfer and Certificate of Title.
- [27] The second issue is whether there are any section 7 (1) factors present that should be taken into consideration as to whether the parties' interest should be varied. In relation to this issue, counsel referred to section 7 (1) of the Act to outline the instances where the court may deviate from the one-half share rule.

Mr Steer submitted that based on the evidence in the case at bar none of these factors existed. As a result, the court should grant the orders sought by the Claimant to declare that she owns one-half share of the property located at 2 Cherry Hill Drive. In support of this position, the Claimant relies on the authorities of ***Shepherd v Cartwright*** [1995] AC 431 and ***Abbott v Abbott*** [2007] UKPC 53.

The Defendant's Submissions

[28] The Defendant's counsel referred to the Property Rights of Spouses Act and the cases to dispute the Claimant's claims of 50% interest in the 2 Cherry Hill property. Counsel opened the submissions by referring to section 2 of PROSA to define "family house" and also referred to section 7(1) of the Act which gives the court the power to vary the equal share rule where it would be unreasonable or unjust to allow it. ***Stewart v Stewart (supra)*** was also used to emphasize that in order for the court to vary the 50/50 rule one or more of the factors outlined in section 7(1) of PROSA must be present and which would open the gateway to a variation of the rule. Counsel also referred to the case of ***Gardener v Gardner*** [2012] JMSC Civ. 54 which explored variation of the equal share rule. In this case Edwards, J emphasized that if it is the spouse that is alleging that it is unreasonable to apply the equal share rule, the spouse must bring evidence to rebut that presumption.

[29] Upon the abovementioned authorities counsel submits that the home located at 2 Cherry Hill should not be considered as the family home notwithstanding that it has some features of the definition because it is not in full alignment with the definition. Counsel submits that the property was given to the Defendant as a gift by his parents for his sole benefit and use. Also, at the time of the marriage the Defendant had already completed a substantial portion of the sale and the

agreement for sale was only signed in his name. As a result, the property should be considered as a gift and not the family home.

[30] However, in the event that the court finds that 2 Cherry Hill is the family home, counsel submits that it would be unreasonable and unjust to allow for the Claimant to be entitled to one-half share. This submission was supported by the fact that the Claimant made no financial contribution to the purchase of the property and did not make any improvements to the property during the marriage. Also, the Claimant moved with the furniture she asserts that she purchased when she left the home, the property was a gift to the Defendant from his mother and ill father who gave the gift as a dying wish. Finally, the process to purchase the house was completed prior to their marriage. Counsel submits that these are the reasons why if the court finds the property to be the family home that the Claimant is only be entitled to 20% interest in the property.

[31] Having considered the submissions and viva voce evidence adduced at the trial, I will determine the issues that arise as a result of the application.

ISSUES

- I. Whether the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew is to be considered the family home.**
- II. Whether the presumption of the equal share interest in the family home ought to be varied on the basis that it would be unreasonable and unjust to award same and if so, what percentage should be awarded to each party.**

THE LAW AND ANALYSIS

ISSUE I: Whether the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8 in the parish of St. Andrew is to be considered the family home.

[32] *The Property Rights of Spouses Act (hereinafter PROSA)* is the main legislation that governs the property rights of spouses and their entitlement to such rights in Jamaica. **Section 2 of PROSA** is the interpretation section which outlines the definition of “family home”. Section 2 (1) provides that:

“family home” means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;”

[33] **Section 2 of PROSA** makes it clear that the family home can either be owned entirely by one or both spouses. This home may be used as the only or main family home consistently or occasionally. However, if the family home was a gift to one spouse whose intent was for that spouse to solely benefit from the home then it will not be considered as the “family home”. Based on the evidence in the case at bar, at face value it would seem that the property located at 2 Cherry Hill is indeed to be declared as the family home even though the Defendant and his parents were the ones to finance the purchase because the Claimant and Defendant consistently occupied it after they got married and moved in together and lived there until the marriage broke down.

[34] In addition, they were both registered on the transfer instrument and the Certificate of Title as joint tenants. Therefore, a reasonable inference is that there must have been some agreement between the Claimant and the Defendant and or the Defendant and his mother, who he said encouraged him to put the Claimant’s name on the title. However, the crux of this case at bar is whether the

property was indeed given to the Defendant as a gift with the intention for him alone to benefit.

- [35] The evidence before the court is that Mr Forbes Snr., wanted to help his son with the purchase of a house as his last big gift to his son before his death. While the Defendant's father's intention to gift the Defendant a house was clear there was no indication as to whether he wanted the house to only benefit the Defendant. On the other hand, the Defendant's mother in her evidence admitted that she encouraged the Defendant to put the Claimant's name on the title and to include her in the decision making since they were to be married. This indicates that the Defendant's mother at least had some expectation that the Claimant and or at least the couple's future children would benefit from the purchase of the 2 Cherry Hill property.
- [36] In ***Peaches Stewart v Rupert Stewart*** Claim No 2007HCV00327 Sykes J (as he then was) assessed the meaning of a family home in accordance with section 2 (1) and section 13 of the Act. At paragraph 22, he stated that "*the statutory definition of a family home means the permanent or usual abode of the spouses.*" This definition of a family home was also approved by Justice Phillips at paragraph 39 in Court of Appeal case of ***Dalfel Weir v Beverley Tree***, 2014 JMCA Civ 12.
- [37] Also, in the case of ***Pameleta Marie Lambie v Estate Leroy Evon Lambie (deceased)*** [2014] JMCA Civ 45, McDonald Bishop, JA. (Ag.) (as she then was) stated that there are two components to the classification as to whether a dwelling house can be deemed as a family home within the definition of section 2 (1) of the Act. When considering whether a dwelling house falls within the classification of a family home the court must give consideration to the following test: "*the dwelling house*" must be the principal residency of either or both spouses (*the residency test*) and the property must be wholly owned by either or

both spouses (the ownership test). McDonald Bishop also opined that both tests must be satisfied for the dwelling house to be considered a family home.

[38] In the case of *Pameleta Marie Lambie (supra)* an appeal was made against the orders made by Pusey, J declaring that the property in question did not fall within the definition of the family home in accordance with section 2 (1) of PROSA. The Court of Appeal in assessing the trial judge's decision held that the learned trial judge failed to take into consideration both elements of the test required in determining whether a dwelling house can be considered the family home within the statutory definition of section 2 (1) of the Act. The court held that two of the primary tests that can be utilized in coming to this conclusion is the residency test; whether the property is the primary residence of the parties and the ownership test; whether both parties have any ownership in the property in question.

[39] This court in applying these two tests to the case at bar is of the view that the property in question was registered and transferred in the names of the Claimant and the Defendant as joint tenants (the ownership test). Thereafter, it was used as their primary place of residence from 2015 up until the date of final separation in 2020 (the residency test). Based on section 2 (1) of PROSA and the evidence herein, I am of the view that the property located at 2 Cherry Hill Drive is the family home shared by the Claimant and the Defendant.

[40] On the other hand, counsel for the Defendant argued that the property in question ought not to be deemed as the family home on the basis that it was a gift to the Defendant from his parents as the property does not fall within the statutory definition. However, I am of the view that based on section 2 (1) of PROSA and the evidence herein this court finds that the property located at 2 Cherry Hill was indeed the family home shared by the Claimant and the Defendant.

[41] On this finding it is clear that section 6 of PROSA also applies in the instant case. Section 6 of the Act provides that:

“6.-(1) 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 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.”

[42] Section 6 of the Act gives this court the jurisdiction to make a declaration as to the general one-half share entitlement of the parties to the property located at 2 Cherry Hill on the basis of their separation and the fact that it is unlikely that they will reconcile.

ISSUE II: *Whether the presumption of the equal share interest in the family home ought to be varied on the basis that it would be unreasonable and unjust to award same and if so, what percentage should be awarded to each party.*

[43] Historically the issue of division of the matrimonial property was rooted in the common law and equity. However, to achieve an accepted standard of fairness PROSA was enacted in the laws of Jamaica and based on the Act the general rule is that each party is entitled to a 50% share in the family home unless they could provide evidence to the contrary.

[44] Section 7 (1) and (2) of PROSA states that:

“7. — (1) Where in the circumstances of any particular case the Court is of opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following -

- (a) that the family home was inherited by one spouse;*
- (b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
- (c) that the marriage is of short duration.*

(2) In subsection (1) “interested party” means —

- (a) a spouse*
- (b) a relevant child; or*
- (c) any person within whom the Court is satisfied has sufficient interest in the matter.”*

[45] Section 7 (1) of the Act makes it clear that the party who disputes the application of the rule ought to make the application for its displacement. In addition, the court is not only limited to the factors listed in section 7 (1).

[46] According to the Oxford Advanced Learner’s Dictionary the word *“including”* is defined as *“having something as part of a group or set”*. Based on this definition it is clear that the court is open to other considerations and is not just restricted to the three considerations listed in section 7 (1) of the Act. Finally, this section of the Act makes it clear that the court should only exercise its jurisdiction to vary the equal share rule where it would be unreasonable and unjust not to vary especially if any of the factors stated therein exist.

[47] In **Jones v Jones** [2021] JMSC Civ. 60 Carr, J Ag. (as she then was) at paragraph 22 referred to what Brooks, J held in **Stewart v Stewart** 2006 HCV 03158

“If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule... In considering whether the equality rule has been

displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution.”

[48] **Jones v Jones (supra)** makes it clear that in the instant case, Mr Forbes would have to satisfy the court that there are factors which ought to be considered that would make an award of 50% in the family home to the Claimant unreasonable and unjust.

Duration of the Marriage

[49] Another consideration of this court is whether the Claimant and Defendant's marriage is a short one. The case of **Margaret Gardner v Rivington Gardner** 2012 JMSC Civ. 54 para. 29 provides that:

“...the law in the Jamaican context only recognizes common law unions of five years or more. So persons in such a union for five years or more are recognized by law as spouses. Following the New Zealand line of logic then, in the Jamaican context any marriage of less than five years would be a marriage of short duration. I am therefore, prepared to find that the logical and reasonable benchmark for short marriages is less than five years...”

[50] Based on the abovementioned case this court has considered the evidence regarding the timeline of the marriage. They were married on November 8, 2014 but according to the Defendant they were separated in December of 2019 which would make it approximately 5 years and 1 month. Whereas the Claimant's evidence is that they separated on October 23, 2020 which would be approximately 5 years and 11 months. Based on the circumstances here it is not necessary for the court to dispute when the couple separated because whether it was December of 2019 or in 2020 it would have just reached and or exceeded 5 years which is the standard in Jamaica. That means they would have narrowly escaped the time period of under 5 years for their marriage to have been considered a short union.

The Application to Vary

[51] The case of **Carole Stewart v Lauriston Stewart** [2013] JMCA Civ 47 at paragraph 46 provides guidance as to whether it is necessary for the Defendant to make a formal application for the 50/50 rule to be varied. Paragraph 46 states that:

*[46] “Similarly, as was carefully explained by McDonald Bishop J in paragraphs 20-24 of **Graham v Graham**, there is no necessity for a party, who is seeking, by virtue of section 7 (1), to dispute the application of the equal share rule, to proceed by way of a formal notice of application for court orders. In assessing the complaint in that case, that there was no formal application in place, the learned judge noted that in the Acknowledgement of Service of the Claim Form, the defendant, Mr Graham, had stated that he did not admit any part of the claim and that he intended to oppose it. She went on to say at paragraph 21 of her judgment:*

“...There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of [the disputed property]. That, however, is a matter of form. The substance of his response to the claimant’s case amounts to an application for the court not to apply the equal share rule in respect of [that property] and for the court to make an order in the circumstances that is ‘fit and just’. This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7.”

*In applications under both section 7 (1) and section 13, what is required is that the documents, as filed, make clear to the court and to the respondent, the relief that the applicant seeks. The learned judge pointed out in **Graham v Graham** that the claimant in that case would have had ample notice from the defendant’s affidavit that he was applying for a variation of the equal share rule. She is correct in her assessment that his application was one in substance, if not in form.”*

[52] The abovementioned case makes it clear that it was not necessary for the Defendant to make a formal Notice of Application for Court Orders to vary the 50/50 rule. Once the substance of the Defendant’s response to the claim was enough to seek a variation that would be enough. Therefore, this court finds that Mr Forbes’ response to the Claimant’s claim by his affidavit was enough to

amount to a valid application for the equal share rule to be varied thus an independent application is not necessary.

[53] ***Carole Stewart v Lauriston Stewart (supra)*** makes it clear that variation of the equal share rule should not be taken lightly. Brooks JA made it clear at paragraphs 50 and 51 that sections 6 and 7 of PROSA served the purpose of firmly securing the presumption of the equal share rule. Therefore, the court should not displace the rule unless one of the factors outlined in section 7 (1) or other factors exist. Brooks JA also stated that the court should be reluctant to vary the equal share rule and should only do so if the application of the equal share rule would be unjust and or unreasonable. In this case the court overruled the court of first instance's declaration that Mr Stewart was entitled to 80% and Mrs Stewart was entitled to only 20%.

[54] The facts of ***Stewart v Stewart (supra)*** make it distinguishable from the instant case. I also find the same to true for other authorities that I have explored on the point of the equal share rule. In some of these cases the court explored numerous sections of PROSA including sections 10 and 14. However, this court will only explore the sections of PROSA that are applicable to the case at bar which are sections 2 (1), 6 and 7.

[55] ***Stewart v Stewart (supra)*** establishes that the onus is on Mr Forbes on a balance of probabilities to prove to this court that the application of the equal share rule would be unreasonable and unjust. The court accepts the Defendant's evidence that he and his parents made the decision to start the process to purchase the property located at 2 Cherry Hill. The court also accepts the Defendant's evidence that he and his parents were the ones who financed the purchase of the property.

[56] It is clear that any benefit to be accrued to the Claimant by the addition of her name to the Certificate of Title would have been on the occurrence of any

eventualities, which if taken literally could be interpreted to mean on the death of the Defendant. This is supported by the affidavit evidence of Attorney-at-Law Hope M Ramsay Stewart who provided legal services for the Defendant regarding the acquisition of the property. She deponed that the Defendant explained that the addition of the wife's name to the Certificate of Title was solely based on the occurrence of any eventualities, that is, in the event that if anything were to happen to him, his wife and their future children would be protected.

[57] It is well established that the replacement of the presumption in equity and common law by PROSA is unique in nature. The section that is relevant to the issue of whether it is unreasonable and unjust to award 50/50 in the family home is section 7 (1) of the Act, although it does not fit squarely in these proceedings. In the instant case the starting point in the division of matrimonial property is where the parties have separated with no likelihood of reconciliation. In order to displace the 50/50 rule it is necessary to assess fairness to the parties, cogent evidence and contributory factors that would satisfy the court that the equal share rule, if not displaced would be unreasonable and unjust to one of the parties involved.

[58] According to Brooks JA, as he then was in ***Stewart v Stewart (supra)*** the existence of a section 7 (1) factor opens the gateway for the court to consider other factors. One of those factors is fairness to the parties. According to McDonald J (Ag.) as she then was in ***Graham v Graham (supra)*** at paragraphs 15 and 16 reassured:

“15. ... It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See R v R [1992] 1 A.C. 599, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing 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: per Lord Nicholls

of Birkenhead in *Miller v Miller; McFarlane v McFarlane* [2006] 2 A.C. 618, 633.

16. *The objective of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation. It is this notion of fairness that underpins the provisions of sections 6 and 7 of the Act that are under scrutiny in the instant proceedings.*"

[59] I am therefore guided by McDonald Bishop JA that the objective of the statute is to ensure that fairness is achieved upon dissolution of the marriage.

The conduct of the parties

[60] The behaviour of the parties throughout the marriage until its break down is also important. There is no evidence throughout the marriage that the couple pooled their resources to carry out certain activities or had a joint account from which funds were taken or deposited for the benefit of the family. Or for that matter there is no evidence to suggest that they were involved in each other's affairs.

[61] Furthermore, there is no evidence to support the position that the parties shared a common view of conducting their affairs. There is no evidence to indicate that the Claimant supported the Defendant financially or non-financially in the day to day running of the household. Her behaviour runs counter to the view that marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union that if or when the partnership ends each is entitled to an equal share of the assets.

[62] When examining their conduct in relation to the acquisition of the home the Defendant's evidence is that he and the Claimant did not look for a home together. At paragraph 5 of his Affidavit, he says:

"Paragraph 4 and 5 of the Affidavit are denied. At that time my family and I were looking for a property to purchase (2012), the Claimant and I had no plans to purchase a home together as the relationship was still in its early stages. The reason my family and I were looking for a property to

purchase was solely due to the fact that my father, who was gravely ill, wanted to gift me, his only child, a home that I could call my own as I faced difficulties qualifying for a loan from the National Housing Trust. That is the only reason my mother and I were looking at homes to buy which eventually resulted in the purchase of the property located at 2 Cherry Hill Drive (the subject property)."

Paragraph 9 of the Defendant's Affidavit gave evidence on the conduct of the parties involved in the initial meetings and selection of the property. Paragraph 9 states:

"Paragraph 8 of the Affidavit is admitted in that the Claimant did accompany me on one occasion to view the plans for the subject property, however, it should be noted that all initial meetings with the developer were with my mother and myself."

[63] At paragraph 10 of the Defendant's Affidavit his evidence is:

"Paragraph 9 of the Affidavit is denied. Over a period of several months, my mother and I made various visits to Matalon Homes at their office as well as the construction site. It was my mother and I who selected Lot 2 having regard to our finances at the time and the units they had available. It was not a joint decision with the Claimant as she was not involved in the selection of the unit. My mother expressed interest in unit 3 but it was not available at the time and my mother and I had several conversations about the shortcomings of unit 2 and how much more suitable unit 3 was."

[64] The Defendant at Paragraph 11 of his Affidavit state:

"Paragraph 10 of the Affidavit is denied. The down payment on unit 2 was made on January, 2013 and not in May 2013 and goes to show how little involvement the Claimant had in this process. In fact, the Claimant should not be privy to any information concerning the deposit as these funds came from my family's personal accounts and I did not have any discussions with her regarding the down payment. It is vehemently denied that unit 3 was the first choice of myself and the Claimant as again, the Claimant was not involved in the unit selection process and unit 3 was first choice of myself and my mother."

[65] In paragraph 15 of the Defendant's Affidavit he states:

"...The Claimant only became involved in the decision making in relation to the subject property at the very end of the process after we were

married. The Claimant was not involved in any of the decision making regarding the units and did not contribute financially to the purchase of the property. The Claimant's use of words such as "we" and "our" in paragraphs 5-12, suggesting that we jointly sought out this property to purchase and live in together, is misleading."

[66] When assessing the contribution made by both parties the acquisition of items for the family home it is raised that the Defendant was responsible for purchasing the furnishings for the house. At paragraph 22 of his affidavit, he exhibits the cost of furnishings among other items that he purchased. Also, at paragraph 23 he outlines further inequitable behaviour of the Claimant. Paragraph 23 states:

"I will add that the Claimant offered to use her credit card to purchase a work desk, a lamp and rugs so that she could benefit from the points of such a purchase. However, I was constantly pestered to repay her the money that was spent and I made sure to do so."

[67] In addition, at paragraph 25 he states:

"Over the period of our marriage, I covered the majority of the expenses of the house and its environs. These include all landscaping, paying the gardener and paying the housekeeper."

[68] Also, it is noted that at paragraph 23 of the Defendant's Affidavit he said the following:

"I will say that the only furniture pieces that were taken from East Kings House property were a bedroom set which was placed in the guestroom, and two small wooden chairs which were apparently owned by her late grandfather and had sentimental value."

[69] Certainly, the above mentioned are all relevant considerations in determining whether it is unreasonable and unjust to vary the equal share rule and in the instant case it would appear as though Defendant's contributions outweigh the Claimants' contributions.

Intention of the parties

[70] In examining the evidence as it relates to the acquisition of the 2 Cherry Hill property, the cogency in the evidence will illustrate how the property was purchased as a gift for the Defendant alone from pooled family funds. It was the last dying wish of the Defendant's father who was terminally ill, that his son should own a home. On the other hand, the Claimant relies on the principles in **Abbott v Abbott [2017] UKPC 53** which illustrates that financial assistance to a newly married couple to acquire the matrimonial home is intended as a gift to both rather than to one alone. However, in the case at bar, the financial assistance was not given to a "newly married couple" but was given to the Defendant even before the parties were ever engaged. Therefore, it could not have been intended as a gift to the both of them.

[71] Further, the Claimant at paragraph 19 of her submissions quotes paragraph [15] of the Defendant's affidavit as follows:

"My mother told me and I verily believe that though she was of the view that the Claimant's name should be on the title as my wife, she wanted her own name placed on the title and never intended for it to be owned solely by myself and the Claimant as well since she would have contributed significantly to its purchase."

[72] At paragraph 20 of her submissions, she also quotes the Defendant at paragraph [14] of his affidavit:

"Paragraph (13) is admitted and I will add the only reason the Claimant's name was added to the transfer document was because at the time she was my wife and my mother who is an advocate for women's rights, suggested that the Claimant's name be added to the title to limit contention and promote peace within my new marriage. I did not realize that at the time and did not place my mother's name on the title."

[73] Based on the evidence it would appear that the Defendant intended for the property to be for his sole benefit which is evidenced by the fact that he was the only one who signed the Sales Agreement. In fact, it was almost at the

conclusion of the purchase that he instructed the Attorney to add his wife's name at the urging of his mother so that it would not cause an issue in their marriage. The court is of the view that the conduct of the Defendant to add his wife's name at the point that he did may not have indicated intention for her to benefit initially. However, it cannot be ignored that regardless of the point at which her name was added it was in fact added and so this must count for something but certainly this is not an automatic indication that the Claimant ought to get 50% share in the family home.

- [74] Brooks JA in ***Stewart v Stewart (supra)*** considers other contributions that are relevant in deciding that it would be unreasonable and unjust not to displace the 50/50 rule.

“...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.”

- [75] In ***Abbott v Abbott (supra)***, Baroness Hale of Richmond said:

“The parties’ whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to ownership.”

- [76] It is important to note that the Claimant did not provide any evidence to dispute the Defendant's evidence that she did not contribute financially to the purchase of the home. Based on the Claimant's evidence the court does not find her to be a credible witness. For example, as it relates to the deposit for the property, she said she had an idea when it was paid *“in or about May 2013”* however it was actually paid in January 2013. Based on her response it is clear that she did not

know when the down payment for the house was made, she only knew about it because the information was subsequently relayed to her by the Defendant. Also, in cross examination the Claimant said she contributed financially towards the layout, design and appliances and purchased tiles for the bathroom. However, she did not indicate in any of her three affidavits that she made any such financial contribution. To my mind, this indicates that the Claimant is not a credible witness.

- [77] It is well known that the monetary contribution cannot be presumed to be of a greater value than non-financial contribution. The Claimant did not deny that the property was purchased totally by the monetary contribution of the Defendant's parents. There is no dispute that the Claimant was mainly responsible for the alterations of the building plans and for planning internal decorations and arranging the furniture. It is noted that the Claimant and the Defendant were never on equal footing and did not make equal contributions throughout the marriage. The Claimant falls way short on the upkeep and maintenance of the property.
- [78] A factor to be weighed in the circumstance is that the Claimant's contribution on a whole were very miniscule. It is my view that her contributions were insignificant. Also, it cannot be omitted to say that the Claimant and her parents are co-owners of the property at 17 East Kings House Road, St. Andrew.
- [79] The case of ***Mary Maud Taylor v Mike Alphanso Taylor*** [2015] JMSC Civ. 121 highlights the principle that even though the court is to be reluctant to vary the equal share rule, it should be varied if the failure to vary will be unjust or unreasonable.
- [80] In addition, the case of ***Claudette Crooks-Collie v Charlton Collie*** [2021] JMCA Civ 7 illustrates that when varying the equal share rule, the court at first instance must provide the considerations that resulted in the percentage agreed upon.

The case also makes it clear that the variation of the percentage in the family home must match the extent of the financial or non-financial contribution of the parties. The court should consider whether improvements were made and if it was for the benefit or both or only one party. In addition, both positive and negative factors are to be considered when determining the percentage to be awarded in the variation.

[81] ***Claudette Crooks- Collie v Charlton Collie (supra)*** is clear authority that if the court is satisfied that the 50% half-share rule is unreasonable and unjust then it is within the court's jurisdiction to make the orders that it thinks fit in the circumstances. In the abovementioned case the husband made no financial or non-financial contribution to the acquisition or renovation of the property. The appellant purchased the home in 2005 and lived at the property with her mother and her daughter until the respondent moved in with her in 2008. After moving in, the Respondent made changes to the property but in the scheme of things the court considered them to be "*more of a cosmetic nature than structural*".

[82] Upon the authority of ***Collie (supra)*** the circumstances in the case at bar ought to be the primary consideration in determining how to vary the rule. In the instant case the court finds that it would be unjust and unreasonable to grant the Claimant 50% in the 2 Cherry Hill property taking into account that:

- a. The Claimant made no financial contribution to the acquisition of the property.
- b. The money used to purchase the property was a gift from the Defendant's parents, especially his father who was ill and wanted to fulfill his dying wish of buying a home for his son.
- c. The process to purchase the property started prior to the parties' marriage and was completed after the marriage.
- d. The Claimant made no contribution to the purchase of major furniture and appliances in the home and when she moved out of 2 Cherry Hill she took

the furniture that she had moved from her East Kings House Road home with her. The furniture she bought during the marriage was for her own benefit and the Defendant would have to give her a refund for the purchase.

- e. The Claimant did not make any improvements to the property during the marriage. Also, her suggestions to make changes to the plan of the house for a better flow is the extent of her contribution which would be considered miniscule in the grand scheme of things as they were more of a cosmetic nature than structural, even though these changes may have been permanent.
- f. The Claimant and her parents are co-owners of the property at 17 East Kings House Road, Townhouse No. 3, Kingston 8 in the parish of St. Andrew and she is a woman of means.

CONCLUSION

[83] Based on the evidence in the case at bar I find that the Defendant has proven on a balance of probabilities that it would be unjust and unreasonable to grant the Claimant 50% share that she is claiming in the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew.

[84] Accordingly, the Court hereby makes the following Orders:

1. A declaration that the Claimant is entitled to twenty (20%) of the legal and beneficial interest in the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew.
2. The property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew is to be valued by a reputable valuator to be agreed between the parties within 14 days and the cost of the said valuation is to be borne by the parties equally. If the parties cannot agree to

a valuator, the Registrar of the Supreme Court is empowered to select one, at her sole discretion, upon the application of either party.

3. The Defendant herein is to be given the first option to purchase the Claimant's interest in the property located at 2 Cherry Hill Drive, Townhouse No. 3, Kingston 8, in the parish of St. Andrew. This option is to be exercised within sixty (60) days of receipt of the valuation report failing which the property will be sold on the open market and the net proceeds divided between the parties in accordance with their respective share allotment.
4. In the event the property cannot be sold due to issues concerning the subdivision of the land and/or title, the Defendant, in any event, is to pay to the Claimant the monetary equivalent of her 20% interest in the said house, failing which the said sum shall be recoverable by the Claimant against the Defendant as a debt due and owing.
5. The Registrar of the Supreme Court is empowered to sign any and all documents to give effect to the orders herein if either party fails or is unwilling to sign.
6. No order as to costs.
7. Liberty to apply.
8. A stay of execution is granted pending the Claimant's filing of the Notice of Grounds of Appeal. The said Notice of Appeal is to be filed within 42 days of the date of this Order.
9. The Claimant's Attorneys-at-Law shall prepare, file and serve this Order.