



[2016] JMSC Civ. 45

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015HCV03075**

<b>BETWEEN</b>	<b>SELMA CLARKE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>EDWARD CLARKE</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Ms. Judith Clarke instructed by J M Clarke and Associates for the Claimant

Ms. Charmaine Patterson and Kemesha Baker instructed by Charmaine Patterson and Associates for the defendant

**Heard:** December 7, 2015 and March 31, 2016

**Matrimonial Property- Property Rights of Spouses Act ss 2, 6, 7, 9,13,14 - Entitlement to family Home - The Equal Share Rule - Whether application of the Rule Unjust - Burden of proof - One party acquiring land on which family home is built before the relationship or marriage - whether section 7 (PROSA) factor exists to rebut the equal share rule.**

**BERTRAM-LINTON, J (AG.)**

[1] Mrs. Selma Clarke has brought this claim under the **Property (Rights of Spouses) Act, 2004 (PROSA)**, against Mr. Edward Clarke her husband for a declaration that she is entitled to a 50% share in property situated at Haughton court, Hanover, which they occupied as the Family Home and which is registered in the sole name of the defendant in the Register Book of Titles at Volume 1331

Folio 254. The parties are separated and it is agreed that there is no likelihood of reconciliation.

- [2] The defendant has not formally applied to the court to say what proportion he feels should rightly be attributed in terms of ownership to the claimant, but by his opposition to her application contained in his responses to her affidavits, and his evidence given during the amplification of his affidavit evidence, it may be gleaned that he agrees that the property, even though legally registered to him only, does constitute the family home, he opposes the application of the equal share rule, and is desirous of the court coming to a decision in keeping with the provisions of section 7 of PROSA.
- [3] He suggests that the claimant is beneficially entitled to no more than 25% of the value of the premises, based on the fact that the land was acquired solely by him prior to when he calculates that she became a common law spouse , prior to their marriage and based on his calculation of her contribution to its improvement . He suggests that she is still now, able to reside in the premises in one portion while he would reside in the other with his current partner/fiancé and his partner's children.

#### **ISSUES FOR DETERMINATION**

- [4] The central questions, so far as can be gleaned from the evidence of the parties and the written submissions, are;
- a) whether the claimant is entitled to one half share in the family home or
  - b) is there is enough evidence before this court to find that it would be unreasonable and unjust for the claimant to be entitled to a one half share in the family home given the circumstances of the acquisition and improvement of the property.

Depending on how these issues are resolved, the question also arises as to the best procedure to be undertaken in the realization of the entitlement of each party in the family home.

## **THE LAW**

- [5] The Property (Rights of Spouses) Act Section 6-1 (c) is clear in its pronouncement that, each spouse shall be entitled to one half share of the family home where the “husband and wife have separated and there is no likelihood of reconciliation.”

This is made subject to sections 7 and 10 but for the purposes of this case the defendants suggest that section 7 is relevant.

**Section 7 (1)** provides for the exercise of the discretion of the court:-

*“Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one half the family home, the court may on the application by any interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following-*

*a)...*

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

*c)...*

## **THE SUBMISSIONS**

- [6] The claimant is resolute that her direct and indirect contributions to the building of the family home were from the beginning of construction. She says that as a couple since 1983 it was their joint efforts which saw the genesis of the idea to build on the defendant’s land. Their first child was born in 1985 and by 1986 when construction began, they were living as a couple with their first child and the defendant’s child from another relationship in a cramped one room rented space.

- [7] The defendant is just as insistent that it would be unfair and unjust to award more than a 25% share to the claimant because the land on which the house was built was bought before he met and started a relationship with the claimant and developed solely by him to a substantial structure without her knowledge or help.

[8] The starting point in this analysis is that the claimant is entitled to a share in the family home as prescribed by the PROSA, and as conceded by the defendant. The divergence is as to the apportionment of that entitlement. Section 14(1) says that in relation to this application, the court may make an order for the division of the family home as the case requires.

[9] The statutory rule contained in the Act (PROSA) entitles the claimant on the face of it to a one half share in the family home whether or not the defendant is the sole legal and beneficial owner of the property. I agree that this is the proper interpretation of the statute and adopt the dicta of McDonald –Bishop, J (as she then was) as said in **Graham v Graham 2006HCV03158** delivered in April 2008;

*“the equal share rule must be taken as the general rule and should only be departed from if the parties by written agreement seek to oust its operation pursuant to section 10 or where, in the opinion of the court it would be unreasonable or unjust to apply it. The principle of equality has thus been enshrined within our jurisprudence not as a mere aid to analysis but as a rule by which all considerations in respect of the entitlements to the family home must be governed.”*

[10] Equality should only be departed from where it is only fair and just to do so and where such factors are present as to erode the application of the general rule. It is the party who seeks to displace this presumption that bears the burden of showing that it is “unreasonable or unjust”. The defendant must show that the issues and the circumstances of this case warrant the departure from the statutory presumption.

#### **SHOULD THE EQUAL SHARE RULE BE VARIED**

[11] I will therefore go on to consider the evidence presented via the affidavits, amplification evidence, cross examination and submissions in order to determine this issue. I have had regard also to the cases that have been brought to my attention and all have been considered in my analysis and determination of the issue. The cross examination of the parties was particularly helpful as I had an opportunity to assess the demeanor of the parties and all this has assisted me in my findings.

- [12]** It is in this context that I look at the evidence and the relevant considerations that the Act has prescribed. It must be noted that the framers of the statute have not sought to lay down a finite set of considerations even though identifying three specific ones as an example of what may be relevant in certain circumstances. The defendant has sought to rely on the fact that he owned the land prior to having met the claimant. He further supports his argument for a variation of the equal share rule when he says that the house was built in the period from 1986 to 1987. He carried out the construction on his own as a surprise to the claimant who was the mother of his child with the intention to provide a stable home for his growing family who was in cramped quarters. Under cross examination he says that he kept the whole thing a secret and only took the claimant on his bicycle to show her “our dream house” when the structure was three bedrooms, two bathrooms and a kitchen, at which point they moved into it albeit that construction was not complete.
- [13]** The defendant’s evidence that the claimant had no knowledge of the construction of the house, is not credible when I examine the circumstances described under which they were living during the claimant’s first pregnancy, the birth of their daughter and his assertion that the Family home was built to provide alleviation and as their dream house. I also accept the claimant’s evidence that the defendant’s mother sent his five year old son to live with them during this time and since 1986 even though the defendant says the child did not live with them until 1987 when they moved into the family home.
- [14]** This is accepted on the basis that the defendant himself says that he had a desire to stay with the claimant in her home from the time she was pregnant with his child in 1985 in order to ensure their safety especially at nights. This child was born in December 1985 which would mean that for a substantial portion of that year and when he was not working on the ship he cohabited with the claimant and therefore embarked on a common law relationship.

- [15] I am further bolstered in the belief that his mother's home was not his primary place of residence as he suggests, since this would explain why his mother would then send the child who had been living with her to now reside with him where he had now set up his family, to where he had shifted his focus and where he was spending the majority of his time.
- [16] Having embarked on the common law relationship he says that the home he says that the family home was for the benefit of Selma and the children, and so I find that it is not likely that he embarked on this venture in secret. I do not accept then that with both parties employed and with two children to support, that there was no contribution whether directly or indirectly to the venture of the initial building of the house by the claimant. Even if it were to be accepted (which is strenuously refuted by the claimant) that strictly speaking, his funds were used to establish the beginnings of the family home, there is insufficient evidence to digress from the thought that they were now existing and operating as a family unit, with the parties who were deeply involved in a relationship sharing joint hopes and aspirations as they were embarking on their life together.
- [17] In **Jones v Kernott [2012]1 ALL ER UKSC 53**, Lord Nicholls of Birkenhead expressed the thought quite succinctly he said,

*“The presumption of a beneficial joint tenancy is not based on a mantra as to equity following the law... there are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not lightly to be embarked upon. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which they live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise. THAT IS SO EVEN IF THE PARTIES, FOR WHATEVER REASON, FAIL TO MAKE THAT CLEAR BY ANY OVERT DECLARATION OR AGREEMENT.”*  
[Emphasis mine]

- [18] The parties were together in a relationship for approximately 31 years and married for 21 of those years. Disparity in financial contribution is just something that happens in ordinary marriages, there is nothing unusual about one party

owning property and both pooling to develop it and make a life there while raising a family. On the contrary it reflects a stark normality that would characterize a 31 year relationship. An examination of the respective assertions of the acquisition of the property and the contributions by either party does not reveal that a section 7 factor has been proved. "Contribution, by itself does not qualify as a section 7 factor" per Brooks, J in **Stewart v Stewart [2013] JMCA CIV 47** and therefore cannot form a basis to consider departure from the equal share rule established by the statute.

- [19] It is my finding therefore that there is nothing to suggest that it would be unreasonable or unjust for the interest in the family home to be shared in a way than in keeping with the manner intended by the Statute, in equal shares by both spouses. I note that learned counsel for the claimant in her submissions speaks about repayment of several funds paid in taxes and fees in respect of the property, there were no submissions advanced in respect to these and I make no finding connected with those requests.

#### **HOW SHOULD THE SHARES BE REALISED**

- [20] The parties have separated and there is some disparity as to how their interests should be realized. The Fixed Date Claim Form asks for the claimant to realize her interest either by the defendant purchasing her share or by placing the property on the open market and dividing the proceeds. Later on in the written submissions the claimant suggests that if the defendant should fail to exercise the option to purchase the claimant's interest that she should be placed on the Title as a tenant in common. Both those positions seem incongruous since if the ultimate goal is to formalize their separation then placing them together on the title would only create a stop gap measure and incur additional tax obligation for the transfer of the property.

**[21]** Based on the reasons above stated I make the following orders:

1. The property situated at Haughton Court, Lucea in the Parish of Hanover registered at Volume 1331 Folio 254 of the Register Book of Titles in the name of Edward Clarke is the family home of the parties and the claimant is entitled to a 50% share of the said property.
2. The defendant is hereby restrained from disposing of the said property without the consent of the claimant.
3. The property is to be valued by a valuator agreed by them within 30days of this order failing which the Registrar of the Supreme Court is hereby empowered to appoint a valuator. The cost of the valuator is to be borne by the parties equally in any event.
4. The defendant is given first option to purchase the claimant's share of the said property within ninety days of the receipt of the valuation report. The claimant's attorney at law shall have carriage of sale in that event.
5. Should the defendant be unwilling or unable to exercise his first option to purchase the claimant's interest in the property as ordered by the court, the said property shall be sold by the parties on the open market and the net proceeds of sale divided equally between the parties. In that event the Attorneys at law of both parties shall have joint carriage of sale.
6. The defendant is restrained from denying or restricting the claimant's access to the property prior to the disposition of her interest.
7. Should either Party fail or refuse to execute any documents necessary to give effect to the orders herein, the Registrar of the court is empowered to sign the document.
8. Costs are awarded to the claimant to be agreed or taxed.
9. Liberty to apply.
10. Formal order to be filed and served by the claimant's attorney herein.