IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MATRIMONIAL DIVISION

CLAIM NO. 2016 M 03219

BETWEEN	**DALMAINE JOHNSON**	**APPLICANT**
AND	**ALTHEA JOHNSON**	**RESPONDENT**

IN CHAMBERS

Mr Raun Barrett for the Applicant/Respondent

Mr. Curtis Daniel Cochrane for the Respondent/Applicant

Heard: June 17th, 2019 and July 29th, 2019

T. HUTCHINSON, J (AG.)

Introduction

[1] On the 3rd of September 2018 Mr. Johnson filed a notice of application for Court Orders which was amended on the 20th of November 2018. In this notice, Mr Johnson outlined that he was seeking the following orders;

1. That the property situated at 20 Flannel Terrace, Lot 89 Eltham Vista, Spanish Town registered at Volume No. 1366 and Folio No. 198 of the Register Book of Title being the Family Home of the Applicant and the Respondent be declared to be owned equally by the Applicant and the Respondent in law and in equity.

2. Leave for extension of time to apply for Division of property and that this application and supporting affidavit stand as filed.

3. That the Respondent cease all modifications and/or alterations to the matrimonial property until such time that the Court rules on the interest of the respective parties.

4. That the property be valued by a reputable valuator at the expense of both the Applicant and the Respondent equally.

5. That the property be sold either by private treaty or by public auction and that the net proceeds of the sale be divided between the Applicant and Respondent in accordance with their respective interests as determined by the court or in the alternative the Respondent shall have the right to purchase the interest of the Applicant, such right shall be exercised within 30 days of her receipt of a valuation report.

6. The Applicant's Attorneys-at-law, Malcolm Gordon to have carriage of sale.

7. In the event the Respondent refuses or fails to execute the Agreement for Sale and/or instrument of transfer or any other documents required to give effect to the order of this Honourable Court within 14 days of being requested in writing to do so, the Registrar of the Supreme Court is authorized to execute same.

8. That the Respondent pay to the Applicant the sum of $525,000 for the Respondent's use and occupation of the matrimonial home since December 16th, 2015.

9. That the Applicant and Respondent have joint custody of the relevant children of the marriage: Dejon Johnson d.o.b. 24th June 2010 and Douve Johnson d.o.b. 7th of September 2001 with care and control to the Respondent.

10. That the Applicant is granted reasonable access to the said relevant children.

11. Such further and other relief as the Court thinks just.

[2] In response to this application, the Respondent also filed an application for court orders on the 1st of November 2018 in which she sought the following orders;

1. That the interest of the Applicant in the family home should not exceed 10%.

2. That the Respondent be at liberty to purchase the Applicant's interest in the family home. The Respondent shall exercise her option by notice in writing within 30 days on receipt of the valuation report.

3. The cost of the valuation of the family home be borne by the Applicant as the Respondent is impecunious.

4. That if the Respondent exercises her option to purchase the Applicant's interest in the family home, that the purchase be completed on or before 120 days from the date of the agreement for sale.

5. That the 2003 Odyssey motor vehicle registered 2761 GN or any motor vehicle that replaces it be declared to be equally owned by the Applicant and Respondent.

6. That the said vehicle by valued by a reputable valuer(sic) at the expense of the Applicant and Respondent.

7. That the said vehicle be sold and the net proceeds of the sale be divided between the parties in respect of their respective interest as determined by the Court or in the alternative the Applicant shall have the right to purchase the interest of the Respondent by notice in writing from his Attorney-at-law within 30 days of the receipt of the valuation report.

8. That the Court requests from the Applicant's employer an outline of his emoluments with a view that he maintains his children in line with his earnings. Also that an order be made for the maintenance of the said children up to the point of tertiary training, substituting that made by the Family Court in the Parish of St. Catherine on June 15th, 2016. That the relevant payments be done by way of salary deductions and lodged at named account at Victoria Mutual, Spanish Town branch.

9. That the Parties be granted joint custody of the children with access as follows;

    a. The spending of alternate weekends with the Petitioner

    b. The spending of Father's Day each year with Petitioner

    c. The spending of one week with the Petitioner during the Easter break.

    d. The spending of one month with the Petitioner during the Summer holidays.

    e. The spending of one week with the Petitioner during the Christmas holidays.

    f. The Petitioner is responsible for collecting the children on the relevant occasion.

10. Such further and other relief as the Court deems just.

BACKGROUND

[3] The marriage of the Applicant and Respondent took place on the 23rd of January 2000. In September 2001 the Respondent gave birth to their first child and in February 2004 they moved into the structure which is now the subject of these applications. At the time that the house was acquired it was a studio unit and it was acquired through NHT using the benefits of the Respondent only. It is not in dispute that in 2007, the Respondent acquired another benefit from NHT which she used to do an addition to the structure.

[4] Additional work was done on the building overtime with the addition of another bedroom and a kitchen in addition to enhancing the appearance of the overall premises. The Respondent changed employers during this period and also gave birth to another child in June 2010.

[5] It is accepted by the parties that there came a point when they were not getting along and things escalated to the point where the Respondent applied for and obtained a Protection Order and Interim Occupation order against the Applicant on the basis of domestic violence. Pursuant to this order, the Applicant relocated from the home. The order was subsequently discharged but he did not return home. In the same period of time, the Respondent applied for an order for maintenance of the boys by the Applicant from the St Catherine Parish Court and an order was made on the 15th of June 2016 for him to pay the sum of $3000 per month for each child to the Respondent.

[6] On the 17th of May 2017, the Petitioner filed for divorce and as stated above he filed this application for division of property among other orders in September 2018.

APPLICANT'S SUBMISSIONS

[7] In his submissions on behalf of the Applicant/Respondent, Mr. Barrett has referred to and relied on the provisions of Section 6 and 7 of the Property Rights of Spouses

Act (hereinafter referred to as PROSA). In respect of Section 6(1) he has submitted that there is no issue as to whether the subject property is the family home as it was purchased during the marriage and used habitually by the parties as the only or principal residence, which satisfies the requirement of Section 2(1) of the Act.

[8] In respect of section 6(1) Counsel emphasises that the presumption of equal shares should apply. In examining Section 7, which allows for a displacement of this provision, Counsel submitted that as none of the factors at 7(1)(a) to (c) exists, they are all irrelevant to the Court's consideration. He has also asked that the Court ignore the Respondent's reliance on financial contribution as a relevant factor that could displace the presumption of equal shares as this position no longer applies under PROSA which treats the family home differently from other property owned by spouses.

[9] Counsel has also placed reliance on the decision of ***Stewart v Stewart [2013] JMCA Civ 47*** which examined the provisions of PROSA. He has asked that the Court take careful note of paragraph 76 of that decision which requires that in order for the presumption of equal entitlement to be displaced the Court must be satisfied that a factor listed in Section 7 or a similar factor existed and that contribution to the acquisition of the home by itself is not such a factor. Counsel has also referred to the caution offered by the learned Judge in the same decision which was to the effect that Courts should be very reluctant to depart from the equal share rule and should require very cogent evidence upon which to do so.

[10] It was also Counsel's submission that the Respondent has not provided any evidence, save for a stack of receipts, which he submits is not sufficient to displace this rule. In addressing his client's financial contribution, Mr. Barrett referred to and relied on the content of his Affidavit and viva voce evidence as to mortgage payments made by him. Reliance has also been placed on the Scotiabank loan document as proof in support of the assertion that he spent $760,000 remodelling the house. It was also pointed out that the Applicant had purchased most of the furniture and appliances as well.

[11] In respect of his request for compensation by the Respondent for the use and occupation of the matrimonial home, Counsel has submitted that the Applicant is entitled to same as he was forced to leave the home as a result of a protection and occupation order which was ultimately discharged. It was also submitted that he has not been able to return to the house because of the Respondent's aggressive attitude towards him.

[12] On the issue of custody and maintenance, Counsel outlined that his client is prepared to agree to joint custody of the children with care and control to the Respondent. He also asked that the existing maintenance order be left in place as to disturb this order would be to act outside the jurisdiction of the Court. It was also asserted on behalf of the Applicant that if the Respondent wants a variation of the order she should apply to the Parish Court or appeal same to the Court of Appeal.

RESPONDENT'S SUBMISSIONS

[13] In advancing his submissions on behalf of the Applicant, Mr Cochrane has referred to and relied on the dicta of McDonald-Bishop J(Ag), as she then was, in ***Graham and Graham 2006HCV03158*** where she said as follows;

> *'So it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union when the partnership ends each is entitled to an equal share of the assets unless there is a good reason to the contrary, fairness requires no less.'*

[14] Counsel submitted that this authority makes it clear that the object of the Act is to attain fairness in property adjustments between spouses on dissolution of the union or termination of cohabitation.

[15] Counsel continued that while he recognised that Section 6 creates the rule of equal entitlement; he was asking the Court to bear his mind that this entitlement can be displaced in circumstances where the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half. He also noted that while the legislation provides that the Court can take into consideration the

factors set out at 7(1)(a) to (c) the use of the word including makes it clear that the Court is entitled to take other factors into consideration.

[16] Mr. Cochrane also submitted that the attitude of the Applicant to the acquisition of the house and his contribution to same makes it clear that he was not committed to a long lasting relationship or the establishment of a family home. He contended on behalf of the Respondent that the Applicant's refusal to even place his name on the title spoke volumes as to how the property was viewed by him. Counsel also outlined that the fact that he openly expressed the intention to acquire his own property was a strong indicator that he did not view the subject property as the family home.

[17] Counsel has asked that the Court takes careful note of the following;

(a) Mr. Johnson is still entitled to a benefit from the NHT,

(b) He earns ten times the gross salary of Mrs. Johnson,

(c) His contribution to the home was minimal

(d) Mrs. Johnson has exhausted all her benefits

He submitted that all these factors provide a sufficient basis on which to dispel the rule. He also noted that Mrs. Johnson would be the parent left with the responsibility of caring for the children, given the Applicant's request that she retains care and control of them, as another factor in her favour in having the rule displaced.

[18] In concluding his submissions on the point, Counsel made reference to several authorities in which the Court moved away from the equal shares rule, these were ***Graham v Graham*** supra, ***Gardner v Gardner [2012]JMSC Civ 54, Collie v Collie 2013HCV5949, Kelly-Lasisi v Lasisi [2016] JMSC Civ 47*** which will be reviewed in the course of this judgment.

[19] In respect of the Honda Odyssey Mr. Cochrane submitted that the Respondent is entitled to a financial interest in same as she provided the money that purchased the initial vehicle which was later sold and the proceeds used to purchase the Odyssey.

[20] On the point of a new maintenance agreement it was submitted that this can be done by the Court making an order extending the maintenance of the children to age 23 and adjusting the contribution of the Applicant, to take into account the current circumstances in respect of the children as well as the earnings of the respective parties.

[21] Counsel has also asked that access be granted to the Applicant in the terms of the Orders sought by the Respondent.

Relevant Law – Division of Property

[22] The Application made by Mr. Johnson in respect of the order for division of property has been made on the premise that the property in question is the family home. In respect of what qualifies as the 'family home' Section 2(1) of PROSA defines this as follows;

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

[23] On my examination of the evidence of the respective parties, in spite of the initial apathy of Mr. Johnson, it does not appear that there is any dispute between them that the house in Eltham Vista would fall within the parameters of this definition, as it was the principal residence of the family from 2004 when it was purchased to 2015 when the Applicant moved out because of the Occupation order made against him.

[24] With that issue being an uncontroversial one, the Court would then have to consider the provisions of the legislation in respect of the rights of each individual on the termination of the marriage. On this point, the Court takes note of Section 6 which states;

> *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.*

[25] The application of this section has been examined in a number of decisions from the Supreme Court as well as the Court of Appeal one of the more useful analysis being that of McDonald-Bishop J (as she then was) in ***Graham v Graham Claim No 2006 HCV 03158 (delivered 8 April 2008)*** where she assessed the statutory basis for the equal share rule at paragraphs 15-16 of that case, thus:

> "15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See ***R v R [1992] 1 AC 599, 617*** per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is

good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in ***Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633.***

16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation...."

[26] From this authority, it is clear that the purpose of this provision is to ensure that each party to the marriage walks away with an equal share of the family home unless there is good reason to the contrary. The objective of this being to attain fairness between the parties.

[27] The reference by the Court to the phrase 'unless there is good reason to the contrary' is a recognition of the fact that there are occasions when the application of the rule can and ought to be departed from and Section 7 of the Act addresses this as follows;

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, 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.

[28] In considering how to treat with the provisions of Section 7(1) of the Act the dicta of Brooks JA in ***Stewart v Stewart*** provides useful guidance where he stated at paragraph 17;

At least three things are apparent from section 7(1):

a. The section requires the party who disputes the application of the statutory rule, to apply for its displacement.

b. The use of the word “including”, implies that the court is entitled to consider factors other than those listed in section 7(1).

c. The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.

[29] The effect of this position and its application to this case means that it is the responsibility/burden of the Respondent to satisfy the Court on cogent evidence that this rule should be displaced. In other words, he who asserts must prove. It also means that while certain categories are outlined at (a) to (c) this is not an exhaustive list as the Court accepted that a Judge is entitled to consider factors other than those listed. Additionally, the party seeking to displace this rule has the burden of persuading the Court that it would be unreasonable or unjust to give effect to it.

[30] Further guidance on the approach that should be adopted by a Court to this Section is given at paragraph 34 of the judgment where Brooks JA stated;

> What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration. For instance, the family home may have been inherited by one spouse, but the other may have, by agreement with the inheriting spouse, solely made a substantial improvement to it at significant cost. In such a case the court would be unlikely, without more, to award the entire interest to the spouse who had inherited the premises.

[31] In concluding his analysis of this provision and what it entails at paragraph 76 and 77 the Learned Judge stated as follows;

> [76] In order to displace the statutory rule for equal interests in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act, or a similar factor, exists. Contribution to the acquisition or maintenance of the family home, by itself, is not such a factor, it not having been included in section 7. This is in contrast to its inclusion, as a relevant factor, in section 14, which deals with property other than the family home.
>
> [77] If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule. The degree of cogency of that evidence is greater than that required for other property. In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution

[32] In expounding on this principle, the Court made it clear that contribution by itself is not a sufficient basis on which to displace the equal entitlement rule as what needs to be present is a factor listed in section 7 or a similar factor before contribution can be taken into account.

[33] On the point of the displacement of the rule, a review was conducted of the authorities cited by Mr. Cochrane. On examination of both ***Gardner v Gardner and Kelly-Lasisi v Lasisi*** it was noted that in both instances the relevant marriages had been of a short duration. In ***Gardner v Gardner*** the marriage had been in existence for a total of four years and the home in issue had been owned by the Defendant for decades years prior to the marriage. In those circumstances combined with a number of other included factors the Court found as follows;

> [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.

[34] It was the ruling of the Court that the Defendant was entitled to retain 100% interest in the property. It is instructive that the Learned Judge took into consideration the facts that the family home had not been acquired by the common effort of the parties, their respective age and the stage at which they were in life in arriving at her decision.

[35] In respect of ***Kelly-Lasisi v Lasisi***, the parties having been married for a period of 9 months before co-habitation had ceased. They had been involved for a period of 12 years prior to the marriage. The 'family home' in question had been acquired by the Defendant prior to the marriage but during the period when he was dating the Claimant. It was her position that she had contributed to the maintenance and overall improvement of the property and had even contributed financially to work done on the structure. The Court considered her contribution and decided that in light of the other factors her entitlement could not be greater than ten percent.

[36] ***Graham v Graham*** was also highlighted, in that matter the Court displaced the equal entitlement rule by awarding 60 percent to the Defendant and 40 percent to the Claimant. This was a situation in which the family home had been acquired and an addition done to same by the Defendant with the assistance of his uncle in order to provide accommodation for his mother and a son he had prior to the

marriage. The contribution of the uncle had been made with a view to assist in providing accommodations for the Defendant's mother. The Court considered that this was a situation in which the uncle had done this as a gift to the Defendant and not to both individuals or to the Claimant herself. This gift was determined to have enhanced the value of the house greatly and in that regard the Court determined that this enhanced value ought to be given to the Defendant.

[37] In respect of the matters in which the equal entitlement rule was displaced, it is clear that the Courts have done this not only in circumstances where one of the 'gateways' provided for at 7(1)(a) to (c) existed but they considered all the circumstances of each case taking into account these factors as well as any similar factors which they believed to be of relevance.

ANALYSIS OF INSTANT CASE

House

[38] This application made by Mr. Johnson came almost three years after he had moved out of the marital home and more than 10 years after he said the Respondent stopped doing anything for him, which he said was in 2006. Section 13 of PROSA requires that a claim under this Act should be brought within a year of the separation of the parties or termination of the marriage, otherwise the leave of the Court has to be obtained to do so. In seeking the leave of the Court, Mr Johnson has explained that he did not apply for division previously as he had been living in the house for the first twelve months of the separation and did not know of his right to make this application.

[39] It is clear from the Counterclaim of Mrs. Johnson that she hasn't taken issue with this application for the extension of time or with the Court making an order for division of property. It is simply then for the Court to decide if the explanation provided affords a sufficient basis on which to grant leave to apply out of time. I have examined the explanation provided by Mr. Johnson and while I have noted that the timelines provided therein are contradicted by other parts of his evidence,

I am prepared to accept that the application had not been made earlier due to ignorance and extend the time as requested.

[40] It was the evidence of Mr. Johnson that at the time that the house was acquired he assisted with its purchase by making two financial contributions which amounted to $150,000. He testified that he located the vendor and sent his wife to him and he also paid for the valuation report. He contended that money from their joint savings account was used to pay the deposit, the closing costs and other related expenses. He deponed that the only reason why he did not place his name on the title was because it had been agreed between himself and the Respondent that they would not exhaust their loan entitlement from NHT so as to be able to acquire another property in the future. In cross examination however, Mr Johnson said he told his wife not to put his name on the title as it is a small place and not so expensive so it was best not to put his name there in the event he could get another house.

[41] Mrs. Johnson has denied that $150,000 was given to her by the Applicant and stated that he only gave her $50,000 towards the deposit on the house. She accepted that he paid for the valuation report but denied that she had a joint savings account with him from which money was used to meet any of the expenses associated with the purchase. On her account, the Applicant did not want his name to be added to the Title as he was of the view that the structure was small and he wanted to keep his benefit to acquire something for himself.

[42] It was accepted by Mr. Johnson that the Respondent had accessed another loan from NHT which was used to do improvement and expansion on the house. On the issue of work being done, he pointed out that in 2013 he obtained a loan from Scotiabank for $1,572,000 of which $760,000 was used to do remodelling on the house. The Respondent agreed that remodelling work was done by the Applicant but asserted that the costs of the job amounted to under $200,000. She testified that she was able to say this as at that point the marriage was still subsisting and she would play the role of secretary and record keeper. She has produced the

receipts for material purchased as an exhibit in support of her position. She accepted however that she did not know how much was paid for labour as she had no receipts for that.

[43] The Loan Agreement from Scotiabank has been produced as Exhibit DJ2. It states in the body of the document that the loan was for refinance/auto loan. It was the position of the Respondent that the Applicant had used this loan to refinance other loans that he had as well as to purchase the motor vehicle in 2013. She also maintained that no part of this sum was used to carry out any sort of the work at the house.

[44] In light of the notation as to refinance on the loan agreement Mr. Johnson was asked about the true purpose of the loan, he maintained that it was to be used to do work on the house even while accepting that he never informed the bank of this for it to be noted on the documentation. He also indicated that he didn't know what the term refinancing meant even though this wasn't his first loan.

[45] In addition to producing the loan agreement, Mr Johnson has produced a receipt ostensibly from an architect who had been tasked to produce the drawings to be used in the remodelling process which the loan had been taken to finance. The receipt has been examined and it was noted that while the loan was disbursed on the 21st of December 2013, the relevant receipt for the drawings to be used was dated the 20th of January 2006, more than 7 years before the loan was obtained.

[46] In continuing his evidence to make out his claim, Mr. Johnson stated that he was the person who had been paying the mortgage from 2006 to 2018. He testified that in 2006 his wife had left UHWI where she had previously been employed and had taken up a position with Central Medical Labs and had asked him to take over making the payments by salary deductions. He stated that based on the payments made during this period he has paid over $2,397,000 in mortgage payments. He has made reference to Exhibits DJ3 which he says are his pay slips for the period 2008 to 2015 as evidence of these payments.

[47] A review of this exhibits reveals a number of payslips, 20 of which are blotted out in respect of the dates and the details of the payee and the Court was unable to say which period they related to. The other pay slips provided covered 2008, most of 2009, 2010, 10 months in 2011, all of 2012 and 7 months in 2013. It is clear that in producing these documents the Applicant is heavily relying on the contribution made over the years.

[48] It was worthy of note that in cross examination Mr. Johnson accepted that for the period 2006 to 2010 the Respondent would reimburse him for the mortgage payments made. His explanation for the repayment was to the effect that this had been agreed as his salary would have been heavily depleted by the payment of the mortgage. He said that this money would be used by him to purchase gas to transport the family to work and school. Interestingly Mr. Johnson refused to accept that the reimbursement would reduce the sum that he said he had personally paid as mortgage for the period 2006 to 2018.

[49] On further cross examination it was accepted by him that he had in fact stopped servicing the loan between August 2017 and March 2018. He insisted that he had informed the Respondent that he had but this was denied by her. When pressed for the date on which he informed her he said this was on the 24th of June 2018, almost a year after he had ceased making payments.

[50] In respect of the contents of the house, it was the evidence of Mr. Johnson that he had purchased the majority of the furniture and appliances and the invoices for same were exhibited as DJ4. A review of these documents reveal that the names of both individuals appeared on the invoices submitted.

[51] In her evidence, Mrs. Johnson testified that for the period 2006 to 2010, Mr. Johnson would make the mortgage payments as his salary was steady and the deduction could be easily organised, this was done however on the understanding that he would be repaid his money. She stated that the agreement was that he

would provide her with a receipt in respect of each reimbursement. She said that he did this on the first occasion and refused to do so thereafter.

[52] In respect of the period 2010 to 2015 the Applicant testified that the Respondent was unemployed and he was solely responsible for the mortgage as well as all household expenses. This was accepted by the Respondent who said that in this period she had given birth to their second child and had suffered a bout of ill health as a result of which the Applicant suggested that she should take a break from working. She has pointed out that in this period she continued to see to the smooth running of the household. She also pointed to the fact that she had been paid up by CML in November 2010 and gave some of this money to the Applicant who had complained about financial challenges.

[53] In respect of work being done on the house it was accepted by Mrs Johnson that in 2012 and 2013 the Applicant did some work on the house. It was also pointed out by her that she also did additional work on the house in 2017 having regained employment in 2016, but I note that this was after the period when the Applicant had moved out pursuant to the Court order.

[54] Mrs. Johnson also outlined that when she left UHWI she was paid a lump sum and gave $295,000 out of this to the Applicant to assist with the purchase of a car. The receipt of this sum has been acknowledged by him. She testified that the Applicant later sold this car to assist with the purchase of the Honda Odyssey and it is based on the assistance provided that she claims an interest. In his account the Applicant denied that the vehicle had been sold and the proceeds used in this fashion. He asserted instead that the car had been written off on Mandela and he had sold the salvage for $120,000. It was accepted by him that he did not give this money to the Respondent. It was clear from the verbal response and physical reaction of the Respondent that she had never heard this evidence before.

[55] Mrs. Johnson testified that in or about the 2nd of July 2018 she was advised by the NHT that the mortgage was in arrears as it had not been paid for 7 months. As

a result of this on the 2nd of July 2018 she wrote a letter to NHT requesting that the mortgage no longer be paid by salary deductions from the Applicant's account and made arrangements to take over the payments having gained employment with the Spanish Town Hospital.

[56] Both the Applicant and Respondent have produced payslips as well as letters from their respective employers speaking to their annual income. The Court noted that the earnings of the Respondent per annum amount to $659,445. Her payslips reveal that with the usual deductions applied her net salary ranges between $17,000 and $24,000 per fortnight. It was also noted by the Court that the deductions did not include her mortgage which would remain to be covered from cash received. It was stated by the Respondent that she will never be able to afford another house on her salary neither can she acquire another NHT loan as she has 'maxxed out' her benefits with them.

[57] In respect of Mr. Johnson, he provided three payslips for October to December 2018 but none for 2019. He has however provided a letter from his employers which speaks to his emoluments being in the amount of $2,046,612 per annum. He was cross examined about the payslips provided as it was noted that apart from his basic salary which amounted to $148,692.92 in December 2018 he also received other payments to include allowances and what he termed as overtime payments. For the period October to December 2018 this brought his gross salary to a range of $264,000 to $269,000 per month. In cross examination, Mr. Johnson accepted that he had received a pay increase but he could not say when. He has indicated that the additional payments aren't the norm but a review of his payslips going back to 2008 shows that these payments are a standard part of his earnings.

[58] He pointed out to the Court that note should be taken of his expenses, the largest deduction being $44,000 being paid to Scotia for the loan taken out in 2013. He has accepted however that this payment came to an end in 2018. He has also stated that the payment to JN in the sum of $17,000 was in respect of a loan taken to purchase furniture when he left the home in 2015 while the payment to JNB-

UWI of over $34,000 was a loan taken to pay his legal fees. Unlike the situation with the loan from Scotiabank, Mr. Johnson has not attached any form of documentation to confirm that these payments are actually to service loans.

[59] In concluding his evidence on this area, Mr. Johnson testified that he wouldn't be able to obtain another house based on his age and salary. He was cross examined on this point and stated that he was not aware that NHT made loans available to minimum wage earners.

[60] In considering the applications brought by the respective parties, the Court had the added benefit of seeing and hearing from the witnesses themselves. As a result of this, the opportunity was provided to assess their demeanour as well as their consistency in putting forward their respective accounts. In respect of Mr. Johnson, I found him to be lacking in consistency on a number of important points. I also found that he prevaricated when asked simple straight forward questions. Examples of the above were found in his indication that relations had come to an end between he and the Respondent in 2006 but the younger child was born in 2010 and it was accepted that in 2006 he was given money by the Respondent to help with the purchase of a vehicle. In respect of his tendency to prevaricate he accepted that he was reimbursed by the Respondent for payments made in 2006 to 2010 but refused to accept that he would not have paid over $2 million dollars on the mortgage, as he testified, if he was reimbursed some of the payments.

[61] These were not the only instances in which I had a difficulty with Mr. Johnson's credibility as I found that even his explanation as to why his name did not appear on the title seemed to have undergone a transformation of some sort when one examined the differences between his evidence in chief and cross examination. The same issue was again noted when his explanation about his payslips and the date of his pay increase were examined. In the Court's opinion, these were all simple issues which he should have no difficulty in explaining yet he either lacked consistency or he was evasive.

[62] On the other hand, there were no such issues identified with the account of Mrs. Johnson as she willingly volunteered that the Applicant had paid the mortgage for the period 2010 to 2017. She also testified that he had done work on the house in 2012 or 2013 and she stated that he had given her a contribution towards the deposit amount, the sole point of departure between them being one of quantum. In the course of examination in chief she had indicated that she did not agree that the Applicant had paid for the valuation report but when the Court resumed after the lunch break she volunteered that she had thought further about it and was prepared to accept that he had. It was incidents like this that served to mark her as an honest and straight forward witness on whom the Court could rely. As such where there were points of disagreement between them, I preferred and accepted the account of Mrs. Johnson.

[63] In light of the requirement that the party who is seeking to displace the application of the rule must produce cogent evidence on which to do so, the credibility of the witnesses takes on greater significance. In her application, Mrs Johnson is asking the Court to award no more than 10 percent of the interest to the Applicant. In considering her request, it is useful to outline the evidence which has been accepted by the Court on a balance of probabilities;

1. The premises in dispute were acquired utilizing a loan from the NHT. While I believe that Mr. Johnson contributed the sum of $50,000 to the deposit as well as paid for the valuation report, I accept that it was the mortgage benefit of Mrs. Johnson that made the acquisition of the home a reality.

2. I accept that having acquired the home, Mrs. Johnson made a further investment in same by obtaining another NHT benefit which she used along with funds received from the UHWI as part of her redundancy payments to improve on the structure in light of her growing family.

3. I believe that as a result of the fact that she has acquired two benefits from NHT, in respect of the home, Mrs. Johnson has maximised the benefits that she can receive from this mortgage institution. The Court recognises that the NHT is the mortgage institution of choice for persons of modest income given the lower interest rates that they provide.

4. I accept that Mrs. Johnson is now in her forties and earns a net salary of less than $50,000 per month after the usual deductions but before the payment of her mortgage of just under $17,000. In these circumstances, I accept that the likelihood of her qualifying for and obtaining another mortgage to acquire a home is very low.

5. I accept and believe that Mr. Johnson had refused to have his name placed on the title as he harboured hopes of acquiring a different property.

6. I accept that unlike Mrs. Johnson he has never used his NHT benefits and that he earns a salary which is considerably higher than hers as his net salary, with the cessation of the loan payments to Scotiabank would be in the range of $200,000 per month or possibly higher.

7. I believe that his position is markedly different from Mrs. Johnson as he would still be able to contend and likely qualify for a mortgage loan and I accept that he enjoys a greater likelihood of acquiring another home than Mrs. Johnson does.

8. I believe that while Mr. Johnson has been and seeks to continue to be a father to his sons, it is Mrs. Johnson who has always been their primary caregiver. This is a situation which is likely to continue given the Applicant’s request that care and control of both boys be given to Mrs. Johnson which the Court is prepared to grant.

9. I accept and believe that the boys are 17 and 9 years old respectively and have always lived in this home. It is the Applicant's request that the house be sold in order for him to receive his half of the proceeds.

10. I believe that the financial reality of Mrs. Johnson being as it is means that she is faced with the likelihood of being left to physically care for both boys without the certainty of a roof over their respective heads.

[64] In light of the foregoing findings, the Court is of the view that the disparity in the economic and physical realities of the parties is an appropriate basis on which to depart from applying the equal entitlement rule. Added to this is what I accept to be the greater financial contribution of the Respondent. This is a case in which fairness between the parties requires a different approach and in this regard, I refer to and adopt the words of McDonald-Bishop J (Ag) when she stated thus in ***Graham v Graham;***

> *So it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union <u>when the partnership ends each is entitled to an equal share of the assets unless there is a good reason to the contrary, fairness requires no less.</u>'*

[65] It is not agreed however that the displacement should be by as much as the Respondent has contended as in spite of his reluctance to be committed to the subject property in name, Mr Johnson has made his own contributions which have served to enhance and add value to the property. I believe that a more equitable division would see the Applicant receiving 35 percent interest with 65 percent being awarded to the Respondent.

Occupation Rent

[66] Mr. Johnson has asked for Occupation Rent from the Respondent which he says is due to him based on the fact that she has had sole possession of the house since he moved out in December 2015. While he accepts that this was as a result of an Order of the Court made under the Domestic Violence Act, he contends that

this was discharged the following year but he has not moved back in because of the Respondent's aggressive conduct towards him. He has asked for the sum of $525,000 but the basis for this amount has not provided to the Court.

[67] In relation to this request, these were not circumstances in which the Respondent had enjoyed sole occupation of the premises. She remained there with the couple's children who were 14 and 5 years old respectively at the time that the Applicant left the premises in December 2015. The Court also notes that the circumstances under which the Applicant left was pursuant to an order of the Court under the Domestic Violence Act. By Mr. Johnson's own account, he has elected not to return to the premises not because he could not do so but because of the Respondent's aggression towards him, from my assessment of the parties as well as the evidence, it is an aggression that goes both ways.

[68] From the dicta of Brooks JA in ***Stewart v Stewart*** at paragraph 71, it is noted that in the post separation period, the party in occupation could be ordered to pay an 'occupation rent'. The payment of this sum is clearly a matter for the Court's discretion. I have reviewed the circumstances of the occupation referred to above and I am not persuaded that the instant case is one in which the application of this principle would be appropriate.

Custody and Access

[69] In respect of custody and access to the children, Mr. Johnson has complained that he has been denied access to the children on several occasions. This has been denied by Mrs. Johnson who stated that this happened only twice. The first time was when he wanted to take the younger of the boys during the Valentine period and she objected to this. The second occasion was in Easter of this year. She said there was no prior arrangement that the Applicant was supposed to have the children but he asked to have access to the younger. She said that she advised him that she would think about it, but he showed up at the house she making

demands in circumstances where the child was ill and she was not minded to send him with him in that state.

[70] On the issue of custody, I note that the parties are ad idem that the children should remain in the care and control of the Respondent with custody being joint. The Court agrees with and endorses this position. In respect of access, it is apparent that a more structured arrangement is needed in order for there to be no uncertainty for either party as to their entitlement for a relevant period. I have reviewed the proposal of the Respondent and I believe that this is a schedule that would allow the Applicant to have the type of access to the children that he desires and adopt it accordingly.

Maintenance Order

[71] In respect of the Respondent's application for maintenance of the children, Counsel for the Applicant has indicated that the Court has no jurisdiction as the Parish Court has already adjudicated on this and made an order. It was also his submission that the approach to be taken was to have a variation made or the ruling appealed but this Court could make no orders. It is the Respondent's position that the order was made without that Court having the full benefit of the Applicant's earnings and additionally the older boy is now 17 years old, he will be 18 years old in September 2019 when the life of the current order would end. In light of the fact that he commences his second year of sixth form in September 2019 and hopes to go on to pursue tertiary education, she is seeking a new order from this Court to extend the maintenance contribution to age 23 years.

[72] In relation to this application, while the Court recognises that Section 3(2) of the Maintenance Act allows for an application for Maintenance in PROSA proceedings, there is already a Maintenance Order in place that can be re-visited by the Respondent. An application can be made there for the variation of the amount previously ordered as well as for the extension of the Order in respect of Douve. The Court would recommend that this application be made as a matter of urgency

as his 18th birthday isn't very far off and based on the decision of ***Rosevelt Rowe v Beverly Rowe [2014] JMCA Civ 30*** it has to be applied for before he attains that age.

Honda Odyssey

[73] From the Respondent's own account, it is clear that when the money was given to the Applicant it was given as a gift. It is also clear that repayment was never expected but her position has changed with the change in circumstances between them. While the sum may have been given with the understanding that the car would be used as the family's transportation this cannot and ought not by itself be used as a basis to try to convert a gift into a loan/investment. In the circumstances, while the Court understands the Respondent's disappointment that the car is no longer available to transport her, I am unable to make the order which is sought.

CONCLUSION

[74] The orders of the Court are as follows;

i. Leave is granted to extend the time to bring this application for division of property.

ii. The property situated at 20 Flannel Terrace, Lot 89 Eltham Vista, Spanish Town registered at Volume No. 1366 and Folio No. 198 of the Register Book of Title is declared as being the Family Home of the Applicant and the Respondent. It is also declared to be owned in the shares of 35 percent by the Applicant and 65 percent by the Respondent in law and in equity.

iii. The Respondent is at liberty to purchase the Applicant's interest in the family home. The Respondent shall exercise her option by notice in writing within 30 days on receipt of the valuation report.

iv. The cost of the valuation of the family home is to be borne equally by the parties.

v. If the Respondent exercises her option to purchase the Applicant's interest in the family home, the purchase is to be completed on or before 120 days from the date of the agreement for sale.

vi. That the property be sold either by private treaty or by public auction and that the net proceeds of the sale be divided between the Applicant and Respondent in accordance with their respective interests as determined by the court or in the alternative the Respondent shall have the right to purchase the interest of the Applicant, such right shall be exercised within 30 days of her receipt of a valuation report.

vii. In the event the Respondent refuses or fails to execute the Agreement for Sale and/or instrument of transfer or any other documents required to give effect to the order of this Honourable Court within 14 days of being requested in writing to do so, the Registrar of the Supreme Court is authorized to execute same.

viii. Carriage of sale to Mr. Malcolm Gordon, Attorneys-at-Law.8

ix. The application for an order of equal entitlement to the Honda Odyssey is refused.

x. The Application for maintenance is refused.

xi. By consent the Parties are granted joint custody of the children with care and control to the Respondent and access to the Applicant as follows;

    a. The spending of alternate weekends with the Applicant.

    b. The spending of Father's Day each year with Applicant.

c. The spending of one week with the Applicant during the Easter break.

d. The spending of one month with the Applicant during the Summer holidays.

e. The spending of one week with the Applicant during the Christmas holidays.

f. The Applicant is responsible for collecting the children on the relevant occasion and returning them to the custody of the Respondent.

xii. Liberty to apply