



[2020] JMSC Civ 120

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV00534

BETWEEN	LORNA HUNTER	CLAIMANT
AND	DEVON DALEY	DEFENDANT

IN CHAMBERS

Mr David Clarke for the Claimant

Ms Tenneshia T. Watkins for the Defendant

Claim for 50% interest in property – Parties divorced – Whether property is the family home – Whether the equal share rule should apply – Property (Rights of Spouses) Act

Heard: September 24, 2019 and June 19, 2020

LINDO, J.

- [1] The Claimant Lorna Hunter Daley, (Ms Hunter) a businesswoman, was married to the Defendant, Devon Daley (Mr. Daley) on February 14, 2008. They met in or around October 26, 2006 and started living together at Lot 247 Arnett Gardens, Kingston 12 in the parish of Saint Andrew, in November of the same year. The property is registered at Volume 1238 Folio 546 of the Register Book of Titles to Devon Daley by transfer No.1275432 registered on the 15th day of January 2004. Their marriage was dissolved on February 10, 2017.
- [2] By way of Fixed Date Claim Form filed on February 9, 2018, Ms Hunter is seeking, *inter alia*, a declaration that she is entitled to 50% share in the property “pursuant to the Property (Rights of Spouses) Act and/or at common law”. The Fixed Date

Claim Form is said to be “In the matter of the respective rights of ownership of Lorna Hunter and Devon Daley in the said land”, “In the matter of the Property (Rights of Spouses) Act”, “In the matter of the Partition Act”, “In the matter of the Registration of Titles Act” and “In Equity”. It is supported by the affidavit of Ms Hunter, to which a copy of the certificate of title to the property, a copy of the marriage certificate, a copy of the birth certificate of the child born to them on January 26, 2009 and a copy of the Decree Absolute granted on February 10, 2017 are exhibited.

- [3] On October 31, 2017, Mr Daley filed an affidavit in response to the claim, and on January 9, 2019 he filed an affidavit of Troy Crosdale, in support of his case.
- [4] At the hearing, Ms Hunter relied on evidence contained in the affidavit filed by her in support of her claim on February 9, 2018, and the affidavit filed on March 15, 2019 in response to the Defendant’s affidavits, as well as the affidavit filed on September 23, 2019 which exhibited a valuation report dated August 2019, in respect of the property.

Claimant’s Case

- [5] Ms Hunter states that she met Mr Daley in October 2006 and moved in with him about one week thereafter and that it was a two bedroom and one bathroom, and she added a living room and bathroom and an office area downstairs, and also renovated the kitchen. She states that she continued to live in one section of the house after the divorce in 2017.
- [6] In her affidavit in response to the affidavits of Mr Daley and Troy Crosdale, she states that she lives in Portmore but operates the internet café from the premises. She indicates that it was her idea to do modifications to the home and to start the internet café, and she used her money and money she borrowed from her mother, and Mr Daley received a cheque for \$100,000.00, which was used to assist with the modifications, but it was paid back with money obtained “from [her] café”. She

adds that Mr Daley only gave minor assistance and did not use his money to buy any computer parts.

- [7] She denies owing money to Mr Daley arising from an agreement they entered in February 2014, and also states that she denies all the information in the affidavit of Troy Crosdale. She indicates that he never asserted any ownership of the property and averred that he is not part owner and therefore she is entitled to 50% share.
- [8] Under cross examination, she admitted that the gym was expanded with a part converted in the internet café and the other part used as a room, which she occupies. She also said the kitchen was relocated and after being pressed, she reluctantly agreed that the only new additions to the property were the bathroom and the extension of the gym, and that the \$100,000.00 loan from the Credit Union was used to buy building material for that, and every other thing was a re-use of space.
- [9] Ms Hunter also admitted that when she went to the property, she saw Mr Daley building and repairing computers, and was hesitant in agreeing that he built a computer for her. She said the café started with four computers and she borrowed money from her mother and bought parts for computers which were built by Mr Daley. She then agreed that they both worked in the café and that the income was used for their benefit.
- [10] She said she accepted the contents of the Valuation Report dated August, 2019 prepared by D. C. Tavares & Finson Realty Ltd. and agreed that, as stated in the report, the kitchen remains unfinished. She also agreed that although they separated in 2013, she continued to live there and admitted that the upstairs, consisting of two bedrooms and a bath room, remain unchanged from what she came and saw. She however denied that the room her things were in, is also unfinished. She stated that Troy moved out in 2005-2006 and then said when she

took control of the café he was still living there although she admitted to taking control of the café in 2014.

- [11] When asked if she was still living there she said “yes and no”. She then said that she lives in Portmore with her husband, and that she comes to Mr Daley’s place to operate the café. She said she move from the property on May 7, 2017, the day before she got married, and that on weekends she takes care of their child. She admitted that the child has never lived with her and that Mr Daley is his primary care giver.
- [12] In re-examination, she said it was her suggestion that Mr Daley borrow the sum of \$100,000.00 from the Credit Union.

Defendant’s Case

- [13] Mr Daley relied on his affidavit filed on October 31, 2018, to which was exhibited the following: Letter from the Ministry of Environment Water and Local Government dated November 30, 2011 relating to the availability of the title to the property; Loan application forms from the National Water Commission Credit Union, Pro Forma Invoice from Courts Furniture Store and copy of cheque from NWC CU for \$173,309.83 payable to Courts; Copy of Protection Order dated September 26, 2014 and copy of Agreement dated February 8, 2014, signed by the parties. He also placed reliance on the affidavit of his witness and brother, Troy Crosdale.
- [14] He states that in about 1985 he along with his mother, her husband and his brother Troy, moved to the property in question and after living there for several years it was offered for sale and he along with his brother paid for the property, he paid \$20,000.00 and his brother, who was then employed as a security guard, paid \$10,000.00. He adds that his brother’s name was not put on the title as he had plans to leave the area and wanted to use his National Housing Trust Contributions to acquire another home.

- [15]** His evidence further is that when Ms Hunter moved in there were two bedrooms and a bathroom upstairs, and a kitchen, gym and a living room downstairs, and the gym area was converted to an internet café and a bedroom, and the kitchen had to be relocated to another area downstairs. He indicates that Ms Hunter's evidence that she added a living room and bathroom and an office area and renovated the kitchen is misleading, as it was through their 'joint vision' they converted the gym to the internet café and a bedroom and the kitchen was relocated. He states further that the office area was added by them both and that he took a loan from National Water Commission Credit Union (NWC CU) to assist with the addition to the building and had savings from his income from the gym and he also worked in his mother's business.
- [16]** He says when Ms. Hunter came to the property he was in the business of repairing and building computers and he started with four computers, used his money to buy parts to build two additional computers and that the internet café was operated jointly until 2014 when Ms Hunter took control of that side of the property. He states further that in February 2014 "in the face of the breakdown of our relationship" they entered an agreement whereby she would pay him \$1,500.00, Sunday to Thursday, as well as \$2,500.00 weekly, to cover her contribution to electricity, the repayment of the loan he took from NWC CU and his share of the profit from the café, but she has not been making the agreed payments. He also states that it was agreed that she would give him \$500.00 daily towards the repayment of the loan from NWC CU which was used to purchase the refrigerator, but she has not done so and he had to repay the sum and interest, and she left with the refrigerator. Mr Daley also states that Ms Hunter relocated leaving their son in his custody, care and control and she does nothing to assist him with the child.
- [17]** When cross examined, Mr Daley said he could not recall when he first decided to purchase the house, but it was paid for before he met Ms Hunter and that Troy, who was born March 3, 1983, was working at Milex Security Company at the time. He agreed that together they did modifications to the house and that the internet

café belonged to them both, and when they were married he was benefitting from it.

- [18]** With regard to the purchase of the refrigerator, he said at the time it was bought they had the child. He also stated that there was no point at which he was not working, as he was building computers and he also worked in his mother's shop and received a salary.
- [19]** Troy Crosdale's evidence is that he is the brother of Devon Daley and that, together, they purchased the property in question and the sale price was \$30,000.00. He says Mr Daley did the transactions and his name was not placed on the title as he had plans to leave the area and hoped to acquire another property with the use of his National Housing Trust benefits.
- [20]** He states that the house was a two-storey, with two bedrooms and a bathroom upstairs, and with a kitchen, gym and living room downstairs and that the gym was operated by his brother. He says the upstairs of the building remains unchanged, but the gym area was converted to an internet café and a bedroom and the kitchen was relocated. He adds that when Ms Hunter moved into the property all three of them were living there, but, because of her behaviour towards him, he took the decision to leave.
- [21]** Under cross examination, he said he gave his brother \$10,000.00 about sixteen years ago and at the time he was not an ordinary security guard, but a 'K9 handler', and he was also doing overtime. He said his basic pay was approximately \$170.00 per hour and while at the property he contributed to internet, food and groceries.
- [22]** He maintained that his name was not placed on the title for the property as it would affect his National Housing Trust benefits. He also said his possessions are still at the property but he moved out to live with his 'baby mother' 2010 -2012 and he does not now have another property.

[23] When he was asked if he did not tell Ms Hunter to leave, he said, “I could do no such thing. She was my brother’s wife. Respect was due”. He agreed that he left the property because he and Ms Hunter could not get along.

The Submissions

[24] At the close of the hearing, Counsel for the parties were ordered to file closing submissions which they did on September 29, and October 1, 2019, respectively. I will not attempt to repeat these submissions but the parties and their Counsel can rest assured that I have carefully reviewed and taken them into consideration.

The Issues

[25] There is no issue that the property was owned by Mr Daley prior to the marriage. The issue is whether he was the sole owner and whether Ms Hunter is entitled to a half share if it is found to be the family home, and whether she solely carried out renovations and improvements to the property or she made any contribution towards it so as to be entitled to an interest in it.

[26] The court will also consider the issue relating to the agreement entered into by the parties after their separation which has been raised on the Defendant’s case.

[27] In addressing the issues, I have carefully analysed the affidavit evidence presented in support of their respective contentions and I have paid attention to the demeanour of the parties and the witness for the Defendant in order to assess their credibility.

The Law and Application

[28] **Section 6 of the Property (Rights of Spouses) Act** (the Act) states as follows:

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

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

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

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

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

[29] The “family home” is defined under section 2 of the Act as:

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

[30] **Section 13 of the Act** provides for the time within which a spouse is entitled to apply for a division of property and **Section 14(1)(a) of the Act** provides that on an application under section 13, the Court shall divide the family home in accordance with section 6 or 7 of the Act.

[31] The undisputed evidence is that the parties enjoyed a marital relationship for about nine years. The marriage between the parties was dissolved on February 10, 2017 and on February 9, 2018 the application, by way of Fixed Date Claim Form was filed.

[32] They have both given evidence that Ms Hunter came to live at the property with Mr Daley from around 2006, at a time when Troy Crosdale was also residing there. They were residing there when they got married on February 14, 2008, and even after the dissolution of the marriage, they continued to reside there, although in separate sections.

[33] Mr Daley is resisting the claim on the basis that he owns the property jointly with his brother and that when Ms Hunter moved in, there were two bedrooms and a bathroom upstairs and a kitchen, a gym and a living room downstairs and it is

through their “joint vision” that they converted the gym to an internet café and a bedroom, and relocated the kitchen.

[34] Ms Hunter has provided a copy of the Certificate of Title registered at Volume 1238 Folio 546 of the Register Book of Titles to show that Mr Daley is the owner of the property. While I accept that this is concrete proof of ownership, I find on the evidence, that it is more likely than not that Troy Crosdale, although not registered on the title, is part owner of the property.

[35] I find Mr Daley’s evidence generally, and in relation to the acquisition of the property in particular, to be credible. I accept as true the evidence that the property in question belongs to them both, as I find as a fact that Troy Crosdale contributed to the purchase of the property and resided there when Ms Hunter moved in. I also find that he remained there even after Mr Daley and Ms Hunter got married and that Ms Hunter was informed that the property was jointly owned by them before the breakdown of the relationship between the parties. I therefore have no difficulty in finding, on a balance of probabilities, that although Mr Daley’s name appears on the title as the sole owner, Mr Daley owns the property along with his brother Troy Crosdale.

[36] I cannot agree with the submission of Counsel for the Claimant that the fact that Troy Crosdale never asserted any rights to the property and sat and watched alterations and renovations without doing anything, shows that he is not an owner.

[37] It is clear that during the course of the marriage, the home was used as the principal family residence and it is also where they raised their son who was born in 2009, but as it was not wholly owned by either or both of them, as I have found, it does not in my view, fit squarely within the definition of ‘family home’ as set out in section 2 of the Act.

[38] Based on my finding that the property does not pass the test of being the family home, as it was not wholly owned by either or both of them, I will therefore examine the claim within the context of Section 14(1) (b) of the Act, which makes provision

for the division of property other than the family home, and section 14(2) of the Act, which sets out the relevant factors to be taken into account when dividing property which is not the family home.

[39] **Section 14 (2)** provides that, in determining interests in property other than the family home, the court should divide the property as it thinks fit, taking into consideration factors such as contribution; that there is no family home; that there is an agreement with respect to the ownership and division of property and such other fact or circumstance which in the opinion of the court, the justice of the case requires to be taken into account. I accept that the court has the power to alter interest in property, other than the family home, where the court is of the view that it is just and equitable so to do (See **Sec 15 of the Act**. See also dictum of Morrison JA (as he then was) in **Brown v Brown** [2010] JMCA Civ.12, paragraph 46).

[40] In coming to a determination, I found the credibility of the parties to be vital. I therefore paid particular attention to their demeanour as they gave evidence and were cross examined.

[41] Ms Hunter, I found, was evasive and defensive and she was far from generous with the truth. She gave contradicting answers in cross examination which showed that she was being dishonest. Her evidence in chief that she solely did renovations was discredited on cross examination. Her evidence that the internet café belonged to her and that she solely operated it is also incredible, especially in view of the evidence which I accept as true, that Mr Daley took a loan from the National Water Commission Credit Union to assist in the renovations and the starting up of the internet café, and that he built computers and even provided his own computer as well as serviced the computers which were in the internet café.

[42] Additionally, in her evidence in chief Ms Hunter said she borrowed money from her mother which was used to do the modifications, but on cross examination she said she borrowed money from her mother which was used to purchase parts for computers, although she later admitted that the computers were built by Mr Daley.

- [43]** Ms Hunter's credibility also came up for questioning when she was asked about another loan taken from the NWC Credit Union, which she said was to take care of things around the house. It was with much reluctance that she later admitted that the sum of \$173,309.83 was to purchase a refrigerator from Courts Furniture Store. She also admitted that she took the refrigerator.
- [44]** On the other hand, I found Mr Daley to be forthright and straightforward and he was not shaken in cross examination. At no point did I have any reason to doubt him. I accept as true his evidence that he operated a gym and when the parties got married, they, by their joint efforts, modified and renovated the property. I also accept as true his evidence that he worked in his mother's business and earned a salary. Additionally, his evidence in relation to the manner in which they operated together including their efforts at modification of the building and the operating of the internet café as an income earner and his input in it is very compelling. Where there is conflict between the evidence of Ms Hunter and that of Mr Daley, I prefer and accept the evidence of Mr Daley as the true position.
- [45]** I accept that subsequent to the marriage, both parties used the property in a manner which was for their mutual benefit. They jointly renovated the property to operate the internet café and both appear to have contributed to the sustainability of the café even up to the date of separation. I find however that the financial contribution of Ms Hunter towards the renovations was minimal, as I do not believe her story that she borrowed money from her mother, given her inconsistent evidence as to what such sum was used for, as well as the fact that she did not give any evidence of the amount she is said to have borrowed or the time she claims to have done so.
- [46]** Additionally, I find that financial contributions made during the course of the marriage appeared to have come from Mr Daley, and all else would be the sums earned from the internet café, which they jointly operated and mutually benefitted from, as I accept as true the evidence that for the duration of the marriage, Mr

Daley worked by building and repairing computers and even worked in his mother's business and received a salary.

- [47] I bear in mind however, that there is no presumption that monetary contribution is of a greater value than non-monetary contribution. (See Sec. 14(4) of the Act). What is clear from the evidence is that Ms Hunter made no monetary contribution but that it is the proceeds from the operation of the internet café, which was a joint effort, which was used by the parties in the household during the subsistence of the marriage. I therefore find that it is non-monetary contribution which she would have to show to give her an entitlement to a share of the property, it not having been found to be the family home.
- [48] I hasten to note that nowhere in her evidence did Ms Hunter indicate any form of non-monetary contribution, such as that she even took care of the child of the marriage, managed the household or performed any household duties or gave any assistance or support to Mr Daley, which would substantiate her claim for a share in the property. Her assertions are that she worked in the café and that based on her financial contribution, in keeping with her allegation that she solely financed the renovations to the property, she was entitled to 50% share.
- [49] **Section 12(2) of the Act** provides that a spouse's share in property is determined as at the date of separation. In the instant case, I find that the date of separation is on or about June, 2013. I note also, that on September 26, 2014, by an order made by the consent of the parties, in the Family Court for the parishes of Kingston and Saint Andrew, a Protection Order was made in favour of Ms Hunter and it was at or about that time that Ms Hunter took exclusive possession of the internet café and occupied one section of the property. The Protection Order expired on September 25, 2016.
- [50] **Section 15 of the Act** gives the court the discretion in proceedings in respect of property, other than the family home, to make such order as it thinks fit, altering

the interest of either spouse in the property, and in making an order, the court must be satisfied that it is just and equitable to do so.

[51] In the circumstances I find that fairness would require that Ms Hunter vacates the property and that she be awarded a sum which amounts to a small percentage of the value of the property as at the date of separation.

[52] In respect of the post separation period, Ms Hunter retained exclusive occupation of one section of the property as well as the operation of the internet café, and the income therefrom. I therefore find that the income derived from the café after separation ought to be shared equally. Mr Daley would therefore be entitled to be reimbursed half the sum of the income from the internet café since the date she took exclusive possession of the café. It is Ms Hunter's evidence that the income is \$60,000.00 per month. Mr Daley has not refuted this, but neither has he put forward any evidence to show what the income was prior to separation. In the interest of justice an accounting will therefore have to be taken to determine the true income, and Ms Hunter is required to provide a statement of account showing the income for the period from September 2014 to present.

[53] For the sake of completeness, even if I am wrong in concluding that the property does not fall in the definition of 'family home', I have also examined the claim within the context of **Section 14 of the Act** which provides that on an application under section 13, the court shall divide the family home in accordance with section 6 or 7 of the Act. This provides for the presumption of equal share in the property and allows the court to vary the equal share rule upon the application of an interested party where, in the circumstances, the court is of the opinion that applying the rule would not be just and reasonable. The law is clear that the equal share rule should only be departed from on just and reasonable grounds.

[54] Mr Daley, by way of his affidavit in response to the claim is seeking a variation of the rule and is asking the court, among other things, for a declaration that Ms Hunter "is entitled to a sum equivalent to one-fifth (1/5) share or twenty percent

(20%) of the property". It therefore appears that he was accepting that the property was the family home as defined by the Act.

- [55] Having examined the evidence and submissions of Counsel, and bearing in mind as well, the factors set out in **Section 7(1) of the Act**, I find that Ms Hunter would be entitled to a small share in the property as on the evidence presented, Mr Daley has shown that it would be unjust and unreasonable for her to be given a half share.
- [56] There is no evidence of any non-financial contribution made by Ms Hunter that could cause me to find that she should be entitled to a large percentage of the property. She was not paying for utilities and there is no evidence that she was making any contribution towards the household or in respect of the child of the marriage. Even after Ms Hunter re-married, she has been returning to the home to operate the internet café and utilize the facilities without making any contribution to it as evidenced by the agreement they entered into, and in respect of which she admits not having paid any money to Mr Daley.
- [57] I do not find that Ms Hunter contributed in any substantial manner to the improvement of the property, financially or otherwise. Based on what I find to be the greater financial input by Mr Daley and the fact that the property was in his sole name, notwithstanding that I find that it was also owned by his brother, I am of the view that in the circumstances it would be unreasonable and unjust to apportion equal interests in the home. Her entitlement to a share in the property, had it been found to be the family home, in my estimation, would have been the same, as I find that in the circumstances it would be both unreasonable and unjust to award equal entitlement to her in either case.
- [58] On the issue of the agreement entered into by the parties on February 8, 2014, I find as a fact that, as the parties were separated and Ms Hunter was in full control of the café and reaping the benefits therefrom, they arrived at an arrangement which was to the effect that she would contribute to the electricity bill and the

repayment of the loan from NWC CU as well as provide a sum from the proceeds of the internet café to Mr Daley.

[59] I bear in mind that, although initially, Ms Hunter sought to deny owing any of the sums noted in the agreement, she later agreed that she made no payment to Mr Daley after they made the agreement. The agreement was admitted in evidence without objection. I cannot agree it should not be taken into account. I find that it provides evidence to substantiate Mr Daley's assertions that Ms Hunter was in fact getting all the income from the café after they separated and that she was not contributing to the electricity or assisting with the repayment of the loan.

[60] **Section 14(2)(e) the Act** requires the court to consider "such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account". It is therefore my considered view that the provisions of the Act allows the court to take into consideration the contents of the agreement entered into by the parties. I bear in mind that it is not a document drafted by an attorney at law and neither is there any evidence as to whether either party had any legal advice at the time of signing the agreement. I note however, that Ms Hunter gave evidence that she owed the sums acknowledged in the agreement and that she has not made any payment to Mr Daley since signing the document.

Conclusion

[61] Ms Hunter has not proved on a balance of probabilities that the dwelling house located at Lot 217 Arnette Gardens was wholly owned by Mr Daley although his name only, appears on the Certificate of Title. The court having considered whether she would be entitled to a share, it being property other than the family home, has found that she made minimal contribution within the meaning of "contribution" as set out in **section 14 (3) of the Act**, but that together they renovated the property and operated the internet café jointly until September 2014 when she took complete control. The court has therefore concluded that she would be entitled to a very small share of the property.

Disposition

[62] The Claimant is entitled to a 20% share of the Defendant's interest in the property located at Lot 247 Arnette Gardens, Kingston 12 in the parish of Saint Andrew, registered at Volume 1238 Folio 546 of the Register Book of Titles.

The Defendant shall pay to the Claimant a sum representing 20% of his share of the market value of the property as set out in the Valuation Report dated August, 2019 prepared by D. C. Tavares & Finson Realty Limited, within 90 days of the date of this order.

It is hereby ordered that the Claimant vacate the property within 7 days of the date of this order.

The Claimant is to provide an account of the income generated by the internet café from September 2014 to the date of judgment within 30 days of the date hereof. Same to be filed with the Registrar of the Supreme Court and a copy served on the Defendant's attorney-at-law.

Any one of the Registrars of the Supreme Court shall undertake an inquiry with a view to verifying the accounting to determine the income generated by the internet café from September 2014 to the date of judgment.

The Claimant shall pay to the Defendant the sum representing 50% of the income from the internet café found on the accounting being taken, in addition to the sum of \$300,000.00 being the Claimant's agreed contribution towards the electricity and loan repayment.

There shall be liberty to apply.

Each party is to bear his/her own costs of the proceedings.

The Defendant's attorney-at law is to prepare, file and serve the order.

