[2022] JMSC CIV. 234

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016M02194

BETWEEN	**SANDRA ELAINE LILLY MCDONALD**	**APPLICANT**
AND	**CARLTON CLIFFORD MCDONALD (By next friend Robert McDonald)**	**RESPONDENT**

IN CHAMBERS

Dr Leighton Jackson of counsel for the Applicant

Ms. Tavia Dunn and Ms. Allyandra Thompson instructed by Nunes, Scholefield, DeLeon and Company for the Respondent

Heard on: July 27, 2022 and December 9, 2022

HUSBAND AND WIFE – CLAIM FOR ENTITLEMENT TO PROPERTY – PROPERTY (RIGHTS OF SPOUSES) ACT ('PROSA'), SECTIONS 2, 6, 7, 13 AND 14– WHETHER THE PROPERTY WAS THE FAMILY HOME – OWNERSHIP TEST/REQUIREMENT – RESIDENCE TEST – THE APPLICABILITY OF SECTION 14 OF PROSA

I REID J.

Introduction

[1] This is an application for, *inter alia*, division of property pursuant to the Property (Rights of Spouses) Act (hereinfater referred to as 'PROSA'). It was filed by Sandra Elaine Lilly McDonald (hereinafter referred to as "the Applicant") against Carlton Clifford McDonald (hereinafter referred to as the "Respondent") by his son and next friend, Robert McDonald.

Previous Application

[2] Before this court heard the current application, the Respondent had filed an application on April 27, 2021, seeking orders to include:

> *"1) The leave of the Court to sell the property situated at Refuge in the parish of Trelawny being the land comprised in the Certificate of Title registered at Volume 1505 Folio 621 of the Register Book of Titles (hereinafter referred to as "the said property").*
>
> *2) Fifty percent (50%) of the net proceeds of sale be placed in an interest bearing account in the names of Nunes, Scholefield, Deleon & Co and Neville C. Stewart & Associates pending the outcome of the Respondent's application under the Property (Rights of Spouses) Act for a declaration of her interest in the said property.*
>
> *3) The caveat numbered 2205839 be removed from the Certificate of title registered at Volume 1505 Folio 621 of the Register Book of Titles.*
>
> *4) That costs of this application be costs in the claim."*

[3] Upon hearing that application, the Honourable Mrs. Justice A. Lindo made the following orders on February 17, 2022:

> *"1. Leave of the Court is granted to the Applicant to sell the property situated at the Refuge in the parish of Trelawny being the land comprised in the Certificate of Title registered at Volume 1505 Folio 621 of the Register Book of Titles.*
>
> *2. The property shall be valued by a reputable valuator to be agreed on by the parties, failing which, if they cannot agree, any one of the Registrars of the Supreme Court is empowered to appoint a valuator.*
>
> *3. The costs of the valuation are to be borne equally by the parties.*
>
> *4. The sale shall be by private treaty and the sale price shall be the market value determined by the valuator.*
>
> *5. The law firm of Nunes, Scholefield, Deleon & Co., Attorney-at-law shall have carriage of sale.*
>
> *6. 50% of the net proceeds of sale of the property shall be deposited in an interest bearing account at a reputable financial institution covered by Deposit Insurance in the joint names of the Attorneys-*

at-Law on the record for the Applicant, Nunes, Scholefield, DeLeon & Co and the Attorney-at-Law on the record for the Respondent, Dr. Leighton M. Jackson pending the outcome of the Respondent's application for a declaration of her interest in the said property.

7. *The Registrar of Titles shall forthwith remove caveat numbered 2205839 from the Certificate of Title registered at Volume 1505 Folio 621.*

8. *Costs will be costs in the substantive claim.*

9. *Applicant's Attorney-at-Law to prepare, file and serve Formal Order.*

10. *Leave to appeal is refused. Application for stay is refused."*

The Application

[4] On January 22, 2019, the Applicant filed a Notice of Application for Court Orders against the Respondent seeking the following orders:

"1. A Declaration that the applicant is entitled to a fifty percent (50%) or one half (1/2) legal and beneficial interest in that parcel of land part of Refuge in the parish of Trelawny being the land comprised in Certificate of Title registered at Volume 1505 Folio 621 of the Register Book of Titles endorsed in the name of the respondent (hereinafter referred to as 'the property');

2. *An Order that the subject property be valued by a reputable real estate appraiser/valuator;*

3. *An Order that the respondent, be given the option to purchase/acquire the applicant's, fifty percent (50%) or one half (1/2) legal and beneficial interest in the subject property within sixty (60) days of the date of this Order;*

4. *An Order that should the respondent, elect not to exercise his option to purchase/acquire the applicant's fifty percent or one half legal and beneficial interest in the subject property within the time stipulated that the property be advertised and put for sale on the open market;*

5. *An Order that should the subject property be sold on the open market, after all expenses and outgoings are deducted, that the proceeds of the sale be divided equally between the applicant and the respondent;*

6. *An Order that the applicant's Attorney-at-Law shall have Carriage of Sale of the said premises;*

7. An Order that the Registrar of the Supreme Court be empowered to sign any documents to effect the transfer of the said property should either of the parties be unwilling, unable and or fail to do so;

8. There be any such further order and or relief as this Honourable Court may deem fit."

[5] The grounds on which the Applicant sought those orders are:

"(a) That the subject matter of this claim concerns the Applicant's interest in property jointly owned by the parties;

(b) The Respondent has instituted divorce proceedings against the Applicant and as such the Applicant is desirous of having her proprietary interests in the family home settled;

(c) That the Applicant does not have any legal and or beneficial interest in any other property save and except the subject property;

(d) That the Court's over-riding objective will be advanced by the making of the Orders being sought herein by the Applicant;

(e) That the matters set out herein are of a very urgent nature;

(f) That it would be proper, equitable and just for this Honourable Court to grant the orders and relief being sought herein."

Preliminary Application

[6] At the commencement of the hearing of this application, Counsel for the Applicant, Dr. Leighton Jackson, sought leave of this court to hear an Amended Notice of Application for Court Order filed on June 30, 2022. That application sought an order admitting into evidence affidavits filed by the Applicant on February 4, 2022, February 8, 2022, February 16, 2022, and February 28, 2022. The Respondent's attorneys-at-law objected on the ground that pursuant to a prior court order, all affidavits ought to have been filed and served by September 30, 2021.

[7] This Court allowed submissions by both sides. Dr. Jackson stated that due to several challenges, the Applicant was late in her filing and service of the document. It was revealed that there were several Court hearings before this hearing date, but Counsel did not seek the court's permission to have those affidavits admitted into evidence. This court did not agree with a suggestion made by the Applicant's

counsel that it was a violation of the applicant's constitutional right to due process and the right to be heard to be refused permission to rely on an affidavit that was served, even if it was in breach of the court order. Counsel was referred to the Civil Procedure Rules ('CPR'), rule 26 (8) which deals with the procedure for relief from sanctions.

[8] I noted that the application could have been made at an earlier stage, but Counsel did not seize that opportunity. At this late stage, that is, on the date of the hearing, in my view, the Respondent would have been prejudiced if the affidavit had been allowed to stand. Parties ought to be aware that the CPR exists to ensure fairness to the parties and to promote respect for timelines given by the court so that matters can be dealt with expeditiously and fairly. Although I acknowledge that had the application been granted, the case would have been adjourned for the Respondent to file his Affidavit in reply. Nevertheless, in my view, for the reasons mentioned prior, I ruled that the application to admit those affidavits into evidence would be refused.

The Evidence

[9] The substantive application was supported by an affidavit filed by the Applicant on January 22, 2019. This affidavit was allowed to stand as her evidence-in-chief, along with her oral testimony elicited by amplifying the affidavit, and she was cross-examined.

[10] The Respondent (who appears by his son and next friend, Mr Robert McDonald) (hereinafter called Mr. R. McDonald) filed an affidavit in response on October 5, 2020, and has denied the applicant's claim of entitlement to a share in the property. That affidavit was also admitted into evidence to stand as his evidence-in-chief, along with his oral testimony elicited by amplifying the said affidavit. Like the Applicant, he was extensively cross-examined.

[11] For brevity, I will not go through the breadth of the evidence presented before this Court. However, all the relevant portions of the evidence that I find essential and pertinent to the issues, in this case, will be duly noted in my analysis.

Submissions

[12] Counsel for both parties filed written submissions. They were also given the opportunity to file and exchange closing submissions and to file a response to those submissions. I have considered the submissions and the copious authorities that were relied on by the parties. The fact that I have not mentioned all their authorities in my analysis is no indication that I did not consider them but rather that I have highlighted those of greater importance to my decision. I am grateful to both sides for their erudite submissions.

Legal Issues

[13] I find that the main issue for determination is whether the Applicant is entitled to a 50% share of the legal and beneficial interest in the disputed property. However, arising from this are several other issues that fall to be considered prior to the determination of the Applicant's interest, if any, in the disputed property. These are:

i. Whether the property was the family home?

ii. If the property is the family home, whether the variation of the equal share rule is justifiably applicable?

iii. If the property is not the family home, whether Section 14 of *PROSA* is applicable?

The Law and Analysis

Issue i: Whether the property was the family home?

[14] The legislation governing a claim for division of property between spouses is *PROSA*. *Section 13* of *PROSA* has guaranteed that a spouse is at liberty to apply for the division of property "*where a husband and wife have separated and there is no reasonable likelihood of reconciliation*". The precipitating event that gave rise to this Application is the Respondent's petition for dissolution of the parties' marriage. Reference can be had to *Sections 2, 6 and 7* of *PROSA* in determining whether a property is the family home.

[15] The law in this area is clear, and I find it pertinent, based on the circumstances of this case, to highlight the unique features of the family home. Section 2(1) of *PROSA* defines the family home 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."*

[16] Therefore, the requirements or tests may be listed as the ownership test (wholly owned by either or both spouses), and the residence test (used habitually or from time to time by the spouses as the only or principal family residence). It is imperative that both requirements are satisfied for the Court to make the finding that the disputed property qualifies as a family home within the meaning of *PROSA*.

[17] The first consideration is the ownership test. There is undisputed evidence that the Respondent is the sole registered proprietor of the disputed property, as depicted on the Certificate of Title. Both parties also agree that the Respondent later constructed a dwelling house on the said land. Therefore, the ownership test is satisfied, in that, the property is wholly owned by one of the spouses.

[18] The second consideration is the residence test. In the oft-cited judgment of ***Peaches Annette Shirley Stewart v Rupert Augustus Stewart*** *(unreported), Supreme Court, Jamaica, Claim No 2007HCV03257, judgment delivered*

November 6, 2007, Sykes J (as he then was) analysed the definition of "*family home"* and elaborated on the term "*used habitually or from time to time by the spouses as the only or principal family residence*". At paragraphs [23]-[24] he said:

> *"23. It should be noted that the adjectives only and principal are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. Only means sole or one. Principal means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression family residence. Indeed, even the noun residence is qualified by the noun family which is functioning as an adjective in the expression family residence. Thus it is not any kind of residence but the property must be the family residence. The noun residence means one's permanent or usual abode. Thus family residence means the family's permanent or usual abode. Therefore, the statutory definition of family home means the permanent or usual abode of the spouses."*
>
> *24. It is important to note that in this definition of family home it is vital that the property must be used habitually or from time to time by the spouses, as the only or principal family residence. The adverbs habitually and from time to time tell how the property must be used. The definition goes on to say that such a property must be used wholly or mainly for the purposes of the household. Thus using the property in the manner indicated by the adverbs is crucial. The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, 'Is this the dwelling house where the parties lived?' In answering this question, which is clearly a fact sensitive one, the court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items; (c) if there are children, where [do] they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items."*

[19] The authoritative interpretation and questions cited above by Sykes J were rather instructive in determining the residence aspect of the test. Specifically, the periods during which the parties lived at the dwelling house are very important in the determination of whether the property was the family home. ***Peaches Stewart v Rupert Stewart*** (supra) was endorsed by the Court of Appeal in ***Dalfel Weir v Beverly Tree*** *[2014] JMCA Civ 12* and Phillips JA at paragraph [39] cautioned:

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

[20] The peculiar facts of the case at bar are taken from the Applicant's evidence that, on the Respondent's invitation, she moved to the disputed property in 1982 and lived there with the Respondent for four years. The Respondent was married, but his first wife was not living at the property. The Applicant migrated to the United States of America ('USA') in 1986 and left the Respondent at the disputed property with his son, her son and a yardman named Yappist.

[21] Mr. R. McDonald gave evidence of how the Applicant came to have resided at the premises, but I found that whatever he had to say on this issue amounted to hearsay as he had no first-hand knowledge of it. He did agree that all of this information came to him through his father, whom he said told him at a time when he was mentally competent to recall certain events. Therefore, I did not consider his evidence on this issue to be relevant.

[22] Mr. R. McDonald gave additional evidence that the dissolution of the Respondent's marriage occurred on December 4, 1996 (a copy of the Decree Absolute was exhibited), but the Applicant was residing in the USA by then. The Respondent and the Applicant were married in the USA on October 9, 1999. The Applicant accepted these pieces of evidence.

[23] I must state emphatically that the period of cohabitation between the Applicant and the Respondent during the period 1982 to December 4, 1996, cannot be considered a spousal relationship between the parties within the meaning of *Section 2* of *PROSA*, which defines spouse as:

> *(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years…."*

[24] Further, Edwards JA explains in **Claudette *Crooks-Collie v Charlton Collie*** [2021] JMCA Civ 7, at paragraph [119] that:

> *"The word 'spouse' therefore refers not only to parties that are married, but also couples in common law relationships of the specified nature and duration. It is clear from this definition that a married man, as the respondent was for most of the parties' relationship, could not be deemed the spouse of a woman other than his wife, as he would not have been a 'single man'. Since, by definition, only a spouse can be a beneficiary of the entitlement of a half-share of the family home under section 6, and the family home could only entail a dwelling house used by 'spouses', as was correctly found by the learned judge,* ***it is clear that the period of the relationship during which the respondent was still married to his ex-wife could not have been used to determine what was the family home and any entitlement thereto.*** *(My emphasis)"*

[25] I agree with the Respondent's counsel that the evidence of premarital relations, the period of cohabitation of the parties, and the fact that the Applicant had resided at the disputed property prior to the dissolution of the Respondent's marriage to his first wife is of no moment. I agree with Counsel Miss Dunn that even though the Applicant lived with the Respondent for four years before she migrated, those years would not count toward cohabitation, as the Respondent was not a single man. So, it cannot be considered that the property was used habitually or from time to time by them as spouses, as the only or principal family residence.

[26] I, therefore, find that in order to satisfy "the residence test", that is, to ascertain if the parties had used the property habitually or from time to time as their principal abode, my assessment would have to consider the date after the dissolution of the Respondent's marriage to his first wife on December 4, 1996.

Whether the disputed property was used habitually or from time to time as the parties only or principal family residence?

[27] In order to determine this critical issue, the court will have to consider in some detail the evidence of the parties relevant to the period after December 4, 1996. The Applicant gave much evidence about her visiting the property and living at the property with the Respondent. The court has sought to identify the specific period or dates during which the Applicant would have stayed at the disputed property.

[28] The Applicant's evidence is that she worked as a Home Health Aid, and on most weekends, she would fly down to Jamaica. She explained that her job as a Home Health Aid was a "9 to 5 job" and that she worked in a private residence Health Care for over 12 years. She said the Respondent lived with her in Connecticut when he obtained US citizenship. The Applicant further added that in 2005, she had a visiting relationship with the Respondent. In re-examination, she denied that after 2006, the Respondent only saw her once in 10 years.

[29] The Applicant said that around 2015, the Respondent stopped visiting the USA because of his health. She further states that in 2016 she went to Trelawny and spent time with the Respondent, and he did not convey to her that he wanted the marriage to end. In fact, she claimed that they were intimate that evening. However, I note that she later testified that the marriage had broken down irretrievably. She said that around 2017, Mr. R. McDonald, the next friend, took the Respondent from Jamaica to Florida to live with him.

[30] The Court sought further clarification from the Applicant, and her response provided greater clarity on some very important factors of the case. She said that when she sued the Respondent for spousal maintenance, he was living in Florida and, at that time, was unemployed because he was sick. She was not aware of who he was living with when she made the applications to be declared his legal guardian nor for spousal maintenance. She explained that her various jobs over the years included her working as Home Health Aid and also in an Assisted Living Facility, where she took care of elderly persons. She further explained that she would work 12 hours every day, sometimes seven days per week, and she got vacation leave once per year. The Applicant said that she lived with her daughter and granddaughter when she worked in the Assisted Living Facility, but she also did private work where she lived on the premises with the resident. She admitted that the Respondent lived for an extended period of time in New York and that he also lived with her in Connecticut.

[31] Mr. R. McDonald, in his affidavit evidence, states that at the time of the marriage between the Applicant and the Respondent, the Applicant had been living in the USA while the Respondent was residing at the house in Refuge, Trelawny. He said the Respondent would not be able to stay in Jamaica for a long-time because he had to fly back and forth to the USA in order to maintain his green card. He said that the Respondent became ill in 2000 and, as such, was unable to work. He added that the Respondent was living with him in Tallahassee, Florida, in 2005.

[32] Mr. R. McDonald sought to give evidence about what transpired between the Respondent and the Applicant, but most of it amounted to hearsay, and, as such, I will not record them as I did not rely on them.

[33] Mr. R. McDonald said that he was the one who purchased airline tickets for the Respondent whenever he travelled to and from the USA. He also states that the Respondent would stay with him for extended periods, and from there, he would visit the Applicant. The Respondent would then return to his (Mr. R. McDonald's) home and, from there, travel to Jamaica.

[34] Mr. R. McDonald said that the Applicant was employed as a full-time live-in aid in Connecticut to an elderly lady who was very sick. He said the Respondent would visit her one week at a time at the home where she was employed and would stay with her at this home in the helper's quarters. Mr. R. McDonald said this was within his personal knowledge as he visited them once in Connecticut.

[35] Mr. R. McDonald gave further evidence that around 2004, upon the Applicant's request, her son Vince was granted permission by the Respondent to reside at the house in Refuge. The Applicant was still in the USA. Vince became abusive to the Respondent, Mr. R. McDonald, and other persons living on the premises, and the Respondent had to seek the assistance of the police to have him vacate the premises.

[36] Mr. R. McDonald said there was a disagreement between the Applicant and the Respondent in 2006. He said that around August 2006, the Respondent requested

that the Applicant remove her remaining items from the house, and her son, Vince, was permitted to return to the property for the sole reason of retrieving these items. On August 25, 2006, the Respondent published a Notice of Separation in the Jamaica Star (the tear sheet was exhibited.) None of this evidence was challenged.

[37] From the evidence presented, the parties spent a lot of their time together in the USA. The Applicant has been unable to give specific dates when she would have cohabited with the Respondent on the disputed property. An analysis of the evidence reveals that when the parties got married, the Applicant was living in the USA, and the Respondent was living in Jamaica. There is nothing in the evidence to even suggest that the parties were together for any specific period of time in any one year in Jamaica. The Applicant even contradicted herself by saying that the Respondent "sometimes stayed overseas for one year at a time".

[38] Mr. R. McDonald said that the Respondent obtained Social Security benefits for his disability because he was a US citizen. He said that as far as he knew, when he was a child, the Respondent worked as an accountant/bookkeeper and later as a carpenter and that he also had a very successful business.

[39] Mr. R. McDonald said that the Respondent was now 74 years old, and over the years, he (Mr. R. McDonald) had been solely responsible for the Respondent's care and managing his affairs. He has obtained a Power of Attorney from the Respondent and had a very close relationship with him.

[40] Mr. R. McDonald said that he visited Jamaica in 2006 and realised that the house needed substantial repairs, and so, between 2006-2007, he spent considerable sums from his personal account to carry out extensive repairs and remodelling to the house. The works included the addition of a new kitchen, retiling the house, and replacing the roof (receipts for building supplies purchased and photographs of drawings for the roof and work being done on the roof were exhibited).

[41] He said that while effecting repairs to the house and because of the Respondent's failing health, he (Mr. R. McDonald) became more involved and responsible for the Respondent's affairs. He said that the Applicant did not contribute to the repair, remodel or maintenance of the house, neither did she offer any assistance to the Respondent nor send any monies to him. Mr. R. McDonald emphasised that the Applicant did not contribute directly or indirectly to the acquisition, construction, maintenance or repair of the property at Refuge, Trelawny.

[42] When the Respondent's counsel sought to elicit evidence about a power of attorney that Mr R. McDonald had obtained from the Respondent, Dr. Jackson objected and sought to question the jurisdiction of the Court to hear Mr. R. McDonald as the next friend of the Respondent.

Whether the Court has Jurisdiction to hear Robert McDonald in his capacity as next Friend of the respondent?

[43] As indicated, during the hearing of the application, Dr. Jackson challenged the jurisdiction of the court to hear Mr. R. McDonald as the Next Friend of the respondent. Mr. R. McDonald, the son of the Respondent and his next friend, by virtue of the Next Friend Certificate filed on September 28, 2020, was allowed to give evidence as his father's (the Respondent's) representative in the proceedings. He exhibited a medical report from Dr. Medhat Awad dated May 21, 2020, which stated that the Respondent was diagnosed with Dementia, Parkinson's Disease, Hypertension, Gerd and Dysphagia.

[44] Dr. Jackson contended that Mr. R. McDonald has no legal standing before the court to represent his father as Next Friend, as his father ought properly to be present to represent himself as the Respondent.

[45] The Respondent's attorney, Ms. Dunn, pointed the Court's attention to rules 23.3(3) and 23.7 of the CPR, which sets out the procedure for being the Next friend of a litigant without an Order of the Court. She pointed the Court to the Certificate of Next Friend, filed very early in the proceedings and exhibited to Mr. R.

McDonald's affidavit. She also referred the Court to the medical report dated May 21, 2020, from Dr. Awad, which spoke of the Respondent's lack of mental capacity.

[46] Dr. Jackson also sought to challenge an order made by Stamp J appointing Mr. R. McDonald as the guardian of the Respondent. He said that his client was present and represented by another legal counsel when the order was made but that she didn't challenge it because she formed the view that that Court also was not seized with jurisdiction.

[47] I note that the Applicant had the opportunity to approach the Court of Appeal if she had a difficulty with the decision of Stamp J. but did not. In any event, Mr. R. McDonald has proceeded in this matter by way of Next Friend.

[48] There is no evidence before me to suggest that Mr. R. McDonald is not suitable to carry on the proceedings on behalf of his father, the Respondent or that he has any interest contrary to that of the Respondent. Dr. Jackson seeks to challenge the medical report of May 2020, comparing it with the earlier reports that his client received dated 2017, which found that the Respondent was mentally competent to carry out his affairs.

[49] Having considered the evidence of the medical report in May 2020 and the submissions, I found that Mr. R. McDonald was suitable to carry on the proceedings as the Next Friend of the Respondent. He, therefore, was allowed to continue giving his evidence.

[50] Mr. R. McDonald said that prior to 2000, the Respondent worked in a contractual relationship with a man named George from New York. He said the Respondent lived with him in New York prior to 2000 and never lived with the Respondent in Connecticut.

[51] Mr. R. McDonald said he left Jamaica in 1986 and returned in 1988, and between 1988 and 2006, he returned quite often, sometimes once per year, staying for about two weeks at a time. He admits that the Respondent is on disability

allowance but doesn't know who applied for it or which state is paying the benefit. He denied that the Applicant gave the Respondent US$2000.00 to work on the house and his pick-up truck. He also denied that the Respondent was receiving social security benefits based on the Applicant's application for spousal benefit.

[52] Mr. R. McDonald denied that the Respondent was taken to the Nursing home in 2016. He said his father spent part of 2017 in Jamaica, and later in that year, he travelled, by himself, to the USA and remained there. He said that his father went into the Nursing Home in 2018.

[53] Mr. R. McDonald said he was in Jamaica in 2016 and possibly 2017. He further said that the Applicant had sent the police to check on the welfare of the Respondent while he was living with him in Florida, and it was after that that she made the guardianship application.

[54] He said that the Applicant and the Respondent's daughter, Sushane, sought to visit the Respondent in the Nursing Home in Florida. The evidence revealed that Mr. R. McDonald got a call and went to the Nursing Home and saw the Applicant and his sister with documents in their hands and his father screaming that he was "not signing anything". Upon the arrival of the police, both the Applicant and his sister ran from the building.

[55] Subsequent to that date, neither the Applicant nor Sushane was allowed to visit with the Respondent at the said Nursing Home. He agreed that the Divorce Petition was served after his father was admitted to the nursing home.

[56] Dr. Jackson asked several questions about the payment of the expenses at the Nursing home, including whether any payments were made by medical insurance and whether any money for the renovation of the roof came from the Respondent's account. I note that the answers to these questions were not relevant to the issues that I had to determine, and so I did not distract myself with the answers which were given.

[57] Dr. Jackson also sought to cross-examine the witness on information which would raise the issue of the principle of constructive trust arising from the relationship between the Applicant and the Respondent in relation to the disputed property. Dr. Jackson said that he wanted to rely on the period of the relationship when the parties were together and the fact that they built the house. He also wanted to show that their relationship was genuine even though the Respondent was still married to his first wife at the time. He argued that making the application under PROSA did not deprive the Applicant of proving otherwise that a trust existed.

[58] Miss Dunn, counsel for the applicant, strenuously objected on the grounds that the claim was brought under PROSA, and there was no revelation in the Applicant's affidavit or the Fixed Date Claim Form that she was seeking any such alternative remedy. Counsel also pointed out that no such evidence was led in amplification of the Applicant's affidavit. Ms. Dunn further added that the purpose of the pleadings was to reveal to the Respondent the case that he is to answer and this claim of a constructive trust had never been pleaded to.

[59] I, therefore, made the ruling that the case will be proceeding under PROSA, as that was the statute under which the claim was brought and the relief sought. The Court also did not allow Dr. Jackson to put any question to the witness regarding any relationship that the Respondent's first wife had with any other male. Counsel resisted the ruling, but the Court was firm in its decision.

[60] It is the Applicant's submission that the property was the family home and their principal place of residence. Dr Jackson highlighted the uniqueness of the parties' relationship, with one party residing overseas while the other resides in Jamaica. He submitted that cases have considered the iconic characteristics of family in the Jamaican context, in which families, due to economic circumstances, may be compelled to not only live in two different places, but also in two different countries. Counsel relied on a number of cases that spoke to the applicability of PROSA where there is a situation of residence in another country, and the principal place of residence is in Jamaica through visits. He relied on: ***Weir v Tree*** *(supra);* ***Fiona***

Kadesha Alfred v Mario Raphael Alfred *[2022] JMSC Civ 50;* ***Sharon Pinding v Derrick Spence*** *[2020] JMSC Civ 24;* ***Pansy O'Connor Reid v Evan Reid*** *[2014] JMSC Civ. 110;* and ***Andrea Theresa Knight-Daley v Raymond Leanord Daley*** *[2017] JMSC Civ 33,* to mention a few. I find all these cases distinguishable from the case at bar.

[61] I agree with Dr. Jackson that case law has established that a dwelling house may still be the family home in circumstances where one party resides overseas, and the lack of continuous residency of the parties in the house is not detrimental in establishing that the property is the family home. However, the circumstances of this case do not allow for a finding that the disputed property was used habitually or from time to time by the spouses as their only or principal family residence.

[62] In the cases relied on by counsel, I was able to garner the frequency of the parties' travels to the disputed properties in Jamaica, the ties they had to these properties and arrangements made for their overseas travels and residency at the disputed property. In the case at bar, the Applicant said that she travelled on most weekends to Jamaica or simply that she travelled to Jamaica. Given the circumstances, it would have been important for the Applicant to provide more details as to her travels to Jamaica, specifically stating the length of her visits to the property. The Court cannot make these assumptions.

[63] In fact, in ***Weir v Tree*** (supra), the respondent, Tree, who was ordinarily resident in the USA, was married to the appellant, Weir, who was a Jamaican national. The Respondent would visit Jamaica about three times per year for a period of three to four weeks. It was held that the family home was the property that the parties shared together and where they maintained their marriage, even though one of the parties was ordinarily resident overseas. The respondent, in the case at bar, was the one travelling to the USA from time to time more frequently. The Applicant had initially stated in her affidavit that she visited most weekends, but there is no evidence given as to where on the island she stayed. The court cannot make any assumptions. However, in any event, in answers to questions posed to her by the

Court, it was evident that this could not be true as she said that she worked 12 hours per day, seven days per week, and only got vacation once per year.

[64] I also find ***Alfred v Allfred*** (supra), distinguishable from the case at bar. There is no evidence from the Applicant that there was any arrangement between the parties to conduct their lives in such a manner that she would take care of the responsibilities overseas. They had no children, and they had no property together in Jamaica. Unlike the claimant in ***Alfred v Alfred*** (supra), the applicant in the case at bar did not provide any documentary proof to show that she travelled to Jamaica during the years which were in contention. This would have been helpful to her case. In ***Alfred v Alfred*** (supra), the court found that the parties were working as one unit and, as such, would have had a joint purpose. The claimant therein would concentrate her resources to establish life in the USA for the family, while the defendant would be responsible for the assets in Jamaica for the benefit of the entire family. There was no such similar evidence from the Applicant in this case.

[65] I, therefore, do not agree with Dr. Jackson that "**Alfred v Alfred** *(supra) is on all fours with the case at bar*." As a matter of fact, there are very few similarities between the case at Bar and most, if not all the cases that counsel relied on. I find that the cases cited by counsel for the Applicant were more supportive of the Respondent's case. I have not found in the instant case that the parties had so arranged all aspects of their lives around these travels to the USA, and visits by the Applicant to the disputed property for the betterment of their lives, or that they acted as one unit in order to facilitate them using the dwelling house habitually and from to time to time.

[66] I note here that in Dr. Jackson's closing submission, he sought to adduce what I would loosely term "*fresh or new evidence.*" This, of course, is not permissible as the case is closed, and submissions can only be permitted on the evidence that has been adduced during the hearing of the application. There was no such evidence from the Applicant that she "would visit once a year and spend a couple

of weeks". In any event, the Applicant's job and the conditions of her service on the job would not have allowed her any such liberty.

[67] Even though the Applicant said that the marriage had lasted for approximately ten years, and Dr. Jackson indicated that these ten years should be considered as the time of residence, the evidence from the applicant does not support this contention. I cannot agree with Dr Jackson that this contention is supported in the words of Phillips JA in ***Weir v Tree*** (supra), that the applicant "*had so arranged their lives so that the applicant would habitually and from time to time return to Jamaica and spend weeks there. She may have been ordinarily resident in the United States but she maintained her marriage here in Jamaica by regular visits ...*"

[68] Furthermore, from the evidence elicited from Mr. R. McDonald, the portions which I find to be properly admitted, the Respondent spent most of the time flying back and forth in order to maintain his green card. In fact, I would agree with counsel for the Respondent that based on the evidence given by the applicant, the parties tended to be more resident together in the USA than together in Jamaica. The Applicant gave evidence that the respondent spent as much as one year overseas at a time and also visiting with her at the several places where she resided in the USA.

[69] In fact, no cogent evidence was led that the parties lived on the property together as spouses, and had used the property from time to time as their principal abode after the dissolution of the Respondent's first marriage in 1996 or during the presumed ten years' marriage. It is interesting to note that the Applicant would have the court believe that she had such a close relationship with the Respondent and yet she was unable to say exactly where he was living in the USA when she filed two separate suits in relation to him. She acknowledged that the Respondent did live for an extended period of time in New York and that he had also lived with her in Connecticut.

[70] Dr. Jackson also submitted that the Respondent, in requesting the applicant to remove the remaining items she had at said property, and permitting her son to return to the property to retrieve those items, indicated that it was the family home. I disagree with counsel on this point. This, to my mind, is not proof of the fact that the parties had used the property as their only or principal place of residence. The applicant lived at the premises prior to the marriage, so it would not be surprising that items would have been left there. Dr. Jackson, further asserted that the items were the Applicant's personal items. No such evidence was led, neither was there evidence as to how long they were there, bearing in mind that for the purposes of this application, time started to run after the Respondent divorced his first wife on December 4, 1996.

[71] I find that the reference to the presence of these items is insufficient to establish that the property was the principal place of residence for the Applicant. It would be very important for evidence to have been led to establish the nature of these items and the length of time they were on the property. Being guided by ***Peaches Annette Shirley Stewart v Rupert Augustus Stewart*** *(supra),* I find that the Applicant cannot use this piece of evidence to support her position that the disputed property was the principal place of residence.

[72] The parties got married in the USA, the Respondent travelled to the USA frequently. Further, the Applicant sought to obtain medical assistance for the Respondent in the USA and she even commenced an action against him for maintenance in a Florida Court and sought guardianship for him in a New York Court. The parties' livelihood and marriage reflected greatly in the USA as oppose to Jamaica. Her work and his travels illustrated that their lives together after their marriage were overseas.

[73] I agree with submissions made by the Respondent's counsel and I find that the disputed property was not where the parties lived or "*used habitually or from time to time as the only or principal family residence*." The visits by the Applicant were sparse as reflected in the period examined. Their lives as a couple were lived

mostly in the USA, where the Respondent spent most of his time with the Applicant. Even though the ownership test was established, the property has failed to pass the residence test, one of two elements that constitute the family home, therefore, the property does not qualify as the family home.

Issue ii: If the property is the family home, whether the variation of the equal share rule is justifiably applicable?

[74] Given my finding that the property is not the family home, the issue of the equal share rule under ss. 6 and 7 of PROSA would not apply. I now turn my attention to whether the Applicant is entitled to a share of the disputed property under s. 14 of PROSA.

Issue iii: Whether the applicant is entitled to a share of the disputed property under Section 14 of PROSA?

[75] The division of property other than the family home is governed by the provisions of *section 14* of the ***PROSA***. The court is empowered to divide property other than the family home taking into account the factors outlined in *Section 14(2)*. V Harris J in **Nadeen Dixon v Herman Dixon** [2016] JMSC Civ.165, at paragraph 80, indicates that:

> *"The court must also consider "the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property ..." Contribution is defined in section 14(3), and it is not confined to mere money. Section 14(4) expressly states that monetary contribution shall not be viewed as having a greater value than a non-monetary contribution.".*

[76] In *section 14* of PROSA, there is no stipulated equal share presumption of other matrimonial property. In determining a party's interest, the Court is tasked to consider the parties' contribution, monetary or otherwise, to the acquisition of the property (see ***Carol Stewart v Lauriston Stewart*** *[2013] JMCA Civ 47.*) The factors stated in section 14(2) of PROSA are as follows:

"(a) the contribution financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation.

(d) that there is an agreement with respect to the ownership and division of property

(e) such other fact or circumstance which in the opinion of the Court, the justice of the case requires to be taken into account."

[77] Section 14(3) of *PROSA* it states that in subsection (2)(a), "contribution" means:

"(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependent of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof;

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse."

[78] Section 14(4) indicates that:

> *"For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution."*

[79] In determining the parties' contribution to the acquisition, maintenance and improvement of the property in question, the relevant factors to be considered are sections 14(2)(a), (b), (c), 14(3)(a), (b), (d), (f) and section 14(4). I find that assessing the credibility of the parties plays a vital role in coming to a just conclusion on this issue. Where there is a conflict between the evidence of the parties, I believe and prefer the evidence of Mr. R. McDonald, whom I found to be more truthful. I found the Applicant was less forthright, evasive and inconsistent on very material pieces of evidence, which tended to damage her credibility. I also found that there were pieces of her evidence which were incredulous, to say the least.

Contribution prior to dissolution of the Respondent's first marriage

[80] The inconsistency in her evidence began as early as 1982, and even though the period before he divorced his first wife was not relevant, the Court did consider the evidence relating to it on the issue of credibility. The court has the duty of taking into consideration all of the admissible evidence of the witnesses to determine whether or not they were speaking the truth.

[81] The Applicant's evidence was that she was working as a bookbinder in Red Hills, St. Andrew, when she met the Respondent. She saved monies from her salary, although she agreed that it was not substantial. She said it was sufficient for her to "survive on it" with her three children and with the assistance she received from one of her daughters' father. From this money, she was able to also maintain the property, effect repairs, pay utility bills and buy groceries. She said that the Respondent had no steady job at the time, and she took care of his son, Richard McDonald (now deceased). When he travelled to the USA for months at a time, she took care of the house and all the Respondent's affairs and continued to take care of his child. She even alluded at paragraph 15 of her affidavit, that *"He rented*

a place down at Stewart Castle, nearby to Refuge, Trelawny, where there was the half done house which he used my money to buy ….”

[82] I must agree with Counsel for the Respondent’s submission that the Applicant’s job at the Red Hills Printery, was prior to her relocation to Trelawny, and there was no evidence that she travelled to work or was employed after relocating for the four years at the property. I find it difficult to believe that during the four years, she remained at the property, her savings from her job as a bookbinder was sufficient to take care of herself, her children, the Respondent, his son and also maintained the property, effected repairs when needed, bought groceries and paid the utility bills.

[83] There is no evidence of the amount of money the Applicant received for her salary as a bookbinder, but from her responses, the court draws the reasonable inference that it was not a large sum. However, based on the number of things that the Applicant was able to finance with this savings, it seemed to be comparable to the “*Widow of Zarephath’s barrel of meal and the cruze of oil; a very limited source that kept being replenished by Divine Providence*”. I do not believe the Applicant that she was able to finance all these outgoings from her savings. It does defy common sense and reason that any such happenings took place.

[84] The Applicant also said that she sent monies from overseas to the Respondent that assisted him in buying groceries and generally picking up the slack so as to facilitate him acquiring the property (see paragraph 15 of her affidavit filed January 22, 2019). This certainly would be contrary to the evidence from both parties that the Respondent purchased the property in 1982, before the Applicant migrated to the USA. It was also her account that she sent money to the Respondent while in the USA to assist in making additions to the house. Her evidence of her financial assistance for the improvements in the house was contradictory. At one point, it was her evidence that she sent monies to help fix the roof (see paragraph 22 of her affidavit), but then she later stated at paragraph 25 of that affidavit that, “*At one time he wanted me to fix the roof, but I refused because it was too much*”. As

Counsel for the Respondent pointed out, there was no real evidence to support the Applicant's claim that she expended monies on the property. Unlike Mr. R. McDonald who provided several receipts and other documents to show his expenditure on the property, the Applicant failed in this regard. All the applicant had was her bare words to try and urge the Court to agree with her position.

[85] Her non-financial contribution, if any, I believe would have been miniscule. I note that during the time that she said she had contributed to the running of the household, her two children were living there with her, and would be utilizing both water and electricity along with groceries. I agree with the Respondent's counsel's assertion that the Applicant would have benefited from not having to pay for accommodations for herself and her children, so whatever monies, if any, that she had expended at the property, would have enured to her benefit.

[86] I accept Mr. R. McDonald's evidence that the Respondent was a businessman and that he solely acquired the land and constructed a house thereon from his personal funds, together with the proceeds of sale from a house at Turnbridge, Saint Andrew. Interestingly, I did find support for this piece of evidence from the Applicant herself but she later sought to retract it by contradicting herself.

Contribution Post dissolution of marriage

[87] After the dissolution of the Respondent's marriage with his first wife, it was agreed that the Applicant was residing in the USA. In September 2001, the Applicant said she received a sizable tax return, and she gave the Respondent US$2000.00 out of that money towards the house to effect repairs on the house roof and repair the pickup that he used to do his job and for his general upkeep. She also said that on several occasions, she would send monies to repair the pick-up, which allowed it to continue working. Once again, the fixing of the roof was mentioned. The Applicant asserted that between 2006 and 2016, she gave the Respondent assistance in relation to the maintenance of the property and himself. In cross-examination, she denied that the relationship with the Respondent started to break

down in 2002. She remained steadfast that between 2006 and 2016, she gave the Respondent money when he came to the USA.

[88] The Applicant made heavy weather of the fact that the Respondent never worked from the time they met and even more so after they were married because of his illness. The Applicant said that she would give the Respondent money to take care of the maintenance of the house whenever he was returning to Jamaica, and she had to send monies to maintain him and the property.

[89] I am inclined to believe that the Respondent had been carrying out some form of work in order to maintain himself and his household prior to his illness, whether through seasonal employment when he travelled overseas or being a businessman and working here in Jamaica. The Applicant did mention that the Respondent had a pick-up that he used in his work (although I am uncertain as to the type of work she was referring to since she had said that he never worked).

[90] I am inclined to believe Mr. R. McDonald that over the years, he has been solely responsible for the Respondent's care and management of his affairs. I also believe that he was the person who purchased the Respondent's airline tickets for his travels to the USA between 2006-2016. I believe that the Respondent would stay with him for an extended period and then visit the Applicant, and at the end of his visits to the Applicant, the Respondent would return to his (Mr. R. McDonald's) home and then travel back to Jamaica. I also believe that it was Mr. R. McDonald who made contributions to the upkeep, repair and maintenance of the disputed property.

[91] I do not believe that the Applicant made any contributions to the repair and remodelling works, nor did she take care of the general upkeep and maintenance of the property. I further do not believe that the Applicant offered any assistance to the Respondent nor sent monies to him.

[92] In assessing both witnesses' evidence, I find Mr. R. McDonald to be more credible. I am mindful that Mr. R. McDonald would not be privy to much of what transpired

between his father and the Applicant, and so I have paid particular attention to those portions of his evidence that he could speak of from his own personal knowledge. I find that the Applicant was very sparing with the truth. I am in agreement with the Respondent's counsel that after the divorce, both parties seemed to have spent more time together overseas than they did together in Jamaica (which is actually gleaned from the Applicant's evidence). I accept Mr. R. McDonald's evidence that he bore the sole financial responsibility for repairing the property in 2006 and 2007.

[93] Another critical feature of the case is the fact that the Applicant was at pains to emphasise to the court, at every juncture, that the Respondent had never worked. Contrary to counsel Dr. Jackson's submission, I have not ignored the ill-health of the Respondent, as both the Applicant and Mr. R. McDonald have agreed that the Respondent has been sick for years. I note that the Applicant was emphatic that it was through her actions that the Respondent was able to benefit from disability allowance and spousal benefit under social security and also medical insurance. She said that she did these things because she wanted to ensure his good health and also because of her belief that the marriage was still vibrant. However, these pronouncements would be in direct contrast to certain of her actions.

[94] Dr. Jackson sought to downplay the evidence of his client's claim for spousal maintenance against the Respondent because it was withdrawn. I find that it is irrelevant that she later withdrew the claim. I found this piece of evidence quite damaging to her case. The fact is that if he had never worked, the question arises as to his sources of income and his financial capabilities that would enable him to pay spousal support to the Applicant. My conclusion upon the analysis of this very important piece of evidence, in relation to the case of the applicant, is that she was seeking to deceive this court. The Applicant's several material contradictions have seriously compromised the integrity of her case.

[95] I also considered the issue of the Applicant's purchase of a property which was raised by the Respondent. The Applicant admitted in cross-examination that she

owned a house at Lot 1 Mahogany Circle, St. Mary Country Club in Jamaica. She bought it in the year 2000, in her name only. I do agree with Dr. Jackson that there is no evidence that the Respondent was not aware of, nor consented to the Applicant's sole ownership of the St. Mary residence. There is also no evidence that she resided at the St. Mary property. However, the fact of the purchase of the property in 2000 would have been contrary to one of her grounds for the remedy being sought in this claim. In the application, it was stated that "*the applicant does not have any legal or beneficial interest in any other property save and except the subject property*". Of course, I do bear in mind that the application was filed on January 22, 2019, approximately 19 years after she acquired the St. Mary property.

[96] I consider that the marriage lasted from October 9, 1999 to about August 25, 2006, the date of the Notice of Separation in the Jamaica Star newspaper. I do not agree with the Respondent's counsel and her reliance on ***Llewelyn Bailey v Sharon Colquhoun Bailey*** *[2018] JMSC Civ 61* to prove that the marriage was of a short duration.

[97] I place reliance on ***Margaret Gardner v Rivington Gardner*** *[2012] JMSC Civ 54* and find that the marriage, though not of a short duration, was not a lengthy one. I find that the marriage was one where, for the most part, the Respondent lived in Jamaica for short periods and the Applicant lived in the USA and may have visited the island on a few occasions during the period under review.

[98] Further, I did not accept the Applicant's evidence that there was no separation in 2006 and that the relationship continued until 2016. I note that the Applicant did not refer to the duration of the visit and so I agree with counsel for the Respondent that the Applicant did not provide any evidence that there was resumption of cohabitation/reconciliation in excess of three months. I pause here to remind myself that the Applicant did not know who the Respondent was living with when she filed for guardianship neither did she have any knowledge if the Respondent was getting spousal benefits. It is quite clear that there was limited communication

between the parties. I do not find that the parties dedicated years of their lives to the marriage in the way that the applicant asserted.

[99] I also note that section 14(4) of *PROSA* stipulates that there shall be no presumption that monetary contribution is of more excellent value than non-monetary contribution. As far as the acquisition of the land and construction of the house are concerned, the property was acquired 17 years prior to the commencement of their relationship when the Respondent was a single man. On the issue of contribution by the Applicant, I am not convinced, on a balance of probability, that she made any contribution to the improvement or maintenance of the disputed property.

[100] I note that the alleged contributions prior to the dissolution of the Respondent's marriage with his first wife cannot be considered in relation to section 14(2) of *PROSA*. These alleged contributions prior to the dissolution of the Respondent's marriage to his first wife can be considered as an expenditure of either labour or money voluntarily given by the Applicant. Edwards JA in **Claudette *Crooks Collie v Charlton Collie*** *(supra)* at paragraph [197] says:

> *"The expending of money or labour on another's property by a volunteer is a legal concept which was not considered by the learned judge. Generally speaking, the fact that a voluntary contribution to another's property enhances the curb appeal of that property, does not give the volunteer any claim to an interest solely by virtue of his voluntary expenditure or labour."*

[101] The Applicant finds herself in a similar position as the respondent in ***Claudette Crooks Collie v Charlton Collie*** *(supra)*. At the start of the relationship with the Respondent, he was not a single man, and he also owned the property for at least 17 years before he married her. She claimed that she made contributions to the disputed property, but unlike the respondent in ***Claudette Crooks Collie v Charlton Collie*** *(supra),* the Applicant had no proof to substantiate her claim and she was woefully discredited both by herself and Mr. R. McDonald.

Whether there was a common intention of the parties for the applicant to benefit from the property?

[102] I pause here to briefly consider whether there was a common intention between the parties that the property should be the family home. In ***Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam*** *[2018] JMCA Civ 15,* at paragraph [131], Edwards JA (Ag) (as she then was), relying on the Judicial Committee of the Privy Council decision of ***Miller and another v Miller and another*** *[2017] UKPC 21,* pointed out that, in an appropriate case, it was permissible for the court to consider the common intentions of the parties, where such evidence existed without resorting to the rules or presumptions of common law and equity.

[103] In ***Claudette Crooks Collie v Charlton Collie*** *(supra),* the Court of Appeal said at paragraph [104]:

> *"It seems to me, therefore, that a trial judge, in the circumstances of a particular case, in considering whether to vary the equal share rule in an application under section 7, is permitted, where appropriate, to consider the common intentions of the parties as to their beneficial interest, as the starting point. He or she must only do so insofar as it is relevant and necessary to meet the justice of the case, as long as the interests of the parties are not determined by any presumption and/or principle of common law and equity perceived to have arisen from those intentions. The mutual intentions of the parties must be considered in light of all the evidence in the case and is but one factor to be considered alongside all the other factors."*

[104] I agree with Counsel Ms. Dunn that at the start of the relationship between the Applicant and the Respondent, there could not have been a common intention for the property to be the family home of the parties because the Respondent was married to a third party. It could not have been as the Applicant stated their "retirement home". It is also noteworthy that even after his divorce from his first wife, the Respondent had never sought to have the Applicant's name endorsed on the Certificate of Title for the disputed property, nor did the Applicant seek to have her name endorsed thereon. They did not share any common property except a joint bank account as asserted by the applicant and even then there was no documentary proof of such. The Applicant's evidence too, is that when the Respondent asked her to fix the roof, she refused because it was too expensive.

Section 14(2)(a) to (e) of PROSA would be very relevant in all the circumstances. In any claim for any property apart from the matrimonial home, the Applicant is required to prove the level of contribution made to such property.

[105] I also note that the Applicant bought a house in St. Mary, but the Respondent was not made a joint owner. I would therefore agree with the Respondent's counsel that based on the totality of the evidence, the parties conducted their affairs in such a manner to negative a common intention to share their properties with each other. Here again, I must say that I do not agree with Dr. Jackson's interpretation of ***Claudette Crooks Collie v Charlton Collie*** *(supra).* It certainly does not support his case.

[106] In all these circumstances, the Applicant would not have been entitled to a beneficial interest in the property pursuant to section 14 of PROSA.

CONCLUSION

[107] From the above discourse, I find that the property was not the family home. The Applicant made no financial or non-financial contribution to the acquisition, preservation, or improvement of the property. Any contributions before the divorce of the Respondent from his first wife would not be relevant under PROSA. The Applicant has been totally discredited, and the court finds it very difficult to rely on her evidence. There is no common intention of the parties for the applicant to rely upon. Based on all the foregoing, I find that the Applicant does not have any interest in the disputed property, and the Respondent is entitled to the entire 100% of the legal and beneficial interest therein.

THE ORDERS

1. The Applicant is not entitled to any legal or beneficial interest in all that the parcel of land part of Refuge in the parish of Trelawny being the land comprised in Certificate of Title registered at Volume 1505 Folio 621 of the Register Book of Titles endorsed in the name of Carlton Clifford McDonald.

2. Costs to the Respondent to be agreed or taxed.

3. Mr. Robert McDonald who was named as the Next Friend as per the Certificate of Next Friend filed on September 28, 2020, is to be reflected in the Formal Order.

4. The Applicant’s attorney-at-law is to prepare, file and serve the order.