



[2021] JMSC Civ.60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO SU2019CV00211

BETWEEN	KENEISHA JONES	CLAIMANT
AND	MICHAEL LANCELOT GARRISON JONES	DEFENDANT

IN CHAMBERS

Mr. Karl Graham instructed by Byfield Mellish and Campbell on behalf of the Claimant

Mrs. Bobbette Brown instructed by Bobbette Brown and Co. on behalf of the Defendant

Heard: February 23 and 24, 2021 and March 26, 2021

**Property Rights of Spouses Act Sections 6 and 7 – Division of Matrimonial Home –
Exceptions to the equal share rule – the factors that the court may consider in
determining whether the equal share rule is to be varied**

Carr, J (Ag.)

Background

[1] Michael and Keneisha Jones were married on the 3rd of February 2010. The couple has two children together and Mr. Jones has five other children from previous relationships. Prior to the marriage some time in or around December 2009 Mr. Jones acquired property located at Lot 147, San Fernando Place, Caribbean Estate, Greater Portmore P.O. in the parish of St. Catherine registered at Volume 1435 Folio 71 (**the Caribbean Estate Property**). The couple moved into the Caribbean Estate property after the wedding and their second child was born while they were living there. The marriage

did not go well according to both parties and Mr. Jones petitioned for the dissolution of marriage, the decree absolute was granted on the 12th of December 2018.

[2] The Claimant, Ms. Jones (as she is now called) contends that the Caribbean Estate property is the family home and that she is entitled to a fifty percent share of its value. Mr. Jones has disputed the claim on the bases that the house was purchased as a gift for his daughters and that it was never his intention that his wife was to hold an interest in the property.

The Claim

[3] Ms. Jones is seeking the following orders from the court by way of a fixed date claim form:

- a) A declaration that property at Lot 147, San Fernando Place, Caribbean Estate, Greater Portmore P.O. in the parish of St. Catherine registered at Volume 1435 Folio 71 was the principal place of residence and family home of the Claimant and Respondent during their marriage, pursuant to the Property (Rights of Spouses) Act 2004.
- b) A declaration that the Claimant, Keneisha Jones, is entitled to a fifty percent (50%) interest in the matrimonial home being property at Lot 147, San Fernando Place, Caribbean Estate, Greater Portmore P.O. in the parish of St. Catherine registered at Volume 1435 Folio 71 pursuant to the Property (Rights of Spouses) Act 2004.
- c) An order that the property at Lot 147, San Fernando Place, Caribbean Estate, Greater Portmore P.O. in the parish of St. Catherine registered at Volume 1435 Folio 71 be valued by a property Valuator agreed and instructed by both parties within twenty-eight (28) days hereof the cost of such valuation shall be borne by the parties in equal shares and that the valuation report is to be made available to the parties within fourteen (14) days of the request for valuation.
- d) An order that if no valuator can be agreed upon then one shall be appointed by the Registrar of the Supreme Court.
- e) An order pursuant to the Property (Rights of Spouses) Act 2004 that the property situated at Lot 147, San Fernando Place, Caribbean Estate,

Greater Portmore P.O. in the parish of St. Catherine registered at Volume 1435 Folio 71 be sold, with the Respondent having first option to purchase.

- f) An order that should the Respondent be unable or unwilling to exercise his first option to purchase, then the property would thereafter be put on sale on the open market by public auction or by private treaty.
- g) An order that the proceeds of sale be distributed equally between the Claimant and the Respondent within fourteen (14) days of receipt of such proceeds via the attorney-at-law with carriage of sale for the Parties.
- h) An order that the Registrar of the Supreme Court is authorized to sign all and any documents necessary to make effective any and all orders of this Honourable Court, if either party is unable or unwilling to sign any document within 14 days of being requested to do so.
- i) An order that the Attorneys-at-Law for the Claimant have carriage of sale of the subject property.
- j) An order that the Claimant may have such other and further relief as this Honourable Court deems fit.

The Law

[4] The governing legislation is the Property (Rights of Spouses) Act (**PROSA**). The family home is defined 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;¹

¹ Section 2 (1) PROSA

That there is a rebuttable presumption of an entitlement to a fifty per cent share in the family home is set out as follows:

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;²

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.³

A spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the Court.⁴

Issues

- [5]** a) Whether Mr. Jones made an application under section 7 of PROSA?
- b) Whether the Caribbean Estate property is the family home?
- c) Whether the court should vary the equal share rule and if so in what proportion?

² Section 6 (1) (a) PROSA

³ Section 7 (1) PROSA

⁴ Section 12 (2) PROSA

Submissions on behalf of the Claimant

[6] Mr. Graham submitted that the court should have no difficulty finding that the Caribbean Estate property was indeed the family home in accordance with PROSA. The next step therefore would be the determination of the Claimant's share in the property. The presumption he suggested was that the Claimant was entitled to a fifty per cent (50%) share of the property. It was accepted that the presumption is a rebuttable one, however the Defendant would be required to show that it would be unreasonable or unjust for the parties to be entitled to the benefit of the presumption.

[7] In Mr. Graham's view no such evidence has been adduced on the part of the Defendant to satisfy that burden. Although the house was purchased prior to the marriage he argued that the parties were previously in a common law relationship and that at the time of the purchase of the house the Claimant was actively involved. Their union he said was not of a short duration as the parties were married for some eight years and were together for some three years prior.

[8] The fact that the Claimant did not contribute financially to the purchase or renovation of the house should not be used to oust the rule. It was argued that the Claimant was prevented from working by the Defendant and in reliance on his instructions not to seek employment she was unable to earn a living in order to contribute to the expenses of the home. The Claimant did however actively participate in the running of the home and carried out her duties as a wife, mother and home maker for the benefit of the entire family. Her contribution in this regard should be considered when the court is making its decision.

[9] Mr. Graham cited several cases as authority for the position that the fact that the Defendant was the sole financial provider does not automatically entitle him to a greater share in the property. It was his contention that this was the true basis for the Defendant's opposition to the claim. The Court, he argued should disregard the Defendant's assertion that he purchased the property for his daughters as this was merely an attempt to defeat the interest of the Claimant. In the event that the court disagrees with that position this

would not prevent a division of the property as the children would still be able to realize their interest in the property.

Submissions on behalf of the Defendant

[10] Mrs. Bobbette Brown strongly opposed the arguments of Counsel on behalf of the Claimant. It was her contention that the matter fell squarely within the statutory exception to the equal share rule. The property, she submitted was purchased solely by the Defendant, he alone bore all the associated costs and he solely made the attendant mortgage payments. Further she suggested that although the transfer was effected on the 16th of December 2009, the Defendant had been in negotiations for the purchase from as far back as July 2009.

[11] The marriage it was argued was of a short duration. Even if the court was to consider the relationship of the parties prior to marriage it is evident that the Defendant was also in another relationship that produced a child in the same year that the couples' first child was born.

[12] In support of her submissions she pointed out that although the divorce decree was signed in December 2018, the parties ceased cohabiting as husband and wife in November of 2016 as they were then living in separate bedrooms in the same house and the Claimant had ceased all of her marital duties.

[13] The financial contribution of the parties should be considered in the determination as to whether the Claimant is entitled to a fifty per cent (50%) share in the property. By her own evidence the Claimant admitted that she made no financial contribution to either the purchase or the upkeep of the home. In cross examination she told the court that she had given one of the workmen money to buy a window. Mrs. Brown argued that the Claimant ought not to be believed on this point as the house was brand new and no windows would be required, also in her affidavit she told the court that she purchased the window and now she was saying that she gave the money to someone for that purpose. It would be inequitable in these circumstances she argued, for the Claimant to be entitled to a fifty per cent share of the property.

[14] Mrs. Brown also sought to refute the Claimant's averments that she was an outstanding home maker. Instead she argued that the Claimant was so uninterested in performing her wifely duties that the Defendant had to engage the services of three household helpers over the period of the marriage to assist in that regard. When the helpers were not present to assist, the older siblings in the household would do so. It was therefore her contention that the Claimant could not rely on her role in the home to support her application for a fifty per cent (50%) share in the property. The court was referred to the Supreme Court decision of **Antoinett Lehmann vs. Peter Lehmann**⁵ which counsel said had similar facts to the present case.

Analysis and Discussion

Undisputed facts:

[15] a) The parties were involved in an intimate relationship prior to their marriage however they never lived together.

b) Prior to the marriage, Mr. Jones purchased the Caribbean Estate property by way of a mortgage in his name only.

c) After the wedding the couple moved into the Caribbean Estate property and it has been the primary place of residence.

d) Mr. Jones made improvements to the house mainly at his own expense and he is also solely responsible for the mortgage payments.

e) Ms. Jones although engaged in several short term employment opportunities was never formally employed during the course of the marriage.

Did Mr. Jones make an application to displace the statutory rule?

⁵ [2017] JMSC Civ. 186

[16] Mr. Jones in his affidavit filed on the 1st of March 2019 sought to dispute the fact that it was the family home. His main reason for saying so was that the house was purchased prior to the marriage and as such it was never his intention for it to be the “family home” since he had purchased the home for his two daughters. He asked the court to dismiss the claim as set out.

[17] It is implicit in the Affidavit in response to the fixed date claim form that Mr. Jones is challenging the claim of Ms. Jones and making his own application that her claim be dismissed by virtue of Section 7 (1) of PROSA. He has therefore substantially applied for the equal share rule to be displaced even though he has not filed a formal application to that effect.

Was Caribbean Estate the family home?

[18] The case for Ms. Jones rests on the fact that the Caribbean Estate property was the family home. The evidence which she relies on in support of this has been unchallenged by Mr. Jones. The couple moved in after their marriage and it has been their only place of residence. As such the court has no difficulty in accepting that the Caribbean Estate property is the family home.

The displacement of the equal share rule

[19] Section 7 (1) of PROSA provides for the displacement of the equal share rule in certain circumstances. Brooks J.A. as he then was in the Court of Appeal decision of **Carol Stewart v. Lauriston Stewart** ⁶ discussed the principles to be applied when determining the applicability of the rule. He pointed out the following:

- (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).**

⁶ SCCA No. 15/2011 para. 27

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

[20] Brooks J.A., made reference to the case of **Donna Marie Graham v. Hugh Anthony Graham**⁷ a decision of McDonald Bishop, J (Ag.) as she then was and affirmed that the rule may be displaced in circumstances where the court is of the view that justice demands it. It is also evident that each case must turn on its own facts.

[21] The burden of proof rests with Mr. Jones to satisfy the court by cogent evidence that the application of the equal share rule would be unreasonable and unjust in the circumstances. In making that determination the court may have regard to the factors as outlined in Section 7 (1) of PROSA. It is also recognized that the fact of the presence of one of the factors for consideration as set out in Section 7 (1) does not automatically deprive Ms. Jones of a share in the property.

[22] Brooks, J in **Stewart and Stewart**⁸ held ;

“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...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.”

[23] In applying these principles to the present case the court finds that a section 7 factor exists. The Caribbean Estate property was owned by Mr. Jones prior to the marriage. A considered review of the attendant circumstances of the case is therefore required to determine if it is unjust or unreasonable to apply the rule. I observed the demeanour of both parties and I found Ms. Jones to have been less than forthright in her

⁷ 2006 HCV 03158

⁸ Supra. 5 para.77

Affidavit evidence it was only on cross examination that she admitted to certain facts. I did not find her to be credible. Mr. Jones appeared to be truthful in his responses and I generally accepted him as an honest witness. I propose to deal with their evidence in light of the following areas which formed the gravamen of counsel's submissions:

- a) The duration of the marriage,
- b) The conduct of the parties,
- c) The financial contribution of the parties; and
- d) The non-financial contribution of the parties.

The duration of the marriage

[24] Counsel for the Defendant submitted that the marriage was of short duration even though there was no specific date given in the affidavit of Mr. Jones as to when the couple separated. It was her contention that the court should infer the date based on the evidence of the parties as to the date of filing of the petition for dissolution of marriage. Mr. Jones gave evidence that he filed for divorce in 2017, Counsel has asked the court to find that given the nature of those proceedings there is a requirement for the parties to have been separated for a period of one year prior to the filing of the petition. The date of separation therefore must have been some time in 2016.

[25] PROSA does not define a marriage of short duration however Edwards J, as she then was, in the case of **Margaret Gardner v. Rivington Gardner**⁹ found 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...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.”** The marriage

⁹ 2012 JMSC Civ. 54 para. 29

between Mr. and Ms. Jones based on the evidence would have been approximately six years. In light of the decision in **Gardner** it could be argued that the marriage does not qualify as a short marriage for the purpose of the application of the section. However, I am prepared to find that as there is no definitive date of separation there is no real evidence to support the fact that it is exactly six years. In the event that this is not accepted I still find that in the circumstances a minor difference of a year is not enough to say that it was not a marriage of short duration. I accept therefore that the marriage was of a reasonably short duration.

The conduct of the parties

[26] In cross examination Mr. Jones agreed that he wanted to start a life with his new wife and he agreed that it was his intention to live at the Caribbean Estate property with her as husband and wife where they would raise their family together including his other children. He was adamant however that the house was purchased as a gift for his two daughters, Jada Jones and Kadiann Jones. Although Mr. Graham asked the court to reject this notion, I cannot find that it is easy to do so. Mr. Jones, when questioned in cross examination, admitted that he had purchased another home in Old Harbour, he said that this home was for his older children. The Caribbean Estate property was for his daughters.

[27] The evidence that Mr. Jones purchased a home in Old Harbour for the benefit of his older children must be juxtaposed against his assertion that he purchased this home for the benefit of his daughters. Mr. Jones has several children and his purchase of the Old Harbour home as well as the Caribbean Estate property is indicative of a father who is making provisions for his children. It is therefore not difficult to accept that his intention was that his daughters should benefit from the Caribbean Estate property. I find and accept that at the time of the purchase he did not intend for Ms. Jones to hold an interest in the property as it was in fact a gift for his daughters.

[28] In contrast, Ms. Jones' evidence did not align with the submissions made on her behalf. It was argued that she had been involved in the process leading up to the

acquisition of the Caribbean Estate property. In cross examination she indicated that although she went with Mr. Jones to the New Era head office prior to the purchase of the home, she could not recall the conversation with Mr. Jones while there. She was unable to provide to the court any details as to the purchase of the home apart from the fact that Mr. Jones to her knowledge, paid some money in cash and the rest was financed through a mortgage. She thought it was with Scotiabank but she was not sure. She first saw the model home when she went with Mr. Jones that day. It was patently clear from her evidence that she was unaware of the negotiations surrounding the purchase. I accept the submission of counsel that her lack of participation was due to the fact that she was aware of Mr. Jones' intention to have his daughters benefit from the acquisition of the property.

The financial contribution of the parties

[29] Mr. Jones was the sole financial contributor to the purchase of the home as well as to the subsequent mortgage payments. He was also the sole financial provider for the members of the household. There is no dispute that the home has since the marriage undergone significant improvements. Ms. Jones evidence is that she contributed to the purchase of a window. This has been challenged by the defendant as it was argued that there would be no need to buy a window since the house was brand new. Later in cross examination Ms. Jones told the court that she gave the money to the workman to buy the window. I rejected her evidence in that regard. I accept that she has made no financial contribution to either the purchase or improvement of the home.

[30] Ms. Jones sought to give an explanation for her failure to make a financial contribution to the household expenses. It was her evidence that Mr. Jones prevented her from working. She told the court that her husband advised her that she did not need to work as he had enough money to take care of the family. She also indicated that when she raised the issue of seeking employment it caused discord within her marriage and as a result she felt as if she was unable to do so.

[31] When pressed in cross examination Ms. Jones admitted that during the marriage she operated a cook shop with her mother, she would also bake Christmas cakes for sale and she threw partner in order to have money for herself. Mr. Jones gave evidence that she also planned and organized trips for which she was paid. All the money she received from these ventures was used for her own purpose. I do not accept that Ms. Jones was restrained in any way from obtaining employment. I accept and find that she chose not to seek permanent employment and that she deliberately used whatever money she earned from her temporary employment for her own use instead of assisting with the expenses of the household.

[32] As the fact of financial contribution is not to be given more weight than that of non-financial contribution I now turn to Ms. Jones' role in the home.

The Non-financial contribution of the parties

[33] Ms. Jones in her affidavit filed on the 23rd of January 2019 averred that she performed the duties of a stay at home wife. Her duties included washing, cleaning, cooking and the general care of the children. In cross examination however she admitted that shortly after the wedding she was unable to perform her household chores as she was pregnant with the couples' second child and was feeling unwell. In the said affidavit she gave the impression that it was only in 2017 that Mr. Jones engaged the services of outside helpers this was in stark contrast to the evidence of Mr. Jones.

[34] Mr. Jones posited that Ms. Jones was lazy. When pressed by Counsel in cross examination he said that she did not want to work and that she did not want to perform any household chores. It was his view that this made her a disobedient wife. He told the court that he had to hire several household helpers in order to clean, wash, cook and iron for the household.

[35] In support of this two Affidavits were filed. The affidavit of Ms. Maxine Lightfoot, does not assist the court as her employment was subsequent to the date of separation. The affidavit of Mrs. Allison Raymond Newell which was filed on March 1, 2019 is however relevant to these proceedings.

[36] Mrs. Raymond Newell in her affidavit confirms that she was employed sometime in 2010 after Ms. Jones became pregnant. She was employed by Mr. Jones to cook and clean for the home. Ms. Jones' sister, Tricia Forrester, was also employed to the household at that time. Ms. Forrester was responsible for the washing and ironing. During the period of her employment Mr. Jones' two children (Jada Jones and Kadiann Jones) from a previous relationship were also living at the premises.

[37] At paragraph 7 of her Affidavit she stated;

"I was eventually asked by Michael Lancelot Garrison Jones to take care of Jada Jones' room and washing of her clothes because Keneisha was not doing it. I did that for about one year until Jada Jones was able to take care of herself."

She went on to say that she also took care of another child Joneil Jones, when he came during the holidays as Ms. Jones refused to do so.

[38] In cross examination she admitted that she is still presently employed to Mr. Jones at his business place. She agreed that after Ms. Jones had her second child that her services were no longer required. At that time however she said that Tricia Forrester was still employed there. It was after Ms. Forrester left that she was asked by Mr. Jones to return to iron and later she was asked to take care of one of the children as Ms. Jones was not doing so.

[39] Ms. Jones confirmed parts of this evidence in her cross examination. She agreed that her sister as well as Mrs. Raymond Newell were employed to the household, however she told the court that she did the cooking. Although Ms. Jones told the court she would get Jada ready for school she also admitted that it was Jada's mother who would prepare her uniform and comb her hair. Ms. Jones did not appear to the court to be truthful.

[40] On the totality of the evidence I find and accept that Ms. Jones was reluctant to care for Mr. Jones' other children. I accept Mrs. Raymond Newell's evidence that she had to take care of the two young children that were not biologically related to Ms. Jones. I do not therefore find that Ms. Jones made any significant contribution to the household

duties in such a way that it would have assisted Mr. Jones in the operation of the home. Her contribution to the daily life of the house is therefore minimal at best.

Disposition

[41] Having regard to the foregoing I find and accept that Mr. Jones has on a balance of probabilities shown that it would be unjust and unreasonable to apply the equal share rule in this case. It would be inequitable to permit Ms. Jones a share in the Caribbean Estate property given the following facts:

- a) the marriage was of a short duration,
- b) the parties were never in agreement that the home should belong to both of them,
and
- c) Ms. Jones made no contribution financially or otherwise in respect of the home.

Order:

1. The Claimant is not entitled to a share in the property.
2. Judgment for the Defendant on the claim.
3. Costs to the Defendant to be agreed or taxed.