



(ii) That the Claimant wholly owns the Property at 2384 Hopewell Road, Waterford St Catherine at Volume 1142 Folio 991 ('Hopewell').

[2] The defendant Mr. Herman Dixon is contending that Kandah Way is the family home and is to be divided equally between the parties in accordance with section 6 (1) of the Property (Right of Spouses) Act 2004 ('the Act'). He further argues that he is entitled to a fifty percent (50%) interest in Hopewell.

[3] Mrs. Dixon filed three affidavits and called five witnesses. Mr. Dixon filed two affidavits. All affiants were cross-examined.

### **Background**

[4] The court in this case is to determine the interests of the parties in two properties acquired in their joint names during their marriage. The parties were married on November 29, 1989. The evidence of Mrs. Dixon indicates that they separated in 2008. Mr. Dixon, however, said that they separated in 2010. Their union produced two children who are now adults. They both gave evidence on behalf of their mother in these proceedings. The children reside at Kandah Way.

[5] The parties currently live and work in the Cayman Islands (CI). Mrs. Dixon has been there since August 21, 2000. She is an administrator. While the evidence is not clear as to the exact date Mr. Dixon joined her in CI, it seems to have been sometime in 2003. He worked as a security guard, shoemaker and businessman. They lived together as husband and wife in CI until they separated.

[6] The testimony of the parties about their respective roles in the acquisition, maintenance, repairs and improvement of the properties was quite conflicting. Not even the date they separated was agreed. As a result, I thought it best to set out their evidence in some detail.

### **Hopewell**

[7] It is agreed that Hopewell was acquired by the parties as joint tenants on August 16, 1999 for \$1.35 million. The purchase was financed by the parties' National Housing Trust (NHT) benefits and obtaining a mortgage from that institution. The mortgage was issued in both their names. This was about all that was not disputed.

### **The evidence of Mrs. Dixon**

[8] Mrs. Dixon said that at the time this property was purchased the parties had a relatively good relationship. She saw the advertisement for the sale of the property in a local newspaper. She decided to purchase it. Initially, she had intended that it was to be used as their family residence. However, this did not happen as the property was in dire need of repairs and practically inhabitable. Consequently, it was eventually rented to relieve the financial strain she was under as she was the only breadwinner of the family at that time.

[9] She paid the deposit of \$200,000.00, part of which came from a loan given to her by her mother (who was deceased at the time the matter was being tried) and brother. The rest of the deposit came from her savings and supplemental income she earned selling clothes and other items. She indicated that she alone repaid this loan.

[10] On her own accord, and without any discussion with Mr. Dixon, Mrs. Dixon said she solely paid up his NHT contribution arrears so that they could access the mortgage to cover the balance of the purchase price. She said that Mr. Dixon was unaware of the purchase of the property at this time.

[11] Mrs. Dixon said that at the time she did this Mr. Dixon was in CI visiting with her mother and would not have been in a position to pay up the arrears because he was unemployed.

- [12] She submitted the necessary application to the NHT and both parties later attended the interview. She stated that it was after she had submitted the application that she told Mr. Dixon about the impending purchase. She said he was quite astonished and even enquired of her where she got the money from to do so. According to Mrs. Dixon, Mr. Dixon told her that he was giving his NHT benefits towards the house as a gift for his children.
- [13] Mrs. Dixon told the court that all the costs associated with the sale was paid solely by her. She got a loan from a Ms. Elga Richards which allowed her to do so and she alone repaid it.
- [14] The mortgage was deducted from her salary until she emigrated to CI in 2000. While in Jamaica she worked at the National Family Planning Board. She said that Mr. Dixon did not assist her with making the mortgage payments.
- [15] Her evidence is that Hopewell was in a deplorable condition when it was purchased and in need of extensive repairs. The roof was leaking, windows were falling out, electrical repairs were needed and it was very dirty.
- [16] On account of its poor condition, Mrs. Dixon said that it was rented at a price well below the mortgage and market rental rates. The property was initially rented to her sister for \$9000.00 per month and then to another tenant for \$6,000.00. The rent was used to offset the mortgage payments. All shortfalls in the rent were met by her without any help from Mr. Dixon. Additionally when the property was not rented she paid the monthly mortgage payments in full.
- [17] She borrowed money from the then GSB Co-Operative Credit Union (GSB) (now First Heritage Co-Operative Credit Union) to effect major repairs to the premises. She repaid that loan in full, again she said, without any assistance from Mr. Dixon.

- [18] After those repairs were done Hopewell was rented at an amount that adequately covered the mortgage payments and any difference in the rent was applied to repair and maintain the property.
- [19] The thrust of Mrs. Dixon's evidence was that apart from contributing his NHT benefits to the purchase, which was only accomplished by her paying his outstanding contributions, and which he said was a gift to his children, Mr. Dixon made no other financial contribution towards the acquisition, repair and maintenance of the property.
- [20] She said that his name appears on the title as a joint tenant because she had no choice given the manner in which it was acquired. Additionally, she was constrained to join with him to acquire the property as she did not earn enough income to do so on her own.
- [21] Mrs. Dixon's evidence concerning Hopewell is supported by the evidence given by her children Tane and Taj Dixon, as well as, her sister Prudence Smith-Kidd.

**Mr. Dixon's evidence**

- [22] Mr. Dixon, on the other hand, told the court that at the time of Hopewell's acquisition, he was working in St. Maarten as a security guard. He said that Mrs. Dixon spoke to him about her desire to buy the property. They had a discussion and agreed that they would put their joint NHT benefits towards the purchase.
- [23] He paid up the arrears in his NHT contributions which had been outstanding for some three (3) years to facilitate the purchase. He said the money to do this came from the income he earned as security guard in St. Maarten and which he had been saving to buy a motor vehicle.
- [24] Mr. Dixon said that he worked seven (7) days per week when he was in St. Maarten. He also sent money in amounts ranging from US\$500.00 to US\$800.00 to Mrs. Dixon every month with various persons who were travelling to Jamaica although he was unable at the time of trial to recall any of their names.

- [25] As far as he was aware part of the deposit for Hopewell came from a loan that was given to them by Mrs. Dixon's mother and the rest came from the income they earned from their clothing business. He was the one who repaid this loan. He was not aware of any sums being loaned to them by Mrs. Dixon's brother.
- [26] He denied that he ever said or intended that his interest in Hopewell would be given to his children as a gift. Hopewell, Mr. Dixon said, was acquired as an investment property. He said that it was rented initially for \$12,000.00 per month and that this amount was sufficient to cover the monthly mortgage payments. He further stated that the monthly mortgage payment is now \$9000.00 and the rent was now well in excess of that. Mrs. Dixon alone, he said, has benefitted from any surplus.
- [27] Mr. Dixon also told the court (and this is agreed) that he was at one time responsible for collecting the rent and that he had previously found tenants for the property. When the tenants quit the premises he paid the outstanding utility bills that they left unpaid.
- [28] He also stated that the property remained vacant for only two months and during that period he paid the utility bills while Mrs. Dixon paid the mortgage. (Mrs. Dixon's evidence and that of her witnesses was that the property was not rented for a considerably longer period).
- [29] Mr. Dixon asserted that he contributed equally to the acquisition, repairs and maintenance of the property as he was working after he returned home from St. Maarten. Had he not done so, his name would not have appeared on the title as a joint tenant.
- [30] Additionally, he stressed that it was Mrs. Dixon who managed their finances during the marriage. They worked together as a team in the clothing business and pooled their resources to pay for Hopewell and Kandah Way, as well as, to offset the household expenses and maintain their children.

**Kandah Way**

[31] It is undisputed that Kandah Way was purchased by the parties on March 24, 2004 as joint tenants for US\$20,000.00. This property had been rented to them since 1990. They resided there with their two children.

**Mrs. Dixon's evidence**

[32] According to Mrs. Dixon at the time the property was purchased the relationship between the parties was shaky. She said that its owner, a Mrs. Constran, had spoken to her from as early as August 2001 and informed her that she intended to sell. Mrs. Constran gave her the first option to purchase the premises.

[33] She was residing and working in CI at this time. When she had this discussion with Mrs. Constran Mr. Dixon was unemployed. When she informed him of the impending sale of the property, he expressed no interest at all in its acquisition.

[34] Mrs. Constran indicated to her that she wanted the sale to be concluded expeditiously because she required the proceeds to purchase a home for herself in the United States of America. However, the sale was delayed on account of the deaths of both her parents.

[35] Mrs. Dixon's stated that she alone paid the deposit of US\$3500.00, as well as, another advance of US\$4000.00. She was therefore surprised and uncomfortable when she discovered that Mr. Dixon's name was on the Sales Agreement as joint purchaser. This, she said, was contrary to her wishes and the instructions she gave to her attorneys.

[36] However, she explained that she did not wish to take up additional time by having the documents re-executed as she was under pressure to complete the sale. In any event, she stated that she did not know that Mr. Dixon's name would have been on the title.

- [37] She said that the balance of the purchase price was raised by a mortgage from GSB in her name only. She also had to increase her shares to obtain the mortgage.
- [38] She made all the mortgage payments. These came from an account she held at GSB that was in her sole name. She has exhibited documents showing the remittances she sent from CI which were deposited directly to her account. Later on the remittances for the mortgage were sent to her daughter Tane who made the payments. She said that Mr. Dixon made no contribution towards the acquisition of the property or the mortgage payments.
- [39] Mrs. Dixon spoke of the extensive improvements she did to the property without any assistance from Mr. Dixon. The funds to do the extension came from her pension fund at Island Brokers. These sums were sent to a number of persons in Jamaica and were used to pay the workmen and buy materials. Mr. Oniel Phillips, the contractor who constructed the extension gave evidence which tend to support Mrs. Dixon on this point. She repaired the leaking roof of the house. The cost was \$105,000.00. She received no contribution from Mr. Dixon.
- [40] She was adamant that she alone paid all the household expenses, as well as, the educational and other expenses relating to her children's maintenance without Mr. Dixon lending a hand. Her children, sister and Ms. Karlene Anderson, who was employed temporarily in the capacity of a household helper, gave similar evidence.
- [41] When she wanted to obtain a loan to pay for Tane's tertiary education which was to be secured against the property, Mr. Dixon refused to sign the loan documents to allow her to do so. He also refused to transfer the property to her even though, according to Tane and her, he had agreed to do so. As a result, she had to source the funds from elsewhere to finance her daughter's tertiary education, which she did on her own.

- [42] She also maintained that when the property was bought in 2004 she was residing in CI. Shortly before the completion of the sale Mr. Dixon joined her there. She insisted that although they visited the property and stayed there during some of these visits, they had never done so together.
- [43] The importance of this evidence, in my view, was to make the point that the parties have never resided at Kandah Way together as man and wife after it was purchased and consequently it is not the family home.
- [44] Mrs. Dixon has exhibited a number of documents. These include receipts for the deposit for Kandah Way, valuation and surveyor's identification report. There are also documents and correspondences relating to the deposit of remittances to her account at GSB from July 2003 to 2010. There are bills for labour and material for the extension that was done at Kandah Way. They are all in her name.

#### **The evidence of Mr. Dixon**

- [45] Mr. Dixon has lodged a caveat against Kandah Way. His evidence is in sharp contrast to that of Mrs. Dixon's. The source of the funds for the purchase was strongly disputed by him.
- [46] He said that he was the one who facilitated the sale by speaking with Mrs. Constran. He arranged for the valuation and surveyor's identification report, as well as, the signing of the final papers.
- [47] He contended that the deposit came from their joint account which was held at GSB, monies borrowed from Mrs. Dixon's mother and a partner draw that he had received. (The documents exhibited did not show that the parties had a joint account at GSB. There is evidence of a joint account at Victoria Mutual Building Society (VMBS) from which the deposit for Hopewell came. However, this account seemed inactive at the time Kandah Way was purchased).

- [48] He has testified that Mrs. Dixon had closed this joint account. At the time she did so there was approximately \$2 million deposited in it and the balance on the mortgage was less than \$1 million.
- [49] Mr. Dixon told the court that during the initial period of the sale he did shoemaking and worked at J Wray and Nephew Ltd. He was also a taxi operator from 2000 to 2001. He made financial contributions towards the acquisition and joint account from which the mortgage payments were deducted. The funds that were used to construct the extensive additions to the property came from both of them. He repaired the roof, assisted with the household expenses and maintained his children. He emphasized that the parties always worked together as a team.
- [50] He testified that before he joined his wife in CI he paid all the household expenses at Kandah Way to facilitate Mrs. Dixon making up the balance (presumably the deposit) to pay to Mrs. Constran. He also said that the agreement between them was that he would pay the rent and take care of the household expenses in CI to facilitate Mrs. Dixon paying the mortgage and other expenses in Jamaica. (Mrs. Dixon denied this and said she was the one for the most part who paid their rent and bills).
- [51] Mr. Dixon has denied that the parties have never lived together as husband and wife at Kandah Way. He is maintaining that it is the family home.

### **Issues**

- [52] These are the questions to be resolved:
- (a) Is Kandah Way the family home or not?
  - (b) How is Kandah Way to be shared between the parties, whether or not it is the family home?
  - (c) What are the parties' respective interests in Hopewell?

**Submissions on behalf of Mrs. Dixon**

- [53] Learned counsel Mr Steer has submitted that Kandah Way is not the family home because although the parties resided there as man and wife before it was purchased on March 23, 2004, they did not do so after. He reminded the court that the period of interest would have been from March 23, 2004 when the property was acquired until the date of separation.
- [54] Mr. Steer advanced that while they lived together in the CI from 2003 until they separated, by Mrs. Dixon's account, in October 2008, they have never lived or even visited Kandah Way together after March 2004 as man and wife. Therefore, their principal place of abode would have been in the CI, where they maintained their marriage and not at Kandah Way.
- [55] As a consequence, the court should find that Kandah Way, like Hopewell, is matrimonial property that is to be divided in accordance with section 14 of the Act, Mr. Steer submitted.
- [56] Mr. Steer has urged the court to be guided by the authorities of **Peaches Annette Shirley-Stewart v Rupert Augustus Stewart** 2007 HCV 0327, **Gregory Duncan v Racquel Duncan** [2015] JMCA Civ. 75 and **Dalfel Weir v. Beverly Tree** [2014] JMCA Civ 12 on this issue.
- [57] He pointed out that while section 4 of the Act displaces the rules and presumptions of the common law and equity as it relates to transactions between spouses in respect of property, "nonetheless, the court is obliged to look at the intentions of the parties at the time of acquisition and determine their intention at that time." (Per Brooks JA in **Carlene Miller and Ocean Breeze Suites and Inn Limited v Harold Miller and Ocean Breeze Hotel Limited** [2015] JMCA Civ. 42 at paragraph 54). Mr. Steer also relied on the cases of **Jones v. Kernott** 2011 UKSC 53, **Goodman v Gallant** 1985 EWCA Civ. 15 and **Oxley v Hiscock** [2004] EWCA Civ. 546.

[58] Mr. Steer also submitted that when the court is considering division of matrimonial property under section 14 of the Act, the concept of equal sharing is inapplicable and in those cases “the applicant is required to show some level of contribution” (Per Morrison JA (as he then was) in **William Clarke v Gwenetta Clarke [2014] JMCA Civ. 14** at paragraph 19).

[59] Additionally, since Mr. Dixon has failed to provide credible evidence that he made some “level of contribution” to the purchase of both properties, he is therefore not entitled to share in them. The court should find that Mrs. Dixon wholly owns both properties since she solely contributed to their acquisition, maintenance, repairs and improvement.

[60] In the alternative, if the court were to find that Kandah Way is the family home, it should apply section 7 of the Act and vary the equal share rule, Mr. Steer advanced. He asked the court to accept the evidence of Mrs. Dixon that Mr. Dixon had “flagrantly disregarded his obligations” to maintain his children. The court is to view this as an “extraordinary circumstance” that would cause the equal division of Kandah Way between the parties to be unjust and unreasonable within the meaning of section 7 (1) of the Act.

[61] The authorities of **Scott v Brooks** 1978 1 NZLR 83 and **Bromwich v Bromwich** 1977 1 NZLR 613 were cited in support of these submissions.

### **Submissions on behalf of Mr. Dixon**

[62] Learned counsel Mrs. Dixon has identified the issues in this way:

- i) Where there is an express declaration of trust that declares the parties beneficial interest, can the claimant still acquire the whole of the properties?
- ii) Do the doctrines of resulting, implied or constructive trusts apply?

iii) Does the court have any discretionary jurisdiction to value the interests of the parties in any other way besides that contained in the title document and is the title document conclusive of the parties' interests in the properties?

[63] She went on to argue that Kandah Way is in fact the family home, because since its acquisition it was used mainly for the purposes of the household including the housing of the children of the marriage and providing a place for the parties to stay when they visited Jamaica.

[64] She posited that Mrs. Dixon, the claimant, cannot acquire the whole of the properties and especially Kandah Way if it is to be regarded as the family home. She cited **Goodman v Gallant** (supra) and **Turton v Turton** [1987] 2 All ER 641 in support of her contention that the courts regard an express declaration of trust as sacred and conclusive of the parties' beneficial ownership of property. The court, learned counsel said, as a result of these two authorities had no discretion to consider a resulting, implied or constructive trust.

[65] She urged the court to consider that both properties are held by the parties as joint tenants, and in the absence of any evidence to the contrary, the presumption is that they are both the legal and beneficial owners of the properties in equal shares. She relies on the case of **Stack v Dowden** [2007] 2 AC 432 as supportive of this submission.

[66] Counsel Mrs. Dixon has advanced that the claimant has failed to prove the source of the funds that came to Jamaica by way of remittances to pay the mortgage for Kandah Way in light of the agreed evidence that the parties were living together and working in the CI from 2003 until they separated. This would tend to show, she said, that the acquisition of Kandah Way was more in keeping with Mr. Dixon's assertions that it was purchased as a result of their joint efforts and the pooling of their financial resources.

[67] Both parties, counsel Mrs. Dixon argued, purchased Hopewell using their NHT benefits. She has asked the court to accept that Mr. Dixon was the person who

paid up the outstanding arrears so that he could assist the claimant to purchase it. She made the point that Mr. Dixon would be equally liable for the repayment of the mortgage and this clearly shows that the parties had an understanding that they would hold the property equally as legal and beneficial owners at the time they acquired it.

[68] She further stated that Mr. Dixon had given up the opportunity to use his NHT benefits to purchase a property on his own and that this was “the clearest evidence of detrimental action or alteration of position on his part.”

[69] Counsel Mrs. Dixon also submitted that the cases of **Scott** and **Bromwich** are distinguishable from the case at bar. She pointed out that in those two cases it was not stated whether the parties held the properties as joint tenants and Mr. Dixon did not desert his family.

[70] In closing, counsel Mrs. Dixon put forward that the court is to reject the evidence of the claimant and find that Mr. Dixon did not abandon his responsibilities to his children. She further urged that the court’s decision should be that the parties hold both properties as joint tenants in equal shares.

## **The Law**

### **Kandah Way**

[71] This claim is brought pursuant to the Act. Section 2 (1) defines what is meant by the term “family home”:

*“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 a dwelling-house which is a gift to one*

*spouse by a donor who intended that spouse alone to benefit;*

[72] Section 6 (1) of the Act, which is relevant to these proceedings, states:

*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 a grant of a decree of nullity of marriage;*
- (c) where a husband and wife have separated and there is no likelihood of reconciliation.*

[73] Section 7 gives the court the power to vary the equal share rule, while section 10 allows the court to take into account any pre or post-nuptial agreement between the parties with respect to ownership or division of property.

[74] Therefore to meet the requirements of the Act, it is a prerequisite for any dwelling house that it must “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”, before it can be termed the family home.

[75] In **Stewart** (supra) Sykes J defines the family home in this way at paragraphs 23 and 24 of the judgment:

*“23. It should be noted that the adjectives **only** and **principal** are ordinary English words and that there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. **Only** means sole or one. **Principal** means main, most important and foremost. These adjectives modify, or in this case, restrict the width of the expression **family residence**.*

Indeed even the noun **residence** is qualified by the noun **family** which is functioning as an adjective in the expression **family residence**. Thus it is not any kind of residence but the property must be the **family residence**. The noun **residence** means one's permanent or usual abode. Therefore the statutory definition of **family home** means the permanent or usual abode of the spouses.

24. It is important to note that this definition of family home is vital that the property be used **habitually** or from **time to time** by **the spouses, as the only or principal family residence**. The adjectives **habitually** and **from time to time** tell how the property must be used. The definition goes on to say that such a property must be used **wholly** or **mainly** for the purposes of the household. Thus using the property in the manner indicated by the adverbs is crucial. **The legislature, in my view was trying to communicate as best as 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 at 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 correspondences. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative**

**assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items.**” (Emphasis supplied)

[76] **Stewart** was approved by the Court of Appeal in **Weir v Tree** (supra). However, Phillips JA at paragraph 39 of the judgment had this to say:

*“...Of course I would add as always that each matter must be dealt with on its own peculiar facts...”*

[77] In that case it was held that the family home was the property that the parties shared together and where they maintained their marriage, even though one of the parties was ordinarily resident overseas.

[78] In **Gregory Duncan v Racquel Duncan** (supra) the parties and their children had removed from premises that they had resided in for some time and they went to live at another property. Mr. Duncan was the sole registered owner of the former property having purchased it before the parties were married. Mrs. Duncan sought a declaration that the former property was the family home within the context of PROSA and that she was beneficially entitled to a one-half share.

[79] Batts J found that the property was not the family home. At paragraph 13 of the judgment he said:

*“The evidence before me clearly suggests that the property ... was not the family home at the time of their separation ... **It may have been otherwise, if having relocated, the family had maintained some connection** or visiting relationship with [the property] ...”* (Emphasis supplied)

**Hopewell**

[80] Section 14 of the Act is relevant where the property to be divided between the spouses is not the family home. The court is mandated to take into account the factors found in section 14 (2) (a) to (e). The court must also consider “the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property ...” Contribution is defined in section 14 (3), and it is not confined to mere money. Section 14 (4) expressly states that monetary contribution shall not be viewed as having a greater value than a non-monetary contribution.

[81] In **Clarke v Clarke** (supra) Morrison JA as he then was) provided valuable guidance about the application of section 14 of the Act at paragraph 19:

*“...Apart from the entitlement of each spouse to a share in the family home, there is no concept of equal sharing in the Act and, in a claim to any other item matrimonial property; the applicant is required to show some level of contribution.”*

[82] In **Jones v Kernott**, **Goodman v Gallant** and **Oxley v. Hiscock** (supra) it was emphasised that the courts have long regarded the legal and beneficial interests in property as separate and that they could look beyond the legal interest to determine the beneficial interests of the parties. This, however, was not a task to be “lightly embarked upon”.

[83] In **Jones** Lord Walker and Lady Hale at paragraph 51 of the judgment provide useful guidelines for the courts to follow when considering cases in which property is jointly owned without any clear declaration of the parties’ beneficial interests. The learned authors of **Family Law Week** have set out what I regard as an excellent summary of these principles which I will adopt.

*“(1) The starting point where a family home is bought in joint names is that they own the property as joint tenants in law and equity;*

*(2) That presumption can be displaced by evidence that their common intention was, in fact, different, either when the property was purchased or later;*

*(3) Common intention is to be objectively deduced (inferred) from the conduct and dealings between the parties;*

*(4) Where it is clear that they had a different intention at the outset or had changed their original intention, but it is not possible to infer an actual intention as to their respective shares, then the court is entitled to impute an intention that each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property; and*

*(5) Each case will turn on its own facts; financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair.”*

[84] In **Turton v Turton** (supra) the court held that an express declaration of trust that the couple held the property as joint tenants was conclusive and excluded any discretionary jurisdiction to value the interests in any other way.

[85] In **Scott v Brooks**, the wife left the home leaving the husband to bring up the children on his own. He remained in the former matrimonial home, which the parties had built together. The equity had grown significantly from \$5000.00 at the time of separation to \$20,000.00. On an application by the husband to determine the parties respective shares, it was held that the wife's share would be fixed at \$5000.00 (25% of the value of the premises) as it would be unfair for the wife to be awarded half of the equity at the date of the hearing as this would not take into account the husband's contribution in keeping the house on foot since the date of separation.

[86] In **Bromwich** the parties purchased a house by means of a loan. The husband deserted the wife and their two children for 6 years. During the period they resided there, he had done nothing to improve it. After he left the wife paid the outgoings and looked after the children. It was held that the house would vest in the wife subject to a charge in favour of the husband for \$500.00 which would be payable on the death or remarriage of the wife or upon the sale of the property or when the younger child attained the age of 18 years.

[87] The court found that the desertion by the husband who had contributed nothing to the acquisition of the matrimonial home and who had flagrantly disregarded his obligations to his family, were “extraordinary circumstances” repugnant to justice within the meaning of section 14 of the Matrimonial Property Act 1976.

### **Analysis and Disposal**

#### **Kandah Way**

[88] I found that Mrs. Dixon was forthright. Her demeanour was impressive. She seemed to be better able to recollect the events concerning Kandah Way. Her evidence for the most part was supported by documentary evidence. I also believed the testimony given by her witnesses who appeared to me to be frank. However, I wish to state that I did not act on any aspect of their evidence that was based on hearsay.

[89] Mr. Dixon’s evidence was inconsistent in a number of areas and some of the evidence he gave was omitted from his witness statements. This caused me to conclude that his evidence was unreliable.

[90] However, although I have accepted Mrs. Dixon’s evidence about Kandah Way, I am unable to agree with her that it was not the family home at the time that the parties separated in 2008. I have reached this decision by applying the principles that I have gleaned from **Stewart** and **Duncan**, as well as, because of the following factors:

- (a) In 2004 when Kandah Way was acquired the parties' marriage was still subsisting;
- (b) The property was acquired in both their names as joint tenants;
- (c) Mrs. Dixon indicated that Hopewell had been initially acquired as the family home but that position later changed after it was discovered that those premises were in a state of disrepair and later on Kandah Way was purchased;
- (d) Although the parties were working and residing in CI at the time the property was purchased, their children resided there and were cared for by their aunt in their absence;
- (e) Mrs. Dixon was in daily communication with her children and sister about the children's welfare and matters concerning the household in general;
- (f) Mrs. Dixon paid the household expenses for Kandah Way;
- (g) Tane's evidence, which I accept on this point, was that Mrs. Dixon stayed at Kandah Way whenever she visited Jamaica between 2003 and 2014. Mr. Dixon also stayed there when he visited Jamaica although she cannot recall if they stayed there together;
- (h) The parties also gave evidence that they stayed at Kandah Way when they visited, although they may not have visited at the same time;
- (i) Mrs. Dixon expended a considerable amount of money to the additions to the house.

[91] I am reminded that each case must be judged "on its own peculiar facts". I have therefore considered the manner in which the parties treated with the premises to arrive at the decision that Kandah Way is the family home. The factors listed

above are sufficient to show that the parties “had maintained some connection or visiting relationship with [the property]” (Per Batts J in **Duncan**).

[92] Sykes J in **Stewart**, in addressing the question of whether a residence is a family home, sets out certain factors, which were not exhaustive, that the court ought to bear in mind. These include where the children of the marriage live, eat, sleep or get dressed for school. However, in determining this issue, there is no one size that fits all. The court essentially has to look carefully at the peculiar facts of each case.

[93] While the parties may have stayed at the premises at different times on their visits, I do not believe that this is fatal to a finding that the residence is the family home when the circumstances of the instant case is considered. The parties were living and working abroad and due to the exigencies of their jobs may not have been able to visit the property and children at the same time.

[94] There was also no evidence that they were granted permanent residential status in CI between 2004 and 2008. I have therefore drawn the reasonable inference that Kandah Way was the place they regarded as their principal family residence during this period. More likely than not, it would have been the place that they would have returned to in the event of any changes in their immigration and employment arrangements in CI.

### **Should the equal share rule be varied?**

[95] In light of my finding, section 6 of Act mandates that the family home is to be divided equally between the parties. However, the court is empowered by section 7 to vary the equal share rule, “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, upon application by an interested party, makes such order as it thinks reasonable taking into consideration such factors as the court thinks relevant...”

- [96] Mrs. Dixon for the defendant has urged the court to apply the equal share rule if it found that Kandah Way was the family home, especially in the circumstances of the case where the parties own the property as joint tenants. Mr. Steer, on the other hand, has submitted that if the court accepts the evidence of the claimant that she alone maintained the children of the marriage, paid all the household expenses, repaired the roof and contributed to the full cost of the acquisition, maintenance and extension to the house, then it would be unreasonable and unjust for Mr. Dixon to share equally in the property. I quite agree.
- [97] I wish to state at this point that although no formal application has been made to vary the equal share rule, it has been settled that the court can do so even in the absence of one. (See **Donna Marie Graham v Hugh Anthony Graham** 2006 HCV 03158) Mrs. Dixon in her FDCF and supporting affidavits has asked the court to find that she wholly owns the property. That is sufficient notice to me to say that she is asking for a variation of the equal share rule, should the court find that Kandah Way is the family home.
- [98] There was substantive disparity in the evidence concerning their respective financial contributions to the purchase, maintenance and improvement of Kandah Way. This position is the same as it relates to the evidence about the payment of the outgoings and maintenance of the children.
- [99] I am well aware that the family home “is presumed, in the absence of exceptional circumstances, to be equally owned by the spouses.” (Per Brooks JA in **Miller** at paragraph 37). However, the following features of the evidence, which I have listed below, have led me to the inevitable conclusion that it would be unjust and unreasonable for Mr. Dixon to be given any beneficial interest in Kandah Way at all. These factors, I believe, have placed the case in the realm of “exceptional” and validate what I can only term as a “radical departure” from the equal share rule:

- (1) Mrs. Dixon alone paid the deposit and all the associated costs for the purchase of Kandah Way;
- (2) She was also solely responsible for the mortgage payments. The mortgage was obtained in her name only at GSB and the sums for the mortgage came from an account in her own name and not a joint account held by the parties as Mr. Dixon said;
- (3) Mrs. Dixon paid the household expenses. She maintained the children of the marriage and paid for their educational expenses without any assistance from Mr. Dixon. I take into account the evidence of his refusal to sign the documents to allow for a loan to be secured against the property for his daughter's tertiary education. I regard his failure to maintain his children and assist with their educational and other expenses as a "flagrant disregard" of his parental obligation;
- (4) Mrs. Dixon repaired the leaking roof at Kandah Way. Mr. Dixon left the house and his children and went to reside elsewhere when this happened;
- (5) She alone paid for the extensive additions that were made to the property.

[100] I will admit that the fact that the property was held by both parties as joint tenants did cause the court some anxiety, especially when that fact was combined with the evidence that the parties' marriage was subsisting at the time of the acquisition. However, Mrs. Dixon described their relationship as shaky and had some concerns with Mr. Dixon's name being on the Agreement for Sale. I have also accepted the explanations she has given for failing to re-execute the documents as truthful and reasonable.

[101] As indicated earlier, I am of the view that the circumstances of this case are highly extraordinary. Mr. Dixon did not contribute to the acquisition, repairs, maintenance and improvement of the property. He failed to assist with the household expenses even though his children resided there. He did not help with

their maintenance and educational expenses. Mrs. Dixon was left alone to bear those weighty financial burdens.

[102] I am not inclined to the view that contribution *per se* is to be regarded as irrelevant when considering an application under section 7 of the Act. As McDonald-Bishop J (Ag) (as she then was) said in **Graham** and with which I concur:

*“...I do not believe that contribution can automatically, and without more, be declared as irrelevant. It must be for the court to determine in the circumstances what considerations are relevant and then to decide on the weight to be accorded to each in light of the intent and purpose of the statute to ensure fairness. The contribution of the parties... to the marital union and to the family assets might be a relevant consideration once there is a challenge to the application of the 50/50 rule. It must be that on the totality of the circumstances, when all things are considered and evaluated, including but not limited to contribution, that the court would be able to say whether or not sufficiently good reason exist for a departure from the rule within the ambit of section 7.”*

[103] I find that on the assessment of the totality of the evidence before me that Mr. Dixon’s lack of contribution to the acquisition, maintenance, repairs and improvement of Kandah Way is a relevant consideration. I go further to add that his failure of to assist with the maintenance and education of his children, as well as, the household expenses were also relevant factors that I have placed significant weight upon in coming to my conclusion that the equal share rule is to be displaced.

[104] I am somewhat emboldened in my approach when I consider the learning in **Miller, Graham, Bromwich** and **Scott**. Given what I have identified as the extraordinary circumstances in this case, I have concluded that it would be unjust and unreasonable for Mr. Dixon to be entitled to any beneficial interest in the family home.

### **Hopewell**

[105] Section 14 of the Act governs the division of property other than the family home and sets out the factors to be taken into account when the court is making this determination. (See paragraph 96 above)

[106] The learning in **Clarke** is that when property is to be divided under section 14 the principle of equal sharing does not apply (as under section 6) and the spouse is required to prove contribution, whether financial or otherwise, to the acquisition, conservation or improvement of the property.

[107] I also agree that the principles enunciated in **Jones** (which are itemized at paragraph 99) provide useful guidelines when property is to be divided under section 14. Although the principles adumbrated in **Jones** referred to the family home I am convinced that they are equally applicable to other matrimonial properties. The court is also to bear in mind the factors referred to in section 14 (2) (a) to (e).

[108] In terms of financial contribution, it is agreed that the parties used their NHT benefits to secure a mortgage to purchase the property. The mortgage was issued in their joint names making each of them liable to repay it.

[109] However, the matters in issue are which of the parties paid up Mr. Dixon's NHT contribution arrears? Who repaid loan that was used to pay the deposit? Who paid for the costs associated with the sale? Did Mrs. Dixon pay any shortfalls in the mortgage payments? Did she alone bear the costs to repair and maintain the

property? If the court finds that she did all these things, then how should it share the property between them?

[110] In the instant case the property is held by the parties as joint tenants. Therefore applying the principles in **Jones** they are presumed to own the premises as joint tenants in law and equity and are entitled to equal shares.

[111] I will now examine the evidence to determine if the parties' conduct or dealing supports or displaces the presumption of equal shares in the property.

- (a) At the time the property was being acquired the parties had been married for almost ten years. So I start with the assertion that Mrs. Dixon made that at the time Hopewell was acquired the parties' relationship was good;
- (b) It was not surprising therefore that when she discovered that the property was up for sale and being unable to acquire it on her own she decided to join with Mr. Dixon to purchase it;
- (c) Mrs. Dixon handled the application process to the NHT and she paid Mr. Dixon's NHT arrears. Although Mrs. Dixon said that she did not have a discussion with Mr. Dixon prior to the application being made, I am inclined to the view that there must have been some discussion between the parties about such an important decision;
- (d) The balance of the deposit for the property came from the joint account they had at that time at VMBS;
- (e) They attended the interview together at NHT and the mortgage was duly taken out in their joint names. Both parties were liable to pay it. Mrs. Dixon got the maximum benefit at the time which was \$600,000.00 representing a 52.3% contribution to the purchase price. Mr. Dixon's contribution was \$547,000.00 representing a contribution of 47.7%;

- (f) They were registered as joint tenants of the property;
- (g) Mrs. Dixon said the property was initially purchased with the intention that it would be the family home;
- (h) After the property was acquired, Taj's evidence is that his father was at Hopewell "from the beginning." He was present and participated in the cleaning and painting of the premises together with Mrs. Dixon, their children and her sister;
- (i) Mr. Dixon found tenants for the property and collected the rent giving rise to the inescapable inference that he considered and asserted himself as one of the owner of the property.

[112] Against this background, I am of the view, that the parties' shared a common intention at the time Hopewell was acquired that they would share equally in the legal and beneficial interests in the property. I say so because the parties were married for almost ten years and they shared a good relationship. The property was purchased initially as the family home. This suggests a joint acquisition for the benefit of the parties.

[113] Even if it should be found that Mrs. Dixon paid up Mr. Dixon's NHT arrears because he was unemployed at that time, this does not take away from the fact that without his contribution she would not have been in a position to purchase the property. It could well be that Mr. Dixon could have chosen, at some time later, to pay up those arrears himself and to apply his benefits to purchase a house of his own. I am making this point to say that the use of his NHT benefit towards the Hopewell property, even without more, must count for something. This is only fair.

[114] I did not accept Mrs. Dixon's evidence that Mr. Dixon told her that his contribution was a gift to his children. I accept Mr. Dixon on this aspect of the evidence that he made no such assertion.

[115] While I accept Mrs. Dixon's evidence that she paid the shortfall in the mortgage payments and repaired Hopewell without any input from Mr. Dixon, I found the evidence in this area about how much the property was rented for at given periods, the aggregate figure for the shortfall or surplus in the rent and the amount spent on repairs to be quite vague.

[116] What I discerned was that the current figure for the surplus is at approximately \$5000.00 per month and that it is kept by Tane to be utilised for maintenance and repairs. Just how much have accumulated and over what period, the court was not able to determine given the unsatisfactory state of the evidence.

[117] In any event, in light of the evidence that I have accepted that Mrs. Dixon bore the brunt of the financial burdens as it relates to the acquisition, maintenance and conservation of the property, I do not believe that any issue can reasonably arise with the surplus rent. In any event, the property is still in need of repairs and the surplus is being set aside for that. I can find no injustice in this situation.

### **The application under section 13 of the Act**

[118] Before leaving this matter, I wish to add that the FDCF shows that the claim by Mrs. Dixon was being pursued in accordance with section 13 of the Act. That section provides:

*"13. – (1) A spouse shall be entitled to apply to the Court for a division of property -*

*(a) on the grant of a decree of dissolution of 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.*

*(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.”*

[119] It seems clear from section 13 (2) that it is mandatory that the claim is commenced within twelve months of any of the events that are stated at subsection 1. If the claim is brought outside of this period the applicant must apply to the court for an extension of time for the matter to progress. This application for extension may be made after the claim has been filed. (See **Angela Bryant-Saddler v. Samuel Oliver Saddler** [2013] JMCA Civ. 11).

[120] No application for an extension of time was made in this matter. The evidence reveals two dates of separation, one given by Mrs. Dixon as 2008, the other by Mr. Dixon as 2010. For the purpose of this argument it does not matter which one the court accepts because the FDCF was filed on July 16, 2013. It ought to have been filed either in 2009 or 2011

[121] Based on the evidence, I have no difficulty finding that the parties have separated and there is no reasonable likelihood of reconciliation between them. They have lived separate and apart for a considerable period and the evidence is that they do not now speak to each other and communicate only through their children, if the need arises.

[122] Mr. Dixon did not take this preliminary point and the case proceeded. So now I am faced with the issue as to how to dispose of this matter in a just way. As E.

Brown J said in **Horace Kennedy v Charmaine Kennedy** 2016 JMSC Civ.160 at paragraphs 28 and 29 of the judgment:

*“[28]...According to the learning in **Saddler**, the failure to apply for permission does not render the FDCF invalid. It is merely irregular and cannot proceed until the time for filing has been extended. The situation which faces the court, therefore, is one in which it has proceeded to hear evidence on an irregularly filed FDCF.*

*[29] The answer to the question appears to be to treat the FDCF as having been filed under section 11 of **PROSA**. There is no evidence before me that the parties’ marriage has been dissolved. Indeed, the claim was contested on the basis of their separation... According to Phillips JA, “although a fixed date claim form may be time barred under section 13 (1) (c) of **PROSA**, it could yet validly proceed under section 11 where there is no limitation period as long as the marriage subsists.” (See *Saddler v Saddler, supra*, para [45]). In the absence of evidence that the parties’ marriage has been dissolved, I hold that the marriage subsists and the parties are estranged. I will, therefore, go on to consider the FDCF as if it had been filed under section 11 of **PROSA**.”*

[123] I am convinced that “by necessary implication the equal share rule enacted in section 6 of **PROSA** in respect of the division of the family home applies equally to an application made under section 11 as well as section 13.” (Per E. Brown J in **Kennedy** at paragraph 33 applying the principles laid down by B. Sykes J in **Brown v Brown** [2010] JMSA Civ. 12)

[124] I have adopted this approach so that this matter which has gone all the way can be justly disposed of. The issue was raised by me with the attorneys-at-law who agreed that in the circumstances this was in the best interest of justice.

### **Orders**

[125] The property located at 358 Kandah Way, Waterford, St. Catherine registered at Volume 1129 Folio 93 of the Register Book of Titles is declared to be the family home.

[126] The Claimant is solely entitled to the legal and beneficial interest in the property located at 358 Kandah Way, Waterford, St. Catherine registered at Volume 1129 Folio 93 of the Register Book of Titles.

[127] The Claimant and Defendant are equally entitled to the beneficial interest in the property located at 2354 Hopewell Road, Waterford in the parish of St Catherine registered a Volume 1142 Folio 991 of the Register Book of Titles.

[128] The joint tenancies of the Claimant and Defendant in both properties are severed.

[129] The Claimant and Defendant shall secure a valuation of the Hopewell property within three (3) months of the date hereof. In the event they shall fail to agree on a valuator, the Registrar of the Supreme Court shall be empowered to appoint a valuator. The cost of the valuation is to be borne equally by both parties.

[130] The Defendant shall have the first option to purchase the Claimant's interest within 90 days of receiving the valuation. If he fails to exercise this option, the Claimant shall be entitled within 60 days thereafter to enter into an agreement to purchase the Defendant's interest in the property, failing which the property is to be sold on the open market. Both parties are to bear the cost of the sale equally.

[131] Should the Defendant exercise the option in paragraph 130, then his attorneys-at-law shall have carriage of sale. Should the Claimant exercise the option, then

her attorneys-at-law shall have carriage of sale. Should the property be sold on the open market, the Claimant's attorneys-at-law shall have carriage of sale.

[132] The Defendant shall execute a transfer to pass the legal interest in the Kandah Way property to the Claimant within 30 days of the date hereof. The Claimant's attorneys-at-law shall facilitate this transfer.

[133] The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the orders made should any of the parties be unable or unwilling to do so within fourteen (14) days of being notified in writing.

[134] The parties shall have liberty to apply in respect of the execution of these orders or any issue that may arise as a result.

[135] Each party shall bear their own costs.

[136] The Claimant's attorneys-at-law are to prepare, file and serve the orders made.