



[2012] JMSC Civ. 54

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02594

BETWEEN	MARGARET GARDNER	CLAIMANT
AND	RIVINGTON GARDNER	DEFENDANT

Mrs. Michele Champagne for the Claimant.

Ms. Marjorie Shaw and Ms. Karlene McFarlane Instructed by Dianne Edwards for the Defendant.

Heard: July 20, 21, 22, 2011 and May 7, 2012

MATRIMONIAL PROPERTY – PARTIES SEPARATED – DIVISION OF MATRIMONIAL PROPERTY – FAMILY HOME – VARIATION OF EQUAL SHARE RULE – SECTION 6, 7, 13, 14 AND 15 OF THE PROPERTY (RIGHTS OF SPOUSES) ACT.

FINANCIAL PROVISION – MAINTENANCE OF WIFE – MAINTENANCE OF CHILD OF THE FAMILY – CUSTODY – SECTIONS 10, 20, 21 AND 23 MATRIMONIAL CAUSES ACT – SECTIONS 8, 5, 9 AND 14 OF THE MAINTENANCE ACT.

**EDWARDS J
(In Chambers)**

THE CLAIM

[1] The claimant, Margaret Gardner, company director of 19 Hill Road, Norbrook Heights in the parish of St. Andrew claimed against the Defendant, Rivington Gardner, Architect of 7 Belmont Road, Kingston 5, who is her estranged husband, several declarations and orders. The first of these was an order sought and received pursuant to section 10 of the Matrimonial Causes Act; that pending the final determination of this matter and/or the sale of any interest

she may have in the matrimonial home, whichever is later, her and her children be permitted to continue to reside in the matrimonial home. They continue to do so. The husband resides in rented premises elsewhere.

[2] She also sought a declaration that the property known as 19 Hill Road, Norbrook Heights in the parish of St. Andrew and which is registered at Volume 1385 Folio 123 of the Registered Book Of Titles was the “family home” within the meaning of the Property (Rights of Spouses) Act. There was also a prayer for a declaration that she was entitled to a one half interest in the said property pursuant to the Property (Rights of Spouses) Act generally including sections 6 and sections 11 – 16 and/or alternatively pursuant to the Matrimonial Causes Act generally including section 23 and/or alternatively pursuant to the Maintenance Act generally including sections 4-6 and 11-16 or to such other interest as this Honourable Court deems just.

[3] Other orders sought by the claimant included but was not limited to:

1. An order regarding property rights and/or for division of property and/or alteration of property interests pursuant to the Property (Rights of Spouses) Act, including sections 11,12,13,14,15,17 and 23 including an order that:
 - a. the Defendant purchase the Claimant’s shares in Fi Wi Brand’ish Limited or alternatively an order that Fi Wi Brand’ish Limited be sold and the net proceeds divided equally between the Claimant and the Defendant;
 - b. the mortgage taken over the Claimant’s mother’s house at 4 Jacks Hill Close, Kingston 6 registered at Volume 1112 Folio 650 on behalf of Fi Wi Brand’ish limited be repaid by the Defendant;
 - c. It be determined what interest the Claimant has in all bank accounts, investments, properties and/or assets owned jointly with the Defendant and/or held in their joint names including but not limited to:
 - i. land in St. Thomas part of Marbella Estates;
 - ii. artwork, household furniture, paintings, and other household items;

- d. this Honourable Court determine what interest the Claimant has in bank accounts, investments, properties and/or assets registered or held in the name of the Defendant and/or in the name of the Defendant and others or alternatively not held in the Defendant's name but held in the name of another for his benefit including but not limited to:-
 - i. Bank accounts and/or investments at First Global Bank;
 - ii. as an alternative claim, if it is not the subject of an order awarding the Claimant a share pursuant to section 6 of the Property (Rights of Spouses) Act, the property known as 19 Hill Road, Norbrook Heights in the parish of St. Andrew registered at Volume 1385 Folio 123;

[4] The claimant also sought orders for custody and access for the child of the marriage as well as orders pursuant to the Matrimonial Causes Act generally including section 23 and in accordance with the provisions of the Maintenance Act generally including sections 3,8,9,11,12,14,15,16. In the alternative she also sought an order pursuant to the said sections of the Maintenance Act, for maintenance of the child of the marriage. The maintenance orders sought included but were not limited to orders for the defendant to:

- a) provide suitable accommodation and/or the cost of same for the child to reside with the claimant.
- b) pay for the utilities in respect of the home where the child resides with the Claimant and in particular, the light, water and telephone & cable bills in respect of the said home;
- c) pay the educational expenses including extra curricular activities in respect of the child;
- d) pay the medical, dental and optical expenses;
- e) pay the salary of the employees at the home where the child resides.
- f) pay the sum of \$120,000.00 per month to be paid on the 1st day of each month.

[5] The claimant sought further orders for maintenance for herself including but not limited to a monthly payment of \$150,000.00 the provision of suitable accommodation for herself, payment of utilities and rates, payment of salary for household staff, payment of medical, dental and optical expenses and the payment of grocery bills, fish food and dog food. There was also a claim for a lump sum settlement. An interim consent order for maintenance was effected.

[6] The defendant, not to be outdone, also applied for orders in the following terms:

- (1) An Order that the interim consent order for maintenance on Amended Notice of Application for Court Orders granted herein on the 5th day of July 2010 be varied.
- (2) A Declaration that the Claimant has no legal and or beneficial interest property at 19 Hill Road, Norbrook Heights in the parish of Saint Andrew registered at Volume 1385 Folio 123.
- (3) An Order that the Claimant give full disclosure of her assets owned or held by her immediately prior to the marriage and subsequently and namely for the period at the time September 2005 to December 01, 2010 including butnot limited to:
 - a) Real estate holdings to include the civic address and volume and folio number where there is a title;
 - b) The account number, bank and branch or company where bank accounts and investments are held either in her name solely or with others or in the name of someone else holding for her benefit and the balance or_value of each one as at the date of disclosure.
 - c) Any business or partnership in which she has an interest and the estimated value of any such interest.
 - d) Any signification collection such as antiques, artwork or jewelry and the estimated value of same.
 - e) Any personal property such as motor vehicles and furniture/furnishings and the estimated value of same.
 - f) Any monies owned to her
 - g) Any life insurance policies and the cash value (if applicable) of each policy.
 - h) Her current income.

MATTERS NOT IN DISPUTE

1. The Claim for Marbella

[7] There is no issue taken with the fact that land in St. Thomas part of Marbella Estates was purchased in the name of both parties. The claimant made no financial or other contribution to the purchase of this property. In reality, the actual negotiations for its purchase began before the parties were married.

However, there is evidence that at the time of purchase there was an agreement that both would share in the legal and beneficial interest equally. The defendant in his affidavits, during trial and in counsel's submissions admitted to this fact. Indeed after the land was purchased the parties formed the intention that it would be used for the sole purpose of building a family home for the parties to reside together. There is no dispute that both parties are entitled to one half share in the legal and beneficial interest in that property.

2. The Art Work

[8] The claimant admittedly owned no art work prior to her marriage to the defendant. The defendant owned several pieces of art work acquired before the marriage. Several other pieces were given to the claimant by the defendant as gifts during the marriage. A few pieces were brought into the home by the claimant that belonged to her mother.

[9] During the course of the trial it was conceded by the claimant that her only interest was in those pieces of art work which belonged to her mother and those which were purchased for her or were gifts made to her. There was no dispute on the defendant's side as to the items laid claim to by the claimant in those categories. A list of the said art work was provided to the court and agreed by both sides. The settled list is the subject of a separate agreement between the parties.

3. The Household Furniture

[10] The claimant made a claim for a share in the household furniture, specifically those acquired from the furniture store known as Bali, during the period she was manager there but paid for by the defendant. Her claim was that she chose the pieces and the purchases were facilitated by her managerial discounts. During the trial a concession was made by the defendant who agreed that the claimant could have all the furniture in the matrimonial home with

exception of a few identified items, a list of which was to be drawn up and agreed by the parties.

THE APPLICABLE STATUTORY PROVISIONS

[11] There were 14 affidavits relied on in this matter. The claimant called one witness and all the parties were cross-examined. The issues to be determined and the questions of law to be considered all surround the consideration and application of the relevant provisions in three separate statutes. These were:

- 1) The Property (Rights of Spouses) Act
- 2) The Maintenance Act 2005
- 3) The Matrimonial Causes Act

MATTERS IN DISPUTE

[12] The Claimant applied for division of property under the Property (Rights of Spouses) Act, hereinafter referred to as PROSA. She also sought maintenance for herself and youngest child C. C is not the biological child of the defendant but is a child of the family. Although no direct application may be made to this Court for maintenance, section 3, subsection 2, of the Maintenance Act 2005, allows a Court hearing the proceedings in any case where there is an application made for division of property under PROSA, to make a maintenance order in accordance with the provisions of the Maintenance Act.

[13] I have no intention of reciting the mountain of evidence given in this case. I will however, inevitably refer to those pieces of evidence which are necessary to explain why I have come to a particular finding or view point. To the extent that there is a variance between the evidence of the claimant and that of the defendant, it is to be taken that I do prefer and accept the evidence of the defendant whom I found to be more forthright and concessional than the claimant. I found the claimant to be vague, prevaricating and prone to exaggeration.

1. The Family Home

[14] PROSA is the relevant statutory regime which deals with claims for the division of matrimonial property on separation or divorce. PROSA gives this court jurisdiction to deal with claims involving the respective interest of spouses in both marital and common law unions. Section 6 PROSA provides in part 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 marriage or the termination of cohabitation;*
- (b) On the grant of a decree of nullity of marriage;*
- (c) Where a husband and wife have separated and there is no likelihood of reconciliation;*

(2)

[15] Section 6 requires the court to make a determination firstly, whether the property in question was indeed the family home. Upon that question being answered in the affirmative, each spouse, subject to the named sections, would be entitled, by virtue of the section, to a half share of the beneficial interest in the family home.

[16] One of the subject sections is section 7. Section 7 deals with the power to vary the equal share rule. Section 7 provides that:

7.-(1) 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, 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 other person within whom the court is satisfied has sufficient interest in the matter.*

[17] Section 7 makes it clear that, upon an application by a spouse the Court may make an order varying the equal share rule provided for in section 6. There exists by virtue of PROSA, therefore, a presumption of equality which may be displaced by the application of section 7. The onus rests on the spouse who is alleging that it is unreasonable and unjust to apply the equal share rule to provide evidence to rebut the presumption. In this case the defendant made an application by way of notice of application for court orders supported by affidavit evidence.

[18] Since section 6 requires me to find that there was in fact a family home, I do so find that the house at Hill Road was the family home for the purposes of the application of PROSA. Indeed in that respect there is no dispute. In considering whether to vary the pertinent consideration is fairness. This is clear from the factors the legislators chose to list in section 7. For instance, it may not be fair, in the circumstances of a particular marriage, to divide the family home equally, if one party inherited that home prior to the marriage and the other made no contribution or no significant contribution to its improvement, expansion or preservation. Again, in a short marriage fairness may dictate that a claimant should not be entitled to a share in a defendant's property acquired prior to the marriage. If the family home was not acquired by the joint efforts of the parties then the brevity of the the marriage may justify a departure from the yardstick of equality.

[19] Whether the defendant succeeds or not with his application will entirely depend on whether the provisions of section 7 apply and whether there exist any other relevant factors which the Court could consider in his favour. Where section 7 is being considered questions of contributions by the claimant whether financially or otherwise will become relevant. Factors similar to or such as those

in section 14 may also be considered. In this case the claimant made no financial contribution to the acquisition, improvement or preservation of the family home which was acquired by the defendant before their marriage. The matrimonial properties envisioned by section 7 are recognized as those which are not attributable to the joint efforts of the parties in a marriage or cohabitation and thus it would be unfair, unreasonable and unjust for them to share equally in any such property. The defendant submitted that this matrimonial property in question was not acquired by joint effort in what amounted to a short marriage and was, therefore, a fit case for the application of section 7 of PROSA.

[20] The family home was registered in the name of the defendant only. He owned it prior to this marriage. No one else had any legal interest therein. The parties were married for four years. The parties had no children together but the claimant's three children resided with them. Though the claimant made no financial contribution to the acquisition, improvement, expansion or maintenance of the family home, for the purposes of section 6 and 7, the Act equates non-financial contributions with financial contributions to the family home. Therefore, the non-financial contributions made by the claimant, where they exist, are given the same due regard as if it were a financial contribution.

[21] It was submitted on behalf of the claimant that the Court ought not to vary the half-share rule. It was noted that although the family home was owned by the defendant before the marriage, this was not a case in which it would be fair or just to vary the equal share rule. It was submitted that the family home formed part of a discussion between the parties and the claimant had been led to believe the home was as much the defendant's as it was hers.

[22] It was further submitted that it was the claimant who managed the household and the household staff. It was also argued that the claimant had also made a financial contribution to the running of the household and management of the staff whilst she was employed to Bali furniture store as a manager. It was

further argued that the claimant had been supportive of the defendant in his work and acted as a sounding board for him.

[23] I now turn to consider the evidence relevant to this issue. The parties were married in January 2006 and were separated in April 2010. It was submitted on behalf of the claimant that this was not a marriage of short duration. The court was asked to consider and take guidance from similar legislation in other jurisdiction most specifically section 13 of the New Zealand Matrimonial Property Act of 1976. In that Act marriages were defined as being of short duration if they were less than three years. The Court was also asked to consider all other circumstances including the age of the parties, the fact that both were married before and had children from previous relationships.

[24] Section 13 of the Matrimonial Property Act, 1976 of New Zealand provides:

“For the purposes of this section a marriage of short duration means a marriage in which the spouses have lived together as husband and wife for a period of less than 3 years (in the computation of which any period of resumed cohabitation with the motive of reconciliation may be excluded if it last for not more than 3 months) or, if the court having regard to all the circumstances of the marriage considers it just, for a period longer than 3 years.”

[25] Counsel for the defendant pointed out that PROSA did not define a short marriage neither did it offer any guidance in determining what was to be considered a marriage of short duration. It was argued that even if the court were to use the New Zealand legislation as a guide, the parties’ marriage would be one of a short duration.

[26] The court was asked to take into consideration the fact the parties’ marriage began breaking down from as early as 2008; that the defendant had been subjected periodically to abuse from the claimant. It was argued that this along with the defendant’s medical and mental state provoked him into leaving

the marriage. It was also alleged that sexual relations between them ceased from 2009. It was submitted that on the evidence the court could accept that although the parties physically separated in 2010, the actual separation was as far back as 2008.

[27] Counsel for the defendant cited the case of **In the Marriage of Todd** (No. 2) 25 FLR 260 quoting Watson J at p. 262 where he said:

“Separation means more than physical separation-it involves the destruction of the marital relationship (the consortium vitae). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed”.

It was argued that this was a more appropriate test of separation and that in applying that test the court could find that the marriage was one of short duration.

[28] Although the parties physically separated in 2010, I am prepared to accept that marital relations between them ended from 2009. Even if I were to accept that the marriage ended in 2010, I am not prepared to accept that three years is the bench mark for marriages of short duration. I say this because the law recognizes that domestic relationships require five years of cohabitation before a party is considered a spouse in Jamaica. In any event, section 13 of the New Zealand legislation also contemplates that if the circumstances so provide, a marriage which lasted longer than three years may yet be deemed by the court to be a marriage of short duration

[29] The New Zealand the Property (Relationships) Act of 1976 recognized de facto relationships of less than three years to be relationships of short duration. In that regard de facto relationships are treated in the same way as marriages in New Zealand. I need only point to the fact 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. I find that this was a marriage of short duration.

[30] Whilst the principle of fairness is applicable to both short and long marriages, as parties to a short marriage may still have operated as equal partners, the law recognizes however, that a short marriage by virtue of its very brevity may well produce less fruits which qualify for division.

[31] The family home was described as a three level dwelling house of 6500 square feet. The claimant described it as 7500 square feet but I accept the defendant's description of 6500 square feet. The evidence suggests that it consists of five bedrooms and three bathrooms. It also seems to have been constructed with a powder room, an entertainment area with a full bathroom, a helper's quarters, a gardener's quarters, a swimming pool and a fish pond. In an email attached to one of her affidavits the claimant described it as a "monstrosity of a house".

[32] It was acquired by the defendant more than twenty three years ago. It was registered in the sole name of the defendant. He had lived in it since 1988. The court was asked to note that the defendant had made settlements in his previous marriages which revolved around and included consideration of the market value of the said home. The court was also asked to take account of the fact that the defendant is twenty three years older than the claimant, was close to retirement and that he had already made substantial financial contributions to the claimant using the family home as security.

[33] It was argued that the defendant had made significant financial contributions towards the claimant's financial independence and any further

divestment of his financial interest in her favour to the detriment of his natural born children would be unjust.

[34] The attorneys for the defendant cited the case of **Robinson v Robinson**, (unreported) claim No. 6127 of 2009, where the matrimonial home was purchased from the sole resources of the husband, a retiree, shortly after his marriage to the claimant in 2004. It was registered in the joint names of the parties. The wife had only a modest means but contributed to improving the premises and assisted in the care of her husband, who had serious medical ailments. The marriage lasted five years. The court varied the equal share rule to a twenty percent share, even though it did not consider it to be a marriage of short duration.

[35] In the instant case, at the time the parties met the defendant had been in the process of moving back into the home which had been previously rented. After the marriage the claimant moved in with her three children and the home became the habitual family home. As to the claimant's claim that she managed the household and household staff, the evidence was that there were two helpers and a grounds man. The grounds man had worked with the defendant for over twenty years. The two helpers were brought into the home by the claimant having had them in her employ prior to her marriage to the defendant. All three were paid directly by the defendant. The grocery bills were paid directly by the defendant who went shopping with the claimant and paid at the cashier. All furniture and utilities, dog food and fish food were paid by the defendant. All bills relating to the children were paid by the defendant, especially those relating to the child C, with the exception of school fees for the two oldest children R and Z. He also paid for the claimant's car and the maintenance of it.

[36] During the earlier periods of the marriage the claimant received a salary from Bali of roughly between \$100,000.00 to \$140,000.00 thousand dollars and also a monthly allowance of \$150,000.00 dollars from the defendant. None of

these sums was spent on household expenses except admittedly in some minor sense not specifically identified by the claimant. In fact the claimant was unable to say exactly what her earnings and allowance was spent on, although she declared that she did not know she would have to account for it. Neither was any of it saved. She said they worked as a team although, she admitted, his contribution was greater than hers because his income was greater.

[37] The most generous interpretation one could give to her claim that she managed the household would be to say that she told the helper's what to do. This would be indeed a generous interpretation as she went to work at the furniture store daily and later to Fi Wi Brand'ish store and office. She herself failed to provide any details as to just how she managed the household staff and ran the house. It was the defendant who stayed home with the children in the evenings supervising them along with the helper, assisted with the dropping off of R and picking up of C to and from school, assisted her with the grocery shopping and paid for the groceries. He took C to ballet twice per week and on excursions on the weekends. He also spent a great deal of time with the children generally.

[38] She also claimed that she provided support and assisted the defendant in his work. The claimant is undoubtedly a highly educated individual. She had studied agriculture at the College of Agriculture and at Texas A & M University. She is also the holder of a master's degree in business from the University of New Orleans. The defendant is an architect by profession. He is self-employed, very well known and had been very successful in his chosen field. At least that was the evidence presented on both sides. I have no reason to believe otherwise. He had been an architect for over 39 years. There is no evidence that he only became successful in the years of meeting and marrying the claimant. They met in October 2005 and after a short courtship they were married in January 2006.

[39] The claimant claimed to have been his sounding board. She said that she gave him advice from time to time which he actually used. She also claimed to have had brainstorming sessions with him because she had good ideas. She said he took his work home and showed it to her. The defendant, not surprisingly, has rubbished her claims that she helped him with his work, pointing out unnecessarily, I think, that she had no training in architecture. For my part I am prepared to accept that the claimant did nothing more than give a listening ear as was expected of her as a loving and supportive wife who is well cared for by an equally loving and supportive husband.

[40] She also claimed to have made a contribution to the family home, although not financially. She outlined her contribution as being towards the expansion of the master bathroom. She explained that they had brainstormed how it would be done and went and selected tiles and fixtures together. She also assisted with the decorating. This she explained was in the way of transferring her few pieces of furniture to the bedroom and selecting and specially ordering pieces for the living room.

[41] The defendant had been previously twice married and has five children. He has no biological child with the claimant. His second wife had initiated proceedings against him claiming on the said house and for maintenance. As a result of a court order arising out of those proceedings, (which was not exhibited but was not disputed) he claimed to be paying maintenance to two children of that marriage. I mention it here only because I consider it relevant that two wives and five children had already passed through the house and it had already been the subject of a property dispute.

[42] It was also the claimant's evidence that she knew of his two previous marriages and the court proceedings involving them. She also knew that the house was the matrimonial home from the two previous marriages. His first wife lived in that house. She denied knowledge of any settlement regarding the house

between him and a previous wife. His first marriage lasted 7 or nine years. His second marriage lasted seven years.

[43] The parties had no joint account except an account into which her allowance of \$150,000.00 dollars was lodged and from which she would draw cheques or use a debit card. This account was closed in October 2009 and instead she was given cash or a cheque in the amount. She has never paid a utility bill and had never seen one until the defendant left the home. All bills were paid from the defendant's office.

[44] The claimant was working at Bali when the parties met. She stopped working there in 2008. Shortly thereafter with the financial backing and encouragement of the defendant she opened a store under the name Fi Wi Brand'ish, at the Norman Manley International Airport. The circumstance of how this came about is in dispute. However, I accept the defendant's account that the claimant was unhappy at her job and he wished to give her financial independence. The defendant had no need to open a store for financial independence, which he already had before he met the claimant. The claimant and her children had become financial dependents and providing her with financial independence was a prudent fiscal move.

[45] He borrowed heavily against the house in order to fund the store. The mortgage was over \$16,000,000.00. He subsequently sold a lot of land and paid off \$10,000,000.00 of the principal. There is now a dispute as to how the remainder is to be paid off. The claimant accepts no liability for that debt even though it was taken out, on her account, partly for her benefit. The defendant however, has accepted liability for the mortgage on the family home.

[46] With her agreement (which was necessary because of the caveat she placed on the title to the property) the defendant took out another mortgage on the home, since the start of these proceedings, in order to meet the expenses of the continued maintenance of the claimant and the children at the family home. It

was also done subject to the condition that the mortgage would not affect the amount of her interest in the family home.

[47] Most telling however, is the question of the purchase of Marbella. It is her evidence that even before the marriage their plan was to move to Marbella. The property at Hill Road was to be sold. She agreed that the house was to have provided for him in his retirement years. This gives lie to her claim that they had discussed Hill Road being hers as much as his. The strong evidence, which she has not refuted, is that Marbella was bought with a view to it being the family home in which she would share equally. In fact from the outset the defendant had, honestly in my view, conceded this and agreed to her having a half share in the land, which by all accounts is prime valuable real estate, with a view of the sea.

[48] I find that it would be unfair and unjust not to vary the equal share rule prescribed by section 6, in this case. The family home was not acquired by the common effort of the parties. There is no evidence that they considered or envisaged dividing this property during the happy years. It may well be asked why a court would impose on the parties at the end of a marriage, a sharing of this asset, not contemplated by them at the beginning or during the marriage. Separation or divorce is no reason for the court to depart from the principles by which the parties conducted themselves during the happier times.

[49] I have considered other circumstances in this case as well. Foremost, is the fact that the defendant is aging and at his retirement stage of life. The claimant is still relatively young and in good health. The marriage lasted only 4 years. The defendant made every effort to make the claimant financially independent during the marriage. She was made the beneficiary of valuable real estate to which purchase she made no financial contribution.

[50] This has been the defendant's home since the eighties when the claimant was still a child. It has passed through two former wives and five children. The claimant has made no contribution of any kind to its acquisition, renovation or even its preservation or upkeep. Her non-financial contribution was di minimis. She has not cooked in or cleaned this house. The defendant is not in the sort of business where having a hostess wife would contribute to his professional and business development. Her work in FI Wi Brand'ish was for her own benefit. Despite her declaration that they worked as a team, the hard evidence is that they did not. She was a pampered wife. So much so that she has disdained any notion that if the tide were turned she would even consider maintaining him or taking on any of his liabilities or debts.

[51] I bear in mind that financial contribution carries no greater weight than non-financial contribution. Nothing in the non-financial contributions of the claimant justifies refusing to apply section 7 of the Act in the defendant's favour. Taking everything into consideration, I agree with counsel for the defendant that this is a fit and proper case to apply section 7 of PROSA. Having determined that the equal share rule ought to be varied the inevitable next question is to what? I believe in the circumstances that the inevitable answer is to no share at all. I have no reluctance or hesitation in coming to this conclusion. The defendant is entitled in all the circumstances to 100% beneficial interest in the property at Hill Road.

2. Occupation of the Family Home

[52] Under section 10 of the Matrimonial Causes Act the court may on the application by either party to the marriage grant an order relating to the use or occupancy of matrimonial home. There is an interim order in place. It was submitted that it was necessary for the claimant to remain in the family home with the children until other suitable accommodation is provided by the defendant at his cost. It was further submitted that the claimant had no alternative accommodation and could not afford any.

[53] The defendant on the other hand, submitted that this was not so; that prior to her marriage to the defendant, the claimant resided rent free in her mother's house. He rubbished the claim by the mother that she relied on rental from the premises to sustain her and her husband. It was submitted that in any event the claimant was in a position to pay rent to her mother for use and occupation of the premises.

[54] The cost of maintaining that household is astronomical by any estimation. It must necessarily be a strain on the defendant to maintain himself where he resides, the family home, his company, the claimant and her children, his children from the second marriage, a sick daughter from the first marriage and a grandchild solely from the income from his professional services. That situation is untenable. The claimant has given me no reason why she should be allowed to remain at Hill Road, for which she is unwilling to contribute to the upkeep. In any event it is too large and costly to maintain for her and two children to remain in. I do not accept that the claimant is incapable of finding alternative suitable accommodation for her and the two children, in all the circumstances. They lived quite comfortably before meeting the defendant.

PROPERTY OTHER THAN THE FAMILY HOME

[55] Where there is a dispute between the parties over other property outside of the family home it may be considered for division of property interest by the Court under section 14. Section 14 provides that where a spouse applies for division of property, the Court may divide such property other than the family home as it thinks fit, taking into account factors listed in subsection 2. This is subject to section 17(2) which deals with valuation of the properties.

[56] Subsection 2, 3 and 4 of section 14 states:

(2) The factors referred to in subsection (1) are-

(a) 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, whether or not such property has,

since the making of the financial contribution, ceased to be property of the spouses or either of them;

- (b) period of cohabitation;*
- (c) that there is no family home;*
- (d) the duration of the marriage or that there is an agreement with respect to the ownership and division of property;*
- (e) such other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.*

(3) In subsection (2) (a), "contribution" means-

- (a) the acquisition or creation of property including the payment of money for that purpose;*
- (b) the care of any relevant child or any infirm relative or dependant of a spouse;*
- (c) the giving up of a higher standard of living than would otherwise have been available;*
- (d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-*
 - I. enables the other spouse to acquire qualifications; or*
 - II. aids the other spouse in the carrying on of that spouse's occupation or business;*
- (e) the management of the household and the performance of household duties;*
- (f) the payment of money to maintain or increase the value of the property or any part thereof;*
- (g) the performance of work or services in respect of the property or part thereof;*
- (h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;*
- (i) the effect of any proposed order upon the earning capacity of either spouse.*

(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.

[57] Section 14 therefore, in conjunction with section 15, allows the Court to alter property interests, other than the family home and divide, alter or transfer such interest for the benefit of either spouses or a relevant child, as it thinks fit. I will therefore, consider the other property interests identified by the claimant for division in her favour.

1. The Bank Accounts

[58] The claimant has failed to point to any bank accounts, offshore accounts or financial investments held by the defendant to which she is or may be beneficially entitled. The defendant provided a list of current accounts, fixed income accounts and credit card accounts. The current accounts were three overdraft facilities, two mortgages on the family home from the Bank of Nova Scotia Building Society and loan facilities taken on the long term fixed income accounts. They were all in the red. The defendant is in debt to all financial institutions with which he holds accounts. The claimant is taken to have abandoned this claim in any event, not surprisingly faced with the defendant's mountain of debts. No submission was made by her or on her behalf in this regard. She also made it clear during cross-examination that she had no interest in sharing in his liabilities. I find that she is not entitled to any benefit under this heading.

2. Fi Wi Brand'ish

[59] The defendant is a 50% shareholder in this company and the main source of its capitalization. There is a dispute between the parties as to how it came into being. The claimant's case is that it was set up to provide both spouses with an additional income in cases of illness or unforeseen misfortune. The defendant's case was that it was set up solely as a business for his wife to gain economic independence. She admitted that it was his suggestion that she do something for herself instead of working for someone else. She agreed that this meant her having her own economic independence.

[60] The defendant had a plan which he voiced to the court and it was this. He and the claimant would live at Marbella and the house at Hill Road would be sold or rented for his retirement income. The claimant would be economically independent from the earnings from Fi Wi Brand'ish Ltd.

[61] He declared that he wanted no part of the company and had never been involved in the running of it. In 2008 he signed a transfer of his interest to the claimant which was never effected. This was before the store even began operations. Despite her original claim that he be made to assume the debts of the company, at the end of the hearing she asked for an order for transfer of the defendant's share to her and for him to resign as a director within 14 days of the date of judgment.

[62] The claimant also sought an order that the defendant pays the mortgage loan taken out to finance the proposed Negril store, claiming that he had previously agreed to do so. The claimant contended that it was the defendant's idea to open the Negril store. The defendant denied this.

[63] There is no evidence that this was indeed so. The highest evidence advanced came from the mother of the claimant, Mrs. Merline Harriot, that at the time mortgaging her home was discussed the defendant was present. The defendant submitted however, that he surrendered legal interest in the company since 2008. The conduct of the parties since then has been in keeping with an acceptance that the defendant no longer had any legal or beneficial interest in the company. The defendant had never participated in the day to day running of the company or its banking affairs, never withdrawn funds from its accounts, made no decisions with respect to the operation of the business. Neither did he interface with anyone doing business with the company. It was submitted that there was no evidence to show that the defendant had ever shown any proprietary interest in the company.

[64] The court was also asked by the attorney for the defendant to find that the simple fact that he was a signatory to the lease on the Negril store did not place any obligation on him to discharge the mortgage taken over the claimant's mother's home in full. The defendant maintained that he merely lent support to

the desire of the claimant to expand the store to a Negril operation, as any good husband would.

[65] The account for the Negril store is in the name of the claimant and her mother. He was not a signatory to the bank or mortgage account on that store. The mortgage funds were placed into that account. Though the store was never opened, the funds were never used to defray the principal payment but instead remained in the account and according to the claimant, was being used to pay the monthly repayment on the loan. The defendant has no access to this account. \$4,000,000.00 from the loan sum was spent on stock and the lease. Though stock was bought no account had been giving as to why the store was not opened. The stock remained in storage unsold. The lease is still in place although there was no monthly rental.

[66] The defendant spent \$1,500,000.00 of his personal funds to offset the refurbishing of the Negril store. He also gave of his time and expertise as an architect in setting up the store. I accept when he said that he did this in support of his wife's wishes to expand and not for himself or with any expectation to benefit in anyway. If it were otherwise, there would be no need to use the claimant's mother's home as collateral as it is clear that the family home at Hill Road had a great deal of equity.

[67] The claimant contended that the company was in deficit and although it is possible for it to be profitable in the future it was not now so. The defendant countered that the company was profitable but the claimant had taken the decision to invest the profits in inventory. Be that as it may, surprisingly, the claimant has chosen to operate an administrative office located on Braemar Avenue, with its attendant costs, solely to run one store. That office costs \$52,000.00 dollars monthly for rental. It is unfathomable how that could make any prudent business sense, when one claims to be running an unprofitable

business. In actual fact all the figures in the accounts of the company seem to be hugely inflated.

[68] In 2008 the defendant transferred his shareholding to her. Her account is that they discussed his taking a more active role. His account is that he made a comment and she accused him of interfering in the way she ran the business. I accept his account as more likely to result in his transferring his share.

[69] The claimant made no financial contribution to the airport store. All the financing came from the defendant. He signed a personal guarantee to the sum of sixteen million dollars secured by the Hill Road property. He has never asked to be shown the company's books and he has never been presented with them. He has never interfered in the business. She says he has not interfered because he considered her competent to run it alone. He suggested he has not interfered because he considered the business to be hers solely.

[70] The airport store was opened in July 2008. In June 2008 he signed a share transfer to her stating he had no interest in the company. He repaid ten million dollars on the principal loan. The claimant admitted that this was an advantage to Fi Wi Brand'ish.

[71] The lease for the store in Negril was taken out in the name of Fi Wi Brand'ish Ltd. Fi Wi Brand'ish purchased stock for that store. The money came from the account at Victoria Mutual Limited in the name of Merline Harriot and Margaret Gardener opened for the purpose of the loan to Fi Wi Brandish Limited for that store. The defendant's name is not on the account and he cannot access it.

[72] Since the claimant has now asked for the defendant's share and as he had already shown an intention to relinquish those shares, the court has no difficulty making an order accordingly.

3. Rivi Gardener and Associates

[73] The claimant laid claim to a share in the defendant's company. She did not know when it was formed. She does not know where it was formed. She does know it began at Norwood Avenue by virtue of being told so by the defendant. She has had no association with the company, has never worked in the company and she has no architectural background. She is not a signatory to any account for the company. She did say she signed documents to become a director but there was no transfer of shares. She has never attended a meeting of the directors and was never invited to one. However, she later resiled from her position and declared she was not staking a claim.

[74] Her claim for a share in the defendant's architectural firm was unsupported. No submission was made on her behalf regarding it and it is taken to have been withdrawn. In any event such a claim could not succeed.

4. The Mortgages

[75] The claimant is asking the court to order the defendant to pay the balance on the mortgage over the family home taken to capitalize Fi Wi Brand'ish. The defendant has already paid \$10,000,000.00 and \$6,000,000.00 dollars remains. It was to have been repaid by the profits made by the company. Under the sole management of the claimant this did not happen. It is a significant liability for which the defendant has indicated he will take responsibility.

[76] The claimant seems to be laboring under some misguided misapprehension as to the relationship between benefits and burdens. On the one hand she wants the defendant to share in all the losses of the company but she does not wish to bear any of the liabilities. If they are equal partners, on what basis would the defendant be solely personally liable for the debts of the company while she is not? However, in view of the defendant's posture, I have to accept that he agreed to be personally liable for the remaining mortgage

payments on the house in respect of the loan for the store at the Norman Manley airport. This will form the basis of an order for a lump sum payment in the amount of \$6,000,000.00.

[77] In respect of the loan secured by the property belonging to Merline Harriot I cannot see that this has anything to do with the defendant. It is the sole responsibility of the claimant. This property had been owned by Mrs. Harriot for 34 years. It was her family home. She now lives overseas. The claimant had lived in it as a child and later for sometime after her return from Texas. She occupied it with her first husband and children. It was her home until her marriage to the defendant. As an adult she lived there for over sixteen years. She paid no rental for the entire period but maintained the property. She is her mother's only child.

[78] Regarding the mortgage on the property, it was her evidence that her daughter approached her to assist. She gave evidence that on an evening she was sitting by the fish bond when the claimant came home and told the defendant that she had approached her about pledging the house as security for a loan to assist with the start up and build out of the Negril store. She said that was it. She said Margaret told her in a discussion that the loan would be repaid from the sale of a property at Hill Road. She admitted that she had no discussion with the defendant about the payment of the mortgage arising from the loan. It is clear therefore, that the decision was taken by the claimant and her mother independently of the defendant, who was told of it after the decision was taken.

[79] The defendant admitted that he agreed for the claimant to open a store in Negril. He also agreed that the claimant suggested she would approach her mother to use her home as security. He denied that he agreed to pay off that loan from the sale of his property. He claimed to have only agreed to build out the shop from his earnings as best he could. He said that the earnings from Fi Wi Brand'ish were supposed to pay off that loan. He said his obligation was to pay

off the loan on Hill Road to free it up and ensure that the claimant and Fi Wi Brand'ish did not have that burden. He had at that time transferred his interest to the claimant. This was before Fi Wi Brand'ish opening and during a dispute. I find that the defendant is not liable to repay any sums towards the mortgage loan taken over the home of Mrs. Merline Harriot.

MAINTENANCE OF C

[80] Counsel submitted that where there was an application pursuant to section 10 of the Matrimonial Causes Act regarding the use and occupancy of the family home, the Court pursuant to section 23 of the Matrimonial Causes Act, may make such order as it thinks just for the custody, maintenance and education of any relevant child.

[81] It was further submitted that section 3 of the Maintenance Act provides that where there is an application for division of property under the Property (Rights of Spouses) Act, the court hearing proceedings under that Act may make a maintenance order in accordance with the provision of the Maintenance Act.

[82] Parts of the Matrimonial Causes Act were amended by the Maintenance Act 2005. Sections 21, 25 and 28 have been deleted. Section 20 of the Matrimonial Causes Act now provides;

20.-(1) On any decree for dissolution of marriage the Court may, if it thinks fit-

- a) order a spouse, (hereinafter in this section referred to as the contributing spouse) to secure to the other spouse (hereinafter in this section referred to as the dependant spouse) , to the satisfaction of the Court-*
 - i. such gross sum of money; or*
 - ii. such annual sum of money for any term not exceeding the life of the dependant spouse, as having regard to the means of the dependant spouse, the ability of the contributing spouse and to all the circumstances of the case, the Court thinks reasonable.*
- b) ...*

c) ...

and on any petition for dissolution of marriage the Court shall have power to make interim orders for such payments of money to the dependant spouse as the Court may think reasonable.

(2) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (1), direct the contributing spouse to pay to the dependant spouse during their joint lives such monthly or weekly sum for her maintenance and support of the dependant spouse, as the Court may think reasonable.

(3) If, after any such order has been made, the Court is satisfied that the means of either or both of the parties have changed, the Court may, if it thinks fit, discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the Court thinks fit.

(4) An order made under subsection (1) (a) or (2) shall have regard to the matters specified section 14 (4) of the Maintenance Act.

[83] By virtue of section 22 whilst proceedings may commence under section 20 or section 23 (2) once a petition for dissolution of marriage has been presented, no order other than an interim order can be made until a decree nisi has been pronounced, and no such order has any effect until a decree absolute has been pronounced.

[84] Under section 23 of the Act the Court may make such order as it thinks fit for the custody, maintenance and education of any relevant child or for the maintenance of a spouse. This is to be done in accordance with the provisions of the Maintenance Act.

[85] The Maintenance Act confers obligations on spouses to maintain each other and amongst other things on parents to maintain their children. No direct application for maintenance can be made to this Court under this Act. However, where an application is made for division of property under the Property (Rights of Spouses) Act, the court hearing those proceedings can make maintenance orders in accordance with the provisions under the Maintenance Act.

[86] Section 8 of the Maintenance Act provides that:

s.8.-(1) Subject to subsection (2), every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent's unmarried child who-

- (a) is a minor; or*
- (b) is in need of such maintenance, by reason of physical or mental infirmity or disability.*

(2) ...

(3) For the purposes of this Act, a person is the parent of a child if –

- (a) the person's name is entered as a parent of the child in the general register of births pursuant to the Registration (Births and Deaths) act, or in a register of births or parentage information kept under the law of any overseas jurisdiction;*
- (b) the person is or was a party to a marriage (including a void marriage) or cohabitation and the child is a child of the marriage or cohabitation;*
- (c) the person is a party to a marriage or cohabitation and accepts as one of the family a child of the other party to the marriage or cohabitation;*
- (d) the person adopts the child;*
- (e) the person has admitted paternity or a court has made a declaration of paternity under section 10 of the Status of Children Act in respect of the child;*
- (f) the person is the child's natural mother;*
- (g) the person has at any time in any proceedings before a court, or in writing signed by the person, acknowledged that the person is parent of the child, and a court has not made a finding of paternity of the child that is contrary to that acknowledgement; or*
- (h) the person in loco parents to the child, including a person who has demonstrated a settled intention to treat a person as a child of the person's family, except under an arrangement where the child is placed for valuable consideration in a home by a person having lawful custody.*

[87] Section 9 of the Maintenance Act is also applicable. It states that:

- 9.-(1) A maintenance Order for the support of a child-*
- (b) shall apportion the obligation according to the capacities of the parents to provide support; and*
- (c) may make an award for the payment of a sum of money for expenses in respect of the child's parental care and birth.*

- (2) *In considering the circumstances of a dependent who is a child, the Court shall have regard to the following matters in addition to the circumstances specified in section 14 (4)*
- (a) that each parent has an obligation to provide support for the child;*
 - (b) the child's aptitude for, and reasonable prospects of obtaining an education; and*
 - (c) the child's need for a stable environment.*
- (3) *The Court shall have regard to the matters set out in subsection (4) in considering whether any and what order should be made under this section for requiring any party to make by payment towards-*
- (a) the payment of expenses in respect of the prenatal care and birth;*
or
 - (b) the maintenance or education of a child who has been accepted by that party as a child of the family.*
- (4) *The matters referred to in subsection (3) are-*
- (a) the extent (if any) to which that party had, on or after such acceptance of the child assumed responsibility for the child's maintenance; and*
 - (b) the liability of any person, other than the persons who cohabited, to maintain the child.*

[88] In relation to a maintenance order a Court may make an interim or final order for periodical or lump sum payments. The Court also has the power to transfer property to a dependant or order such property to be held on trust for a dependant. At any time after an order has been made the Court upon application, may vary or suspend or cancel the order if the circumstances so warrant it.

[89] There is an interim consent order in place in respect of the claimant and the child C. The claimant's submission was that the defendant be required to pay no less than what was in the consent order. This amounts to over three hundred thousand dollars per month for maintenance of the home and for both claimant and the child C.

[90] C is a child of the family. There is no dispute as to this fact. The claimant's application is for the defendant alone to fully maintain C. This is not in keeping with the spirit of section 5, 8 (1) and section 9 of the Maintenance Act. Both the

claimant and the defendant have an obligation to maintain her according to their respective capacity.

[91] It was submitted that the claimant does not now have nor will she ever have the capacity to maintain her own child. It was claimed that she was the managing director of Fi Wi Brand'ish which was a company in debt. It was also submitted that the biological father of C has never acknowledged her existence or supported her neither has he shown any intention to do so in the absence of a paternity test and a court order. It was also submitted that the defendant's illnesses were controlled by medication and did not prevent him from working and making substantial earnings at his particular calling. It was also submitted that at 64 the defendant showed no intention of retiring from his successful vocation and should be made to fully maintain C.

[92] It was also submitted that the defendant's earnings were sufficient and that the defendant had systematically attempted to secret his earning both from the claimant and from the court. Most specifically, the argument went, he had failed to account for over forty-five million dollars earned from the sale of two properties since the marriage. The court was asked to find that these sums had been secreted away in offshore accounts by the defendant. Of course there was no proof of any such thing.

[93] The defendant argued that he did not have the means to pay and the claimant had failed to prove anything to the contrary. It was further submitted that the parties had enjoyed a lifestyle which was sustainable whilst the defendant was professionally engaged along with assistance from bank financing. It was argued that the downturn in the economy severely impacted the defendant's ability to secure work and his ill-health had now clearly impacted his means and his ability to provide maintenance.

[94] It is clear from the evidence and admissions made by the defendant that during the period of his marriage he grossed on average in excess of twenty four million dollars per year up to 2009. His income has declined with the down turn in the economy and he has no large or medium sized projects pending. Reference was made to two small projects in the negotiation stages. His fee income in 2011 was 61% less than in 2010. He has kept the office open with the assistance of bank loans. He does have an office with monthly payments of over \$1,700,000.00. His personal expenses since leaving the matrimonial home is at least two hundred thousand dollars per month. He claimed to be insolvent with several outstanding mortgages taken out on the family home. The evidence indicated that those mortgages totaled in excess of \$32, 000,000.00 million dollars.

[95] The defendant has five adult children from his former marriages. Two are under the age of twenty three. He still has responsibility for those two. He assumed the cost of university first degree overseas for his son and the overseas cost of a Masters degree for his daughter. They both total a cost of US \$45,000 per semester plus the costs of living expenses, books and airfare. He also assumed financial responsibility of his granddaughter. Her mother is supposedly ill. It is clear as clear can be that even though the defendant earned a substantial income annually during his marriage much of it appears on the evidence to have been wholly expended on the needs of his immediate and extended family. He has no significant savings evidenced before this court. The defendant appears to be one who spends as much as he earns and more.

[96] The attorneys for the defendant asked that the court, in considering the level of maintenance to C, take into account the fact that the defendant was close to retirement; he was in poor physical health; had continuing financial obligations and the fact that the child C had a right to be supported by her known biological father.

[97] They further argued that the claimant had a legal duty to maintain her own child. They asked the court to disregard her assertion that she is unable to do so. They pointed out that the claimant's bank balances and history of indebtedness were in a healthier state than his. His attorneys also argued that the claimant was younger, fully educated and was in a better position to rebound from the financial readjustment that they have had to make.

[98] It was argued that in the absence of any detail as to the financial needs of the child to guide the court in making an award, the court could look at the maintenance given to the older children and accepted by the claimant as adequate. In the case of the boy child Z, it was a monthly sum of \$25,000 plus all educational and medical expenses made by his father. In the case of the girl child R, it was a monthly sum of \$8,400 together with all educational and medical expenses. The fathers of these children are professional business men in their forties with no other children to date.

[99] It was further argued that the claimant, prior to meeting the defendant, had assumed all financial obligations for the child. At that time, it was argued, she managed to maintain herself and all three children on her salary of approximately \$140,000, along with the maintenance sums given to her by the other two fathers.

[100] The court was also asked to consider the evidence that the defendant, as part of a recent settlement, is paying to his second wife a sum of \$45,000.00 for two of their children, together with all their educational expenses. He had supported his granddaughter since birth. She is a dependent. She is the child of one of his daughters and bears the name Gardner. She is nine.

[101] The claimant's evidence was that prior to meeting the defendant, it was her intent to raise the child C by herself. She had no intention of suing the

biological father for maintenance. She was meeting all their needs from her salary and the contributions of the fathers of the other two children.

[102] I have considered all the relevant factors in this case. I accept that at some point the defendant was a high fee earner. But with benefits came burdens. His expenses were also extremely high. His bank accounts are in overdraft, he is in debt to at least three banks for loans, half the equity in his home is in mortgage loans, and his company is also in debt. He needs new business to keep afloat and there is no evidence of much of that coming in. He is getting older and he is not in good health. His own personal monthly expenses excluding that for C and the claimant is way over one million dollars. These are being met from loans which from the evidence are now not being repaid.

[103] I have concluded on the evidence that the sum of \$100,000.00 per month is adequate maintenance for the child C and is a sum within the financial capacity of the defendant. I would also order that the defendant contribute one half of the educational, medical, dental and optical costs for the child C, as they occur. The claimant is advised to seek an order against the biological father of the child C who is also a professional architect. The claimant knows the whereabouts of the father. She has had a number for him since 2004. She called him on that number as late as 2008. The evidence is that he did an affidavit which was not exhibited in this case. Presumably she still knows where to find him. In any event the sum ordered is more than adequate to meet the needs of a small child of seven.

MAINTENANCE OF WIFE

[104] The claimant sought orders pursuant to the Matrimonial Causes Act including section 23 and pursuant to the Maintenance Act including sections 3,4,5,11,12,14,15,16. In relation to property adjustments and financial provisions the court has the discretion to consider the factors in section 5 (2) and section 14(4) and any other fact or circumstances which the justice of the case requires to be taken into account: See section 14 (4) (m) of the Maintenance Act.

[105] In this case the defendant left the marriage citing inability to withstand the claimant's abuse in light of his depressive illness. He also cited her conduct of going out and staying out late on a few occasions immediately before his departure. The conduct of the parties is irrelevant to these proceedings unless it is so gross that it would be inequitable not to take it into account. I agree with counsel for the claimant that no conduct exists on either side relating to the breakdown of the marriage which would be inequitable for me to disregard in deciding on maintenance.

[106] The defendant submitted that no order for maintenance of wife should be made neither should any lump sum be awarded. This was based on the fact that the defendant was without the means to maintain the claimant. Any such order would aggravate the defendant's critical financial position. It was argued that the defendant in consideration of his age and pending retirement had always intended to put the claimant in a position to provide for herself and her children and had already carried out that intention. Furthermore, it was argued, the claimant is practically and professionally capable of providing reasonable maintenance for herself and her children.

[107] Sections 4, 5 and 14 (4) of the Maintenance Act it was said, inures in favour of the cessation of maintenance to the claimant. It was noted also that upon his retirement, despite his generosity towards the claimant, based on her present stated stance, he could not harbour any expectation of any assistance towards his care and maintenance from the claimant. In fact the oral evidence of the claimant in that regard is that the defendant was "on his own".

[108] It was argued that pursuant to section 4, the defendant was incapable of maintaining the claimant. Since his marriage to the claimant he had become increasingly financially encumbered, all the mortgages taken out on the family home being after the marriage. The court was asked to note that these were taken out to meet the expenses of maintaining the claimant and her dependents,

acquiring assets for the claimant and injecting assets into her business. It was argued that none of the factors in section 5 and 14(4) outlining the considerations to be applied in determining spousal contributions lend any support to the claimant's application.

[109] As was previously noted, claimant made no material contribution to the operation of the household and the household staff and utility bills were paid by the defendant. Although she claimed to have managed the household by seeing that the bills were paid, the uncontroverted evidence is that all the bills were paid at the defendant's office. The grocery bills were actually paid by the defendant in person. She assumed no responsibility during the marriage which could be said to impact on the defendant's earning capacity.

[110] The provisions of the Maintenance Act recognize that there is an obligation by either spouse (practicably the one who is more financially able and then only to the extent that he or she is capable) to maintain the other, if it is necessary in order to meet the reasonable needs of the other spouse. This is only to the extent that the other spouse cannot meet all his or her reasonable needs and where certain circumstances exist. This means that maintenance of a spouse is not automatic. It involves necessity, capacity and reasonability. Section 4 of the Maintenance Act states:

4.- Each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to-

- (a) the circumstances specified in section 14(4); and*
- (b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.*

[111] Any order made by the court must ensure that any financial provision for children is equitably shared between the parties and any provision made for the spouse is one which can assist the spouse to become financially independent.

The factors the court is to consider are listed in section 5(2) as well as section 14(4). Section 5(2) provides:

- 5.-(1) *A maintenance order for the support of a spouse shall-*
- (a) *contain such provisions as will ensure that the economic burden of child support is shared equitably;*
 - (b) *make such provision as the Court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support.*
- (2) *In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4)-*
- a) *the length of time of the marriage or cohabitation;*
 - b) *the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;*
 - c) *the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;*
 - d) *the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;*
 - e) *whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;*
 - f) *any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family support.*
- a) *The effect of the spouse's child care responsibilities on the spouse's earnings and career development;*
 - b) *The terms of any order made or proposed to be made under the Property (Rights of Spouse) Act in relation to the property of the parties.*
 - c) *The eligibility of either spouse for a pension allowance or benefit under any rule, enactment, super annuation fund or scheme and the rate of that pension allowance or benefit.*

[112] The claimant is also seeking maintenance in the form of medical and dental and optical expenses for herself. In so far as it is not covered by the order made for C, she is also seeking an order that the defendant pay one hundred and twenty thousand dollars for groceries for herself and staff, dog food, fish food, cleaning agents and any other cost related to running the household. She

also asked that the defendant pays another one hundred and fifty thousand dollars per month to her as well as pay a lump sum settlement as the court deems just.

[113] It was submitted that the claimant was unable to meet the cost of the expenses claimed herself. It was also pointed out that the one hundred and fifty thousand dollars being claimed is the exact figure the defendant had been giving the claimant as her pocket money. A further sum of forty-four million dollars in lump sum was submitted as reasonable in the circumstances. This sum included a sum of thirty million dollars for the purchase of a suitable alternate home, six million dollars, to pay off the bank loan taken for the benefit of Fi Wi Brand'ish and the loan of \$8,500,000 also taken for the benefit of Fi Wi Brand'ish.

[114] Apart from an indication of the school fees for the child C, and the cost of maintaining the Hill Road property, the claimant failed to indicate what their expenses were. Her expenses, whatever they were, seem to be inextricably linked to that of the child C. Her claim for maintenance for both herself and the child seem to be also inextricably linked to the operation of the matrimonial home.

[115] The claimant has not given any evidence as to her reasonable needs. Her claim is really based on the standard of living in which she had been kept by her husband. The approach of the court to short marriages is to concentrate on making provision for the financial needs of the claimant and compensating her for any financial disadvantage she suffered as a result of the breakdown. This is in keeping with section 4 and section 5. There is no compensation for expectation losses. The accustomed standard of living enjoyed by the parties is only one of the statutory check lists at section 5(2) (d) and directly relates to the spouses needs in that regard.

[116] Her children, with the exception of C, are all maintained by their biological fathers. The father of the child Z paid all his educational, dental, medical, optical and extra curricular activities cost and a monthly sum of \$25,000.00. Zacchary no longer lives with her since 2008. There is no evidence that his father had taken out any proceedings for her to contribute to his maintenance.

[117] The child R was also being maintained by her father pursuant to a court order for \$8,400.00 per month. He sometimes paid more. He also pays all medical, dental, optical and the costs of extracurricular activities. Her evidence is that this was sufficient to maintain the child R at the time.

[118] The claimant came into this short marriage with three children, a motor car two beds and a crib plus a few pieces of furniture belonging to her mother. The two helpers was an arrangement she also brought to the marriage, as it was her evidence in cross-examination that she brought them into the marriage as at the time the defendant only had a grounds man. One served as a nanny to her children and the other as a household helper. She has secured as part of a settlement all the furniture acquired before and during the marriage.

[119] The defendant is 6 months from the age of retirement. He has medical ailments. The claimant is not now prepared to maintain him in his retirement. She is aware that he sometimes has cash flow problems. There are five mortgages on the family home. The claimant is not prepared to discharge any of the mortgages on the property.

[120] It is impossible to say what the future holds for this 64 year old man with his varied mental and physical infirmities. How long he will be able to work and continue to earn the kind of income he did in the past is anybody's guess. He has sold most of his capital assets barring Hill Road and Marbella. Hill Run in St. Catherine, he claims exists on paper only as he cannot locate it. His architectural firm's continued existence depends on his continued existence.

[121] He has however, lived a fairly expensive if not extravagant lifestyle, one to which he introduced his wife and C. I readily accept that she may have had a hope of continuing to live to that standard as long as they were financially able and as long as they remained married. But either party was equally free to end the marriage at any time. The defendant was by no means a rich man. He was what one would call comfortably well off. He and subsequently his wife were however living beyond their means as if they were indeed rich, as evidenced by the numerous loans taken out over the capital asset.

[122] The husband brought considerable more to the marriage than the wife and gave considerable more in the marriage. His wealth did not increase during the marriage but his spending did. He made considerable financial outlay in making his wife and children comfortable and setting up the wife in business. I cannot say there was any great deal of increased earnings for him during the marriage as a result of her contribution to the marriage.

[123] The wife is educated and capable of earning a reasonable income within a short period of time. She will now be the primary care giver of two small children the youngest being eight. The parties' contribution to the marriage was unequal. The wife made no contribution to her husband's ability to earn. The defendant is self employed. His earnings depend upon his personal ability to continue to work and to continue to attract the trust and confidence of potential clients. Whilst his earning potential was vast in his earlier years it is impossible to determine what it will be in the advancing years. He has no fixed pension.

[124] The claimant is much younger than the defendant, educated and has vast earning capacity both from her education and the opportunities provided by the defendant himself. However, in the short term she will require some assistance in starting afresh. There is also a child involved.

[125] In this case I have considered the desirability of a clean break which a lump sum would afford. The clean break principle represents the undesirability of continuing financial ties between the parties where the marital relations as irrevocably broken down. Lord Scarman in **Minton v Minton** [1979] 1 All ER 79 at 88-80 referring to the desirability of having a clean break said:

“An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.”

[126] However, a total clean break will not be entirely possible in this case. I believe that in this case a lump sum award is appropriate combined with a short duration in periodical payments. Taking into account the fact that the claimant will be getting half the value of Marbella and the full capital value of Fi Wi Brand'ish which despite the claimant's protestations to the contrary is quite capable of making a profit, I believe a lump sum payment of \$6,000,000.00 is appropriate in this case. That is the sum which the defendant agreed he was responsible for repaying on the mortgage loan taken out on Hill Road to finance Fi Wi Brand,'ish. Once the claimant is able to clear this loan she will be in a better position to realize some income from Fi Wi Brand'ish. I also suggest she close the office for which she is paying over fifty thousand dollars per month for no good or prudent business reason.

[127] I will also make a periodical award of \$50,000.00 per month to the claimant for a period of three years. I am minded to apply this duration taking into account the Scottish approach which commends itself to me. The Scottish approach is to make an order for financial provision so that the party can adjust over a three year period. After vacating Hill Road, the claimant will need to provide a roof over her head and that of her children. That amount will assist with rental and later if she wishes to purchase a property by way of a mortgage, the income from the sale of Marbella will provide a sizable down payment. The claimant is otherwise quite capable of providing for her own support. The

defendant may or may not be able to earn income in a limited way during that period. In any event he has substantial equity in the Hill Road property which will provide an income in his twilight years.

CUSTODY AND ACCESS

[128] By court order custody of the relevant child of the family C had been granted to the claimant. The claimant had also agreed to court appointed access. Throughout these proceedings the defendant has shown no interest in having access to C or any of the other children. Z now lives with his father but R remains with the claimant. No submission was made to me on access. The defendant expressed a concern that C is 8 and he is 65. According to him at some point she is going to want to know her father. He stated that he had no problem looking after C. He claimed to love her dearly. He does not know if he will live to see her graduate high school. He claimed that if an arrangement was made which was structured and reasonable he would agree to it.

[129] No application or submission having been made for access by the defendant, I will refrain from making any order in that regard. The parties will be at liberty to make any application they wish at a later date.

CONCLUSION

[130] I find that this is a proper case to vary the equal share rule provided for in section 6 of PROSA. The justice of the case cries for it. I find that the claimant is not entitled to share in the beneficial interest in the family home. I also find that there is no necessity for the claimant to continue to occupy the family home with the children to the exclusion of the defendant. The defendant having assumed responsibility for and undertaken the burden of providing for the child C in the circumstances where he full knew that the biological father was not doing so and had never done so, must continue with that responsibility until a court (whether of lower or higher power) finds that he can no longer do so. I find that the wife, the

other party to this short marriage, is young enough and educated enough to possess full earning potential to maintain herself. These are modern times. The Maintenance Act of 2005 is a reflection of modern thinking. There is now no entitlement to maintenance by a spouse. The question is one of reasonable needs and the capacity of both spouses. The division of property and the making of financial provision is not a punishment for separation and divorce. The issue is one of fairness and the fair distribution of the fruits of the marriage partnership. This short marriage bore no new fruits as part of the common endeavour of the parties during its lifespan and as such the fruits for division must in fairness be sparse.

ORDERS

[131] Based on the above findings, the court makes the following declarations and orders:

1. The defendant is solely entitled to all the legal and beneficial interest in the property known as Hill Road hitherto described as the family home.
2. The claimant is entitled to a fifty percent share of the beneficial interest in the property known as Marbella. The property is to be sold by private treaty and the proceeds divided equally between the parties.
3. If the property is not so sold within 6 months of the date hereof it is to be sold by public auction and the net proceeds of sale divided equally between the parties.
4. The property known as Marbella is to be valued by a reputable valuator agreed by the parties, cost of said valuation to be borne by the defendant.
5. The claimant's attorney is to have carriage of sale. The party in possession of the duplicate certificate of title is to deliver it up to the claimant's attorney at law within thirty days of the date hereof.

6. Both parties are to bear the cost of sale equally.
7. The Registrar of the Supreme Court is hereby empowered to sign any and all documents required to give effect to the sale of Marbella should either party fail or refuse to do so within 14 days of being required in writing to do so.
8. The defendant is ordered to transfer his fifty percent interest in Fi Wi Brand'ish to the claimant within 14 days of the service of this order upon him or his attorneys at law.
9. The Interim occupation order is hereby discharged.
10. The defendant is ordered to pay directly to the claimant or her nominee the sum \$6,000,000.00 within 60 days of the date of this order.
11. The defendant is liable to pay to the claimant as maintenance for herself a sum of \$50,000.00 monthly which becomes due and owing on the 28th day of each month for a period of three years from the date of this order.
12. The defendant is liable to pay to the claimant for the benefit of the child C, the sum of \$100,000.00 per month for maintenance, plus half educational, extra-curricular activities, dental, medical and optical expenses until the child reaches the age of 18 years.
13. Both parties shall have liberty to apply.
14. Each party to bear their own costs.