[2019] JMSC Civ 72

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV04484

IN THE MATTER OF all that parcel of land part of the Great Salt Pond called Hellshire now called Hellshire Heights in the parish of Saint Catherine being lot number Ten on the plan of part of the Great Salt Pond called Hellshire Heights aforesaid deposited in the Office of Title on the 22nd day of October 1996 and being the lands comprised in Certificate of Title registered at Volume 1299 Folio 363 in the Register Book of Titles.

AND

IN THE MATTER of the Property (Rights of Spouses) Act

BETWEEN	**HEATHER FERN MCLAREN-JOSEPHS**	**CLAIMANT**
AND	**NIGEL ARCHIBALD JOSEPHS**	**DEFENDANT**

IN CHAMBERS

Arlean D.M. Beckford for the claimant at the hearing and Mr. Patrick Thompson for the claimant at the time of judgment

Saverna C. Chambers for the defendant

February 6 and 7, 2013 and April 9, 2019

The parties' interest in the family home – Principal asset – Statutory rule creates an entitlement to equal interest – Equal share rule is the norm but may be displaced – For the rule to be displaced, it has to be shown to be unreasonable or unjust – What constitutes a section 7 factor – No requirement that inheritance factor occurs before the marriage – Once a section 7 factor exists then court can consider all other circumstances including contribution – Inheritance money used to repay mortgage – Post separation contributions do not affect entitlement at separation – Occupation rent – Payment of interest equivalent to payment of occupational rent- Rental Income- Other property- Different considerations – Motor vehicle – Factors that support and rebut a presumption of Gift

D. FRASER J

BACKGROUND TO THE CLAIM

[1] The claimant Heather Fern McLaren-Josephs and the defendant Nigel Archibald Josephs were married on June 24, 1995. The union produced two children; a boy born on December 10, 1996 and a girl born on July 28, 1998. During the course of the marriage, a property located at 10 Cave Hill Boulevard, Saint Catherine and three motor cars were acquired. Their marriage lasted almost fifteen (15) years, before it was ended by decree absolute on January 10, 2010, the divorce having been applied for by the defendant.

[2] Eight months later, the claimant filed this claim seeking declarations concerning the entitlement of the parties to the property acquired. The time of application was well within the 12 months after the dissolution of marriage allowed for such applications under section 13 (2) of the **Property (Rights of Spouses) Act** (hereinafter referred to as **PROSA**). The defendant challenged the extent of the entitlement claimed by the claimant and himself sought orders in relation to the car in the possession of the claimant.

THE CLAIM

[3] By a Fixed Date Claim Form filed on September 16, 2010, the claimant sought the following orders:

(i) A declaration and order that she is entitled to half share of the family home situated at 10 Cave Hill Boulevard, Hellshire Heights in the parish of Saint Catherine registered at Volume 1299 Folio 363 of the Register Book of Title;

(ii) An order that the defendant render to her and file herein within 45 days of the court's order, an account of all the rental collected in respect of the family home from July 2007 to present;

(iii) A declaration that the claimant is entitled to half share or such other share as the court determines of the said rental collected by the defendant;

(iv) An order that the family home be valued by a Valuator agreed on by the parties or if not by one appointed by the Registrar of the Supreme Court;

(v) An order that the defendant should have the first preference or option to purchase the claimant's interest in the family home provided that the option is exercised within 90 days of the date of the order made herein;

(vi) An order that where the defendant does not wish to exercise the option to purchase the claimant's interest, the family home be sold on the open market and the claimant be paid her share of the proceeds;

(vii) An order that the costs of and incidental to such sale be borne equally by both parties;

(viii) An order that the Registrar of the Supreme Court be empowered to sign on behalf of the claimant and/ or the defendant any document, deed, instrument or other paper writing to give effect to any order made herein; and

(ix) The claimant's Attorneys-at-Law have carriage of sale of the family home where it is being sold on the open market.

[4] Her claim was supported by affidavits filed on September 16 and December 9, 2010 and May 31, 2011. The defendant in response to the claim, filed affidavits on March 11 and July 29, 2011. He also filed a Notice of Application for Court Orders on May 18, 2012, seeking amongst others, the following orders, that:

(i) the claimant is not entitled to fifty percent (50%) interest in the family home;

(ii) in the alternative that whatever interest the court determines, that the valuation of the property be at the date of separation as contemplated by s.12(2) of the **PROSA**; and

(iii) the claimant is not entitled to an interest in the 1995 Nissan Sunny motorcar.

[5] The orders were sought on the grounds, that:

(i) the claimant and the defendant were married on June 24, 1995 and the union produced two (2) children;

(ii) the defendant solely conducted all the transactions relating to the purchase of the house including all the financial obligations and expenses and even though both parties obtained a mortgage, the monthly mortgage payments were made solely by the defendant for the years 1997-2005;

(iii) in 2005, the defendant used money from the sale of a house (which was owned by himself and his mother) and made a lump sum payment to discharge the Scotia Jamaica Building Society (hereinafter referred to as SJBS) mortgage in the sum of $1,431,040.06; and

(iv) the defendant purchased a 1995 Nissan Sunny motorcar using his sole resources but in June 2010, the claimant re-possessed this vehicle as it was registered in her name and has had the sole use and benefit of same.

ISSUES

[6] The following issues arise for determination:

(i) What interests are the parties entitled to in the family home?

(ii) Whether in the circumstances of this case, an application of the equal share rule would be unreasonable or unjust, so as to warrant a variation of the general rule?

(iii) Whether the claimant is entitled to an account of the rental income collected by the defendant?/Should the claimant be required to compensate the defendant for the post separation repairs done to the family home

(iv) Whether the claimant is entitled to occupation rent from the defendant?

(v) What interest, if any, is each party entitled to in the 1995 Nissan Sunny motorcar?

ISSUES 1 & 2: What interests are the parties entitled to in the family home? / Whether in the circumstances of this case, an application of the equal share rule would be unreasonable or unjust, so as to warrant a variation of the general rule?

[7] Given the fact that issues one and two overlap, it will be convenient to address them together. Though counsel for the defendant nominally indicated that one issue was whether the Cave Hill property is the family home, in the submissions of both counsel it was accepted, and the court agrees, that in keeping with s. 2(1) of the **PROSA** there is no doubt that the property falls squarely within that description and definition.

Submissions

[8] Counsel for the claimant submitted that:

i) The claim is governed by the **PROSA**, specifically ss. 2. 6, 7 and 14. The equal share rule ought not to be disturbed given the conduct of the parties throughout their relationship. The acquisition of the family home was part of the exercise of the defendant's responsibility to take care of his family, as he contended. The defendant's superior financial contribution to the acquisition of the property should not be the only consideration when determining whether the equal share rule ought to be disturbed;

ii) The claimant's contribution through being largely responsible for child care during and after the marriage is equally as important. The parties' standard of living was significantly eroded after the defendant gave up paid employment to pursue training, that the claimant has not benefitted from, given the breakdown in the marriage, even though she had contributed significantly towards the defendant's attempts at improving his earning capacity;

iii) The defendant has failed in all the circumstances to prove that the legal interests of the parties ought to be disturbed; (See: ***Stack v Dowden*** [2007] 2 ALL ER 929). It is insufficient in all the circumstances that the defendant after some time paid the mortgage loans. The court in considering whether to vary the equal share rule, may have regard to the fact that any rent collected by the defendant and not accounted for by him, could properly be considered as the claimant's contribution towards the servicing of the mortgage obligations;

iv) The parties had discussed acquiring the family home and executed the documents necessary to complete its acquisition. There is no evidence of a prior agreement or of the creation of a trust in favour of the child or children of the marriage or any record of a trust on the Registered Title. The claimant

was just being made aware of this alleged trust. Additionally, the defendant's admission that he thought it imperative that the claimant contribute towards the acquisition of the family home is significant;

v) The court should find the allegation that the defendant said the acquisition of the family home was for the sake of the children (they had only a son at the time) was a recent concoction seeking to sway the court to find the defendant had a 90% share of the property. The court should instead find that the facts of the case are such that it would be unreasonable and indeed unjust to award the defendant a 90% interest;

vi) The parties discussed the work necessary to improve the property. The defendant's evidence that the claimant adamantly refused to leave her mother's home until the work was complete negates the defendant's allegations that he was solely responsible for decision making in the family both before and after he entered training. It should also be noted that there are no receipts or estimates substantiating the defendant's claim that he spent $300,000.00 on the work preparatory to moving in;

vii) At the time of the acquisition of the property the defendant's income was approximately $60,000.00, which included overtime to which he was not always entitled. In 2006, the defendant's income had been reduced to approximately $22,000.00 monthly which would have significantly impacted his ability to maintain the family's accustomed standard of living;

viii) The defendant admitted that in 2007 after the family moved out of the family home, the claimant did some work to it and this ought to be taken into account. According to the defendant, the claimant earned under $10,000.00 monthly and so it stands to reason therefore that the defendant's financial strength at the time (his JMMB accounts) would have afforded him the ability to make a greater contribution to the repairs;

ix) The defendant's concession that the claimant contributed to the household expenses (primarily in relation to the children and purchasing groceries); made mortgage and car payments; was instrumental in saving the family fifty percent (50%) of all insurance payments for the period up to 2007; had to deal with the children's episodes of asthma attacks; lived with her mother (where one may argue that she would have received some concession which would have inured to the benefit of the defendant) in order to reduce the burden of child care and offered some amount of support to the defendant during the period of his training, are factors which are crucial in aiding the court to make a determination in the claimant's favour;

x) The couple did not have a full time helper and the work had to be done. The court is therefore asked to accept that the claimant made a greater contribution to the running of the household than the defendant would have the court believe. In fact, the claimant took part-time employment, sold the family's furniture and the car, which was licensed and registered in her name, and operated a taxi service in order to ensure the wellbeing of the parties' children. The defendant did admit that although the claimant requested $65,000.00 as maintenance, during the period she lived with her mother, he could only afford $10,000.00;

xi) The defendant denied that the claimant ever executed the mortgage instruments in relation to the loan from the SJBS. However, the court is asked to take judicial notice of the fact that once there is jointly owned property, any dealings with said property must be attended to by all parties;

xii) The claimant ought not to be asked to account to the defendant for the payments in respect of the SJBS mortgage as they were made based on an agreement between the parties years prior to the breakdown of the marriage;

xiii) Given the claimant's evidence concerning the reason for not servicing the mortgage, she ought not to be punished for seeking only to take care of the

needs of the couple's children in circumstances where the defendant could have, and refused to do so, especially since 2011 when he said he was a qualified Marine Pilot. Further there was no evidence adduced regarding the sums paid by the defendant in respect of the NHT mortgage, save that by agreement between the parties the defendant started out making that payment, then the claimant at some point assumed making those payments until 2010 and thereafter the defendant continued to make those payments; and

xiv) In keeping with the overriding consideration running through the cases concerning matrimonial property disputes, that the outcome must be fair, the court should rule in favour of the claimant, who is only asking for that which is legally and equitably hers, that is, 50% of the interest in the family home and an accounting for the rental of the property for the period following separation.

[9] Counsel for the defendant submitted that:

i) The applicable law is the **PROSA**. In keeping with sections, 2, 6 and 7, the Cave Hill property is to be regarded as the family home. This application was made within twelve (12) months of the Grant of the Decree Absolute thus invoking section 13. Section 14(1) provides that the court may make an order for the division of the family home in accordance with ss. 6 or 7 as the case may require. S.14 generally speaks to factors that a court in exercising its discretion should take into account when dealing with other property and not the family home;

ii) Accordingly, the claimant's counsel's lines of cross-examination relating to the intention of the parties at the time of acquisition; their discussions and agreements; their standard of living prior to and after 2003; the claimant's assistance of the defendant during his training; and the claimant's management of the household and other questions in that vein, are to be

rejected as they bear no significance in the context of the family home. This is so as under s. 14 (3)(b)(c)(d) and (e) those matters relate to contribution to, acquisition, conservation and improvement of other property not the family home;

iii) Though irrelevant, that line of questions and answers were not prejudicial to the defendant. In any event, the claimant failed to show that she bore the lion's share of expenses during those years;

iv) The defendant relied on s. 7 in contending that it would be unreasonable and unjust for the parties to be entitled to one-half share each and seeks a variation. It is accepted that the three (3) factors listed in s. 7 are not exhaustive;

v) Whilst it is accepted that under ss. 6 and 7 of **PROSA** the question of contribution is not the primary consideration when determining interest in the family home, as opposed to other property, it can nevertheless bear some significance in light of the totality of the evidence including the respective financial position of each party. The evidence is quite clear that the defendant's monetary contribution to the acquisition, conservation and improvement far surpasses the miniscule contribution made by the claimant and it was both parties who managed the house and cared for the children;

vi) The court is asked to reject the claimant's evidence that the parties simultaneously saw the advertisement with the family home for sale. Her evidence that she could not help but agree to its acquisition of the family home is critical, as it proves that the defendant was not interested in removing from her mother's house, was not interested in purchasing the family home and was not interested in moving there;

vii) The claimant averred that she had agreements with the defendant that he would pay the monthly mortgage and the cost of the improvements and she would pay the children's expenses. Whilst the claimant was gainfully

employed, it should not be believed that she was paying for utilities, providing the children's lunch money and more. The evidence is clear that the defendant not only provided the money for acquisition of the house but also paid the mortgage and household expenses. Further, the evidence also demonstrates that the parties did not combine incomes to pay bills, they did not save together and there clearly was no co-mingling of their affairs;

viii) The defendant purchased furniture and furnishings for the family home. The claimant eventually gained monetary benefits from the furniture to the exclusion of the defendant. The claimant not having produced any receipt, the court cannot definitely ascertain her benefit. In the circumstances the court should revert to the defendant's evidence, make a determination as to their cost and award the defendant his due half share;

ix) Although a minor can be registered on a Certificate of Title, if the Registrar of Titles is satisfied that the requisite conditions have been fulfilled, the mortgagee's mortgage policy does not allow such a registration to take place. Therefore since the purchase of the family home included mortgage financing, no interest to the parties' son could have been registered on the Duplicate Certificate of Title;

x) The evidence is that the defendant's mother devised her interest in the Marlie Mount House to the defendant. The property was sold for $3,000,000.00 and the sum of $1,431,040.06 was used to settle the mortgage held with SJBS. A number of critical elements emerge from this evidence:

    a. the defendant and his mother were registered as tenants-in-common in equal shares and not joint tenants;

    b. the Testatrix in her will conveyed her clear intentions as to her beneficiaries and their benefits;

c. the claimant and defendant were married for more than six (6) years before the death of the Testatrix and the Testatrix could have revoked her will if she so desired;

d. this devise by its nature was designed to benefit only the defendant;

e. where parties are registered as tenants-in-common the estate must be settled and the requisite death duties paid to the Commissioner of Taxes before a transfer can be completed;

f. this sale transaction would attract the usual conveyancing costs and fees which when deducted from the sale price reveals that the portion of the sale proceeds used to settle the SJBS mortgage represents more than half of the balance;

g. there is no evidence that this 'inheritance money' became co-mingled with the claimant's money or that there was any agreement for the defendant to share this 'inheritance money' with the claimant;

xi) This 'inheritance money' from the claimant's mother used to close the SJBS mortgage should be considered a special factor relevant to be included in the list outlined in s. 7 of the **PROSA**. This sum represents a contribution made by the defendant unmatched by an equivalent contribution by the claimant who had an opportunity to do so but did not. The court is invited to adopt the principles from the **Family Law (Scotland) Act**, 1985 and the **(New Zealand) Matrimonial Property Act** 1976, on which the **PROSA** was based, and to consider the view taken by Lord Nicholls of Birkenhead in the case of ***White v White*****,** [2001] 1 AC, HL(E), page 610 Letter E-F;

xii) The evidence taken as a whole and particularly the evidence of the claimant points to the defendant receiving more than a half interest. Whatever interest

is found reasonable by the court, the claimant would be due a sum from the rental collected, less amounts credited to the cost of maintenance, proportionate to her entitlement; and

xiii) The cases of ***Donna Marie Graham v. Hugh Anthony Graham*** Jud. del. April 08, 2008, ***Carol Stewart v. Lauriston Stewart*** Jud. del. January 10, 2011, **White v White** and ***R v. R*** [2000] Fam. L.R. 43 are relied on in support of the defendant's submissions.

The Law

[10] The natural starting point is an examination of sections 6 and 7 of the **PROSA**. Section 6(1) of the **PROSA**, establishes the equal share rule. It provides:

> Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home-
>
> a. on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
>
> b. on the grant of a decree of nullity of marriage;
>
> c. where a husband and wife have separated and there is no likelihood of reconciliation.

[11] S. 7 gives the court power of the court to vary the equal share rule in appropriate circumstances. It states:

> 1. Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following:-
>
> a. that the family home was inherited by one spouse;
>
> b. that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
>
> c. that the marriage is of short duration.

2. In subsection (1) “interested party” means:-

    a. a spouse;

    b. a relevant child; or

    c. any other person within whom the court is satisfied has sufficient interest in the matter.

[12] In seeking to resist the defendant’s efforts to have the court vary the equal share rule, counsel for the claimant relied on the case of ***Stack v Dowden*** [2007] 2 All ER 929. In summary, this case held that, 1) the starting point for determining beneficial interests where the legal title is held jointly is that the beneficial interest will also be held jointly; and 2) this presumption may be displaced where there is evidence that was not the parties’ intention. While that is accepted as a correct statement of basic equitable principles in relation to the joint ownership of property, the **PROSA** governs this application and has created special rules in relation to the family home. ***Stack v Dowden*** therefore has to be read subject to our indigenous jurisprudence that has interpreted the relevant sections of **PROSA.**

[13] ***Annette Brown v Orphiel Brown*** [2010] JMCA Civ 12 was the first case in which the Court of Appeal comprehensively examined the impact of the new dispensation introduced by the **PROSA**. That decision made it clear that the **PROSA** introduced a new regime for determining the effect of transactions between spouses relating to property, that replaced the rules and the presumptions of common law and equity that had previously governed such transactions. As part of a detailed review of the development process of and background to the **PROSA** Morrison JA, as he then was, highlighted the special treatment in the legislation of the family home. At paragraph 27 he noted:

> [B]ecause it was thought that the matrimonial home called for special consideration, as it was in most cases the principal asset of the parties, as well as the family home, the committee recommended that the legislation should provide for equal ownership of the matrimonial home between the spouses, subject to provisions to be made for exceptional cases.

[14] He continued at paragraph 34 by indicating that the **PROSA:**

> Introduces for the first time the concept of the family home, in respect of which the general rule is that, upon the breakup of marriage, each spouse is entitled to an equal share.

[15] At paragraph 80, he further made the point that s. 14, which he identified as another far-reaching provision of the **PROSA**, empowered the court to make an order for division of the family home in accordance with ss. 6 & 7 and also to divide other matrimonial property in accordance with the factors specified in s.14(2).

[16] In ***Carol Stewart v Lauriston Stewart*** [2013] JMCA Civ 47, decided on appeal after the closing submissions made by counsel for the defendant, Brooks JA at para. 15 also acknowledged that the **PROSA** created a statutory rule of equal entitlement to the beneficial interest in the family home. He stated that, *"Unlike its treatment of other matrimonial property, the Act creates a statutory rule of equal entitlement to the beneficial interest in the family home."*

[17] At para. 19, Brooks JA also cited with approval the opinion of McDonald-Bishop J (Ag.) (as she then was) in ***Donna Marie Graham v Hugh Anthony Graham***, claim no. 2006HCV03158 (delivered April 8, 2008) at paras 15 – 16, where in assessing the statutory basis of the equal share rule she stated:

> 15. By virtue of the statutory rule, the claimant would, without more, be entitled to her 50% share in the family home as claimed and this is regardless of the fact that the defendant is the sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals. (See **R v R** [1992] 1 AC 599, 617, per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets, unless there is good reason to the contrary, fairness requires no less: per Lord Nicholls of Birkenhead in **Miller v Miller**; **McFarlane v McFarlane**, [2006] 2 AC 618,633
>
> 16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation. It is this notion of fairness that underpins the provisions of sections 6 and 7 of the Act that are under scrutiny in the instant proceedings…

[18] Brooks JA then addressed the interplay between sections 6 and 7. At paragraph 25 he noted that, *"Section 6 of the Act creates the rule that each spouse is entitled to one-half of the beneficial interest in the family home, despite the manner in which the legal interest is held."* Then after setting out section 6(1) and noting that neither section 6 (2) nor section 10 were relevant to his analysis, he continued by stating that, *"It is important to note, however, that the rule of equality created by section 6(1) may be displaced."*

[19] In assessing section 7, at paragraph 27, Brooks JA noted that i) the party who seeks to displace the equal share rule must apply to the court for its displacement; ii) other factors apart from those listed in section 7 (1) may be considered; and iii) for the rule to be displaced, it had to be shown to be unreasonable or unjust, as equality is the norm.

[20] Concerning the nature of the evidence that would be required to displace the statutory rule at para. 31 he indicated that:

> [I]f the door is opened, by the existence of a section 7 factor, for the consideration of displacement of the statutory rule, then very cogent evidence would be required to satisfy the court that the rule should be displaced.

[21] Brooks JA then observed that time and experience would determine what other factors apart from the three listed in section 7, would be held to qualify as section 7 factors. He then went on to do a comparative analysis between sections 7 and 14 of the **PROSA,** as well as contrasting section 7 with section 25 (1) of the **English Matrimonial Causes Act** of 1973. He concluded that a section 7 factor had to be shown to exist, before the court could go on to consider all the other circumstances of the case, such as contribution, to determine if a variation of the equal share rule was warranted, to prevent injustice to the party applying for the variation.

[22] In concluding his analysis of section 7 Brooks JA stated at paragraphs 76 – 78 as follows:

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

[23] Counsel for the defendant placed significant reliance on the case of ***Graham v Graham*** in which McDonald-Bishop J, as she then was, considered the cases of ***White v White*** and ***R v R***, also cited on behalf of the defendant.

The Date of Separation

[24] In ***Carol Stewart v Lauriston Stewart*** Brooks JA noted at para. 78 that:

> [78] The court should also bear in mind that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. Post-separation contributions cannot disturb the entitlement at separation.

[25] That analysis is in keeping with S. 12 of the **PROSA** which provides that:

> (1) Subject to sections 10 and 17 (2), the value of property to which an application under this Act relates shall be its value at the date the Order is made, unless the Court otherwise decides.
>
> (2) 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.
>
> (3) In determining the value of property the spouses shall agree as to the valuator who shall value the property, or if there is no agreement, the Court

> shall appoint a valuator who shall determine the value of the property for the purposes of this subsection.

[26] Therefore, unless there is a contrary agreement between the parties, post-separation contributions will not affect their entitlement as at separation. The claimant indicated that the parties separated in September 2006. She stated that the defendant's assertion that he moved out in September, they having separated in August, as well as some of the circumstances he said led to his departure, were false. However, other than stating that they separated in September 2006, she did not explain what aspects of his evidence were false and misleading. In any event, she later indicated that it was after separation both parties moved out of the family home, with her departure coming a week after the defendant and was fully completed in December.

[27] The law is clear that parties can be separated although they reside under one roof. However, in this case the defendant indicated that while he was not prevented from taking any furniture, he left them there because things were undecided. This suggests that the earliest time at which the parties could be considered to have separated is September 2006, the time of his physical departure and the date put forward by the claimant. The timing makes sense as the defendant's departure would put it beyond doubt that, as at that point if not before, the parties were separated in fact thus satisfying the necessary triggering mechanism in law. Accordingly, in keeping with section 12(2) of the **PROSA**, only contributions made by the parties up to September 2006 will be relevant in determining their respective interests in the family home.

Is there a section 7 PROSA factor in this case?

[28] The overview of the law revealed that the default position under section 6 of the **PROSA** is that parties after separation are entitled to equal shares in the family home. It is only if the court identifies a section 7 "**PROSA** factor" that a consideration of whether the equal share rule should be displaced is triggered. That consideration would encompass the relevant circumstances involved in the

parties' marriage or cohabitation which touch and concern the impact of the section 7 factor.

[29] The three listed reasons under section 7 of the **PROSA** by virtue of which an unreasonable or unjust outcome that would result from the application of the equal share rule under section 6 may be avoided are: i) inheritance of the family home by one spouse, ii) prior ownership of the family home by one spouse at the time of marriage or the beginning of co-habitation and iii) that the marriage was of short duration. Section 7 of the **PROSA** by the way it is worded, makes it clear that the three examples of factors provided that would warrant the variation of the equal share rule are not exhaustive.

[30] Brooks JA in ***Carol Stewart v Lauriston Stewart*** observed at para. 33 that the first two factors listed under section 7 contain a common element that there was no initial contribution by one of the spouses to the acquisition of the family home. That is not the situation in the instant case. Neither does the third listed factor apply, as the marriage could not be described as being of short duration as it lasted for 15 years.

[31] One of the first cases to address whether a section 7 factor that did not fall neatly within the three express examples provided in the section was present, is that of ***Graham v Graham,*** relied on by the defendant and reviewed by Brooks JA in ***Carol Stewart v Lauriston Stewart.*** In ***Graham v Graham*** the parties married in 1993, separated in 2003 and divorced in 2006. The defendant had a child from a previous relationship and they had two children together. While living with the defendant's mother in rented premises, by pooling their resources they acquired a property at Murray Drive in their joint names. The Murray Drive property was subsequently rented to help pay the rent where they lived and make the mortgage payments. The parties never lived together at Murray Drive, but after separation, the claimant moved into that home.

[32] Some months after the acquisition of Murray Drive the defendant without any contribution from the claimant purchased property at Durie Drive. He indicated the purchase of this property was to accommodate his mother and child from his previous union. However, the parties eventually moved, with the defendant's mother, into Durie Drive as their principal place of residence. This property was extensively renovated which was funded by the defendant and his uncle, a contractor. The claimant admitted she made no financial contribution to the renovation but indicated she met with the architect and dealt with some matters relating to construction.

[33] The defendant argued that the equal share rule for the family home at Durie Drive should be varied. McDonald-Bishop J, as she then was, considered the following factors in deciding to vary the equal share rule: She considered the following factors in varying the rule:

(i) Durie Drive was solely owned by the defendant with no contribution from the claimant;

(ii) The defendant was the main breadwinner and dominant partner financially but that monetary contribution cannot be presumed to be of higher value than non-monetary contribution and so unequal monetary contribution cannot be a basis for departure from the rule;

(iii) The family was not a nuclear one but an extended family unit with presence of the defendant's son and mother;

(iv) It was after Murray Drive was acquired jointly, that the defendant moved to acquire Durie Drive solely intending for his mother and son to live there;

(v) Rooms were also added to the house to accommodate his mother and son. The evidence was that the defendant sought to make provisions for persons who were his dependants and accepted as such by the claimant;

(vi) The defendant enlisted the assistance of his uncle, a third party, whom he paid for his services. The claimant was unaware of this and admitted that the defendant did not discuss his financial affairs with her. The claimant did not challenge the evidence that the uncle bore the lion's share of the expenses for the benefit of the mother and she did not know of the arrangements between the defendant and his uncle regarding the renovations; and

(vii) The claimant was not a housewife who spent all her time managing the home and there was nothing in her role that would place it above norm for it to be viewed as striking over and above the role of the defendant.

[34] The court in ***Graham v Graham*** was therefore of the view that the extended family factor and the uncle's contribution were of marked relevance in determining what was reasonable and just. The uncle's contribution was viewed as a gift to the defendant only which added to the value of the property. In such circumstances, it was inequitable to ignore the extra contribution that the defendant made for the benefit of the third parties and the contribution of the third party on his behalf to the family home. Fairness demanded that this added value should be credited to the defendant. Accordingly, the court varied the equal share rule and awarded 60% to the defendant and 40% to the claimant.

[35] It is a given that each case will turn on its own facts. It is also important to recall that ***Graham v Graham*** was decided prior to ***Carol Stewart v Lauriston Stewart*** which emphasised that financial contribution by itself is not a gateway to section 7. However, the decision in ***Graham v Graham*** was not doubted in ***Carol Stewart v Lauriston Stewart*** and, as just outlined in the analysis, there were a number of interlinked factors in ***Graham v Graham*** beyond simple financial contribution that opened the door to section 7.

[36] Turning to the instant case, it is clear that like ***Graham v Graham,*** it does not neatly or automatically fall within the three express examples under section 7 of

the **PROSA**. In the view of the court, the only factor capable of falling under section 7 of the **PROSA,** is the fact that the defendant applied funds from the sale of the Marlie Mount Property to close out one of two mortgages on the family home. The significance of the source of funds used to satisfy the mortgage is due to the fact that he partly owned the Marlie Mount property with his mother before his marriage to the claimant.

[37] The evidence in relation to the Marlie Mount property reveals that the claimant indicated she knew that the defendant and his mother owned the house at Marlie Mount and that he contributed to the monthly mortgage payments. She used to visit him there before they got married. She also testified that she knew the defendant's name was on the title but did not know to what extent and had never seen a copy of the title.

[38] The defendant maintained that his mother devised to him her interest in the Marlie Mount property which caused the entire interest to devolve into his sole ownership on her death. He indicated he sold the property and lodged the proceeds of sale to his JMMB account. In 2005, he withdrew the sum of $1,431,040.06 from that account and paid it to Scotia Jamaica Building Society (SJBS) thereby settling in full the mortgage debt which he had incurred on their acquisition of the family home in 1997. That left only the National Housing Trust (NHT) mortgage taken out by the claimant, the payment for which was approximately $6,000.00 per month. He exhibited a cheque from JMMB dated August 2, 2005, reflecting the sum of $1,431,040.06. The claimant accepted that this accurately represented what happened.

[39] This state of affairs requires careful analysis. It could be argued that the defendant's repayment of the mortgage using funds from a source that pre-existed the marriage, was analogous to the section 7 factors of one spouse having either inherited the home or owned the home before marriage. In a sense, both apply, as after the devise of his mother's interest to him, his interest was made up of that which had initially belonged to him before the marriage and that which he received

by inheritance after his mother's death. It should also be noted, that in respect of the factor relating to inheritance there is no requirement that the inheritance occur before the marriage. Therefore, though Marlie Mount did not become the family home and neither did the funds from the sale of the Marlie Mount property feature in the initial acquisition of the family home, the court has to consider whether the spirit of the section embraces a circumstance like this qualifying as a section 7 factor.

[40] On the face of it, I think it does. The gate to section 7 has been opened. It will now be important for all the other evidence to be considered by the court to determine whether, in all the relevant circumstances, the equal share rule should be displaced.

The Other Evidence of the Parties

Acquisition of the Family Home, Mortgage and Insurance Payments

[41] The claimant stated that after their marriage in 1995, the parties lived rent free at her mother's property, and because of this they were able to save towards buying their own place. She denied that the defendant had savings from the beginning of the marriage and insisted that it was during the marriage he accumulated savings from his salary. She also initially stated that the monies used to finance the acquisition of the family home came from their joint resources and that at the time of acquisition of the family home, she earned in excess of $30,000.00 per month after taxes. However, she conceded on cross-examination, that all the monies lodged to her joint account with the defendant were lodged by him, and that it was the defendant who paid the deposit ($500,000.00) and closing costs ($360,755.00) for the property. She indicated that she also held a joint account with her aunt at Scotiabank into which her salary was lodged.

[42] It is agreed between the parties, that the purchase of the family home in the sum of $2,500,000.00 was financed by a combined mortgage from Scotia Jamaica Building Society (SJBS) in the sum of $1,472,000.00 taken out by the defendant

and the National Housing Trust (NHT) in the sum of $528,000 taken out by the claimant. The parties further agreed that, save and except where the claimant signed documents, it was the defendant who conducted all the transactions with the vendor, the Urban Development Corporation (UDC).

[43] The defendant asserted that he took the decision to solely make the combined monthly mortgage payments of $29,044.47. The claimant acknowledged that the defendant solely paid the mortgage from 1997 to August 2005. She however said that this was based on an agreement between the parties whereby she took care of the expenses relating to the children whilst the defendant covered the mortgage payments. She denied the suggestion that there was no such agreement and additionally asserted that there was an agreement between them that he would pay the mortgage and she would pay the car loan. The claimant also testified that between September 2005 and September 2006 she made mortgage payments to NHT of $66,000.00. She stated she continued to pay the mortgage loan to the NHT until March 2010, when her resources ran out.

[44] The defendant for his part said there was no such agreement or understanding whereby expenses were shared between the mortgage payments and expenses for the children. He also denied that the claimant was solely responsible for the children's expenses. He maintained that in about mid-2005 the claimant had full time employment while he was on training and only receiving a stipend from the Port Authority. Then the monthly loan payment for the NHT mortgage was $6,000.00 and the defendant insisted it was only at this time that the claimant started to make NHT payments and to contribute to household expenses.

[45] As indicated earlier it is common ground that the defendant paid off his SJBS mortgage by a lump sum of $1,431,040.06 in August 2005. The claimant stated that on receiving her redundancy payment of $1,221,000.00 in March 2007, she considered repaying the NHT, but had not done so.

[46] The defendant stated that he alone paid the annual house insurance premium of approximately $105,000.00 between 1997 to 2009, though he conceded on cross-examination that starting in 1997 he benefitted from the 50% staff discount of the claimant who was employed to United General Insurance (UGI) until she lost her job in 2007. The claimant denied that the defendant alone paid the house insurance instead asserting that it was the shared responsibility of both parties.

Improvements to the family home

[47] It was accepted by both parties that after moving into the family home, the parties agreed on improvements to the house involving grill work, perimeter fencing and the gate. It was also accepted that based on agreement between the parties due to the fact that the defendant was the breadwinner he would finance these improvements. The defendant's recollection of their cost was $300,000.00.

Household contribution and expenses

[48] The claimant maintained that by mutual agreement and understanding whilst throughout the marriage the defendant as head of the household spent money on home improvements, covered most of the household expenses, paid for educational and school related expenses and paid for family vacations overseas, she contributed equally to the expenses of the children.

[49] She however also stated that on most occasions between June 1995 and September 2006, she paid the utilities and gave details on other expenses she paid for up until the parties separated in September 2006. These included medical insurance for the family, the 50% staff discount on house and car insurance they benefitted from as she worked at UGI, her contribution to weekends when as a family they went on company trips, and lunch money and general care of the children and herself. She indicated she sometimes also paid the helper who came on a Friday and purchased things the house might run out as well as sheet sets and curtains. The claimant also agreed that in addition to the helper whom she said she sometimes paid, they had two baby sitters during the marriage. She

however did not indicate who was responsible for the remuneration of the baby sitters. She stated the money to pay the monthly expenses to which she contributed came from her family and part of her salary, which included overtime pay.

[50] The defendant agreed that as a rule he took care of the household expenses including the groceries and utilities. He also maintained that he was the one who paid all expenses for the children and the day's worker during the course of the marriage until about mid-2005. He however also agreed, that the claimant managed the children and that there were instances where the claimant would pay for something usually for the children or buy some groceries. He however denied that she paid the utilities or paid for their reconnection.

[51] Both parties agreed that the claimant worked as an Underwriting Clerk. There was initial disagreement as to the amount of her salary. However, three of the claimant's payslips from UGI were exhibited by the defendant two of which indicated that for the months of July and September, 1996, her net pay was $9,517.76. The claimant further stated that she was able to meet some but not all of her daily expenses from the small salary she earned from these two jobs (in September 2007 to April 2008 at Maritime Insurance Brokers and in April, 2008-March 2010 with Maxine Johnson, ICWI Insurance representative) post-redundancy and the money given to her by the defendant for maintenance of the children. The defendant agreed that her position was made redundant in 2007.

[52] Both parties also agreed that during the marriage, the defendant's salary far exceeded the claimant's. He gave evidence that in 1995, he was employed to Maritime Towing Company Ltd. as a Tug Captain earning a basic salary of $706,220.00. This was supported by a letter from Maritime Towing Company Ltd. dated October 9, 1996 which outlined his emoluments. He agreed that in 1996 he earned over $2.859 million based on what the company provided but indicated that his overtime changed from month to month and he did not remember how much of that went into savings. He said he took home over $100,000 per month before

he went on training, but could not recall if his gross was over $200,000 before training. He stated that his earnings in 1996 could have covered the purchase of the family home but he had to save it first as there were other expenses. He further indicated that based on his income then, if he had wanted to, he could have purchased the property on his own. However, he thought it fit that the claimant make a contribution for the sake of the children. He nevertheless admitted that the parties only had a son at the time.

[53] It was common ground that in or about September 2003, the defendant commenced training as a Marine Pilot. The defendant stated that the programme took over 7 years to be completed and he received a monthly stipend of $22,000.00. He did not receive his full payment of at least $2.8 million and at the time he moved out of the family home, he was still getting $22,000.00 monthly. He acknowledged that this change in income affected his family's standard of living but he responded by transferring the children from preparatory to a primary school that was within walking distance from their grandmother's home. He also admitted that there were times he had to cut back on his training periods as he has had different training periods, not just the last one.

[54] The defendant did not share the view that after he went on the training programme the claimant's standard of living was significantly reduced, though they made adjustments as a family. For example he said he would still go to the supermarket as before. He testified that the claimant may have offered him support during his time of training by encouraging him to get through. He also paid off the SJBS mortgage and *'pinched'* the balance of money he had from the sale of his mother's house.

Acquisition of Furniture

[55] The defendant stated that before moving into the family home and during the course of the marriage, he went to Courts Jamaica Ltd, Osbourne Furniture and Appliance Traders Limited and purchased several items of furniture and

appliances. Based on his estimate of the cost of the items he mentioned and the invoices he supplied they total just over $360,000.00.

[56] He complained that the claimant had taken all the furniture and appliances from the house and was still using some of the items whilst she has sold others. He placed a value on the items of approximately $541,000.00, which he said took into account their depreciation over time from use. He admitted that the items he bought were for the benefit of the family and that as a man he felt it was his responsibility to take care of the family. He however stated that the claimant did not put in a fair share even though he recognised, a fair share was not only money. He indicated he thought the claimant acted unreasonably in selling the furniture without asking him first as she had not bought any of them.

[57] The claimant denied that the items are valued at the sum indicated as they had suffered much wear and tear with young children in the home so the income from them was minimal. Further, she asserted that the defendant was not solely responsible for furnishing the matrimonial home as she had taken sheet sets, towel, rags, cutlery, utensils and a toaster to the house when they got married.

Final Analysis

[58] The parties lived together as man and wife for a little over eleven years prior to their separation. Despite the relatively minor conflicts in the evidence between them concerning who was responsible for which household expenditure, it is established beyond doubt in the court's mind that the defendant overwhelmingly bore the brunt of the financial responsibilities in the marriage. Between the deposit and the SJBS mortgage which was over two and three quarter times the amount of the NHT mortgage, the defendant was responsible for over 78% of cost of the acquisition of the property. Then, for significant periods in the marriage, he paid the combined mortgage as well as the insurance payments, benefitting in relation to the latter from the 50% staff discount obtained by the claimant as she worked at UGI. He also bore the lion share of the responsibility for improvements to the family

home, household, medical and educational expenses and the acquisition of furniture.

[59] Undoubtedly, the claimant played her part in the marriage. She did contribute financially especially when the defendant's studies caused his income to be reduced to a stipend, and through the benefit of her staff discount. As her salary allowed she also contributed to household expenses. Though the defendant was unwilling to accept the claimant's assertion that she was mostly responsible for the care of the children, I accept her evidence in that regard, especially since his job and training were undoubtedly demanding.

[60] The importance of acknowledging that during the marriage the defendant largely bore a much higher financial burden is seen when that fact is considered together with the circumstances of the lump sum repayment of the SJBS mortgage. This juxtaposition is necessary, as case law makes it clear that where division of the family home is concerned, inequity in financial contribution by itself is insufficient to activate section 7, given the special presumption of equality on which the interests of the parties is founded.

[61] The lump sum payment was made from a source which was wholly owned by the defendant and not contributed to by the claimant. The proceeds from the sale of a property that the defendant had owned with his mother prior to his marriage to the claimant. Given the financial arrangements within the marriage, there is also no basis for suggesting that the support of the claimant within the marriage enabled the defendant to continue making mortgage payments on the Marlie Mount property before his mother's interest passed to him and he sold the property. It is also significant that the payment was made just over a year before the separation of the parties. It was therefore not a situation where the claimant had a number of years living with the defendant in the family home after the equity from his completely separate funds, the source of which existed before their marriage, was invested in the family home.

[62] Accordingly, in all the circumstances I am satisfied that it would be unreasonable and unjust for the equal share rule to stand. The defendant is however not entitled to 90%. The parties lived together for eleven years. The defendant recognised that a part of his duty was to provide for his family. The claimant contributed to the marriage what she could financially and in other non-financial tangible and intangible ways as well. Considering all the evidence, I find that the two to one ratio of 66 2/3 % to 33 1/3% is the appropriate variation of the equal share rule in favour of the defendant.

ISSUE 3: Whether the claimant is entitled to an account of the rental income collected by the defendant? /Should the claimant be required to compensate the defendant for the post separation repairs done to the family home?

[63] The claimant claims an accounting of the entire rental collected by the defendant. She stated that she is sure that the defendant has collected no less than $25,000 monthly from the rental of the family home since July 2007 but that this sum would have increased since December 2008. It is common ground between the parties that the family home has been rented by the defendant since July 2007 and that only he has benefitted from the rental income which started at a monthly rental sum of $25,000.00 but since 2009 has been $30,000.00.

[64] The defendant also indicated that as the amount for rental changed over time at one point the amount was $28,500.00. He testified that the family home was rented from 2007 to 2012 and during this period he collected over $1.5 million but none of this sum was paid to the claimant. He also stated that he has been living in the family home since November 2010, as the tenant had vacated but he was unsure if the claimant was aware of this. The court notes that the defendant indicated that he has been living at the family home since 2010 though it had been rented up until January 2012. It seems therefore that the defendant’s occupation may have overlapped with the property also being tenanted. The defendant agreed that as he has not accounted to the claimant for any rental collected, the claimant was entitled to a share of the income derived from the property.

[65] Accordingly, as co-owner of the family home, the claimant is entitled to an account from the defendant for the rental income earned from the property from July 2007 until January 2012, (and if there has been any further rental, to the date of this order). She is also entitled to payment of one third of the net rental proceeds for the period after deductions for any reasonable maintenance associated with the rental of the premises.

Post-separation contributions

[66] The claimant maintained that after she had moved out of the family home, she employed the services of her brother in July 2007 to assist with painting the house, in order for it to be rented. However, the work had to be discontinued as she did not have the money. It was after this the defendant completed the works initiated by her.

[67] The defendant said the claimant had abandoned the house which was locked up for a year and that the painting effected by the claimant's brother was unsatisfactory as he was not a painter and suffered from ill health. He stated that in July 2007 he effected repairs to the family home which consisted of painting, plumbing, replacing the faucets in the bathroom, repairing the awnings and roof, which cost him approximately $100,000.00. The money for the repairs came from his JMMB account and he indicated he had some receipts for repairs of which the claimant was unaware. He indicated that he has no doubt that the value of the property increased as a result.

[68] The claimant initially denied the extent of the repairs carried out by the defendant. However she eventually agreed that the repairs done by the defendant in 2007 were substantial and necessary for the house to be rented. She also admitted that from the house was tenanted in 2007 she has not contributed anything to the cost of repairs.

[69] In ***Carol Stewart v Lauriston Stewart*****,** Brooks JA also had to deal with how post separation contributions should be addressed. At paragraphs 67 to 68 he stated:

[67] Their separation brings into focus the provisions of section 12 of the Act. As mentioned above, that section fixes the interests of the parties as at the date of the separation. If, therefore, there was equal entitlement to the family home at the time of separation, there was no post-separation event, barring agreement between the parties, which could adjust that entitlement. That was also the common law position prior to the advent of the Act. It is not a position that is restricted to parties in an intimate relationship. In **Patten v Edwards** (1996) 33 JLR 475, this court ruled that expenditure on property, by one of two or more co-owners of that property, does not adjust the proportions in which the interests are held. Patterson JA explained the principle at page 478D-F:

"…Any amount expended by [one co-owner] to improve the property must be regarded as an accretion to the value of the property as a whole. It cannot be regarded as an accretion to [that co-owner's] undivided share alone with the resultant diminution in that of the [other co-owner]. If that was the position, then one tenant in common could effectively acquire the entire interest in the property by making improvements without the consent of the other tenant in common. The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective share remains constant…."

The principle would become relevant to joint tenants upon claims for partition or, as in the instant case, for determination of the respective interests of each spouse.

[68] There is a practical method of compensating the party who has borne a property related expense alone. In **Forrest v Forrest** (1995) 32 JLR 128, the court ruled that, in the event of one party incurring all the expense which ought to have been borne by both, the party who has met the expense is entitled to be refunded, by the other party, one-half of the expense incurred. Carey JA stated the relevant principle at page 136G-H thus:

"Once the interests of the parties are defined at the time of acquisition, it is my view that the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore, diminish or increase the proportions in which the parties intended to hold at the time of acquisition. In the redemption of the mortgage the respondent must be regarded as having made a loan to the appellant to the extent of the proportion of his interest in the property. That amount is a debt recoverable on the order for accounts to be taken, made by the judge."

> That principle may be adapted to the application of the provisions of the Act. In such an application, where the family home is concerned, "the time of acquisition" would be replaced by "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" (section 12(2) of the Act)…

[70] Having regard to the parties' evidence it is clear that it was the defendant who effectively alone funded significant repairs to the family home and in accordance with the dicta in ***Carol Stewart v Lauriston Stewart*** the defendant would be entitled to be refunded by the claimant for one third of the expenses he incurred in effecting the repairs. It may be convenient for the parties to set off a part of the rental proceeds that the defendant will have to account to the claimant against the refund due to the defendant from the claimant.

ISSUE 4: Whether the claimant is entitled to occupation rent from the defendant?

[71] On the evidence of the parties, they both left the family home in 2006 and the defendant said that he has occupied the family home since November 1, 2010 as the tenant vacated. The claimant has said that she continued to pay the mortgage loan to the NHT until March 2010 when her resources ran out and she could no longer afford to make the payments. It has been accepted by both parties that since April 2010 the defendant has been making the NHT monthly mortgage payments.

[72] In ***Beverly Simpson v Anslyn Simpson*** Claim No. E 129 of 2000 (Jud. Del. 28th November 2008), the claimant voluntarily left the house and the defendant solely paid the mortgage thereafter. The question arose whether the defendant was liable to pay the claimant for occupational rent. The court found that the co-owner who voluntarily gave up possession was also eligible to make a claim for an occupation rent. E. Brown J in ***Mercedes Blake v Andrew Blake*** [2016] JMSC Civ 63, at para. 32 however cautioned that:

> ...if the insufficiency of bare occupation to ground occupation rent is to remain a valid proposition, a co-owner who voluntarily gave up occupation must establish that the equitable or legal balance has been disturbed. He

> does so by proving, for example, either the existence of a contract to pay rent or that the circumstances require an equitable accounting.

[73] Previously at para 31 he stated that:

> In fine, the award of an occupation rent is not an arbitrary judicial gesture. An occupation rent only becomes chargeable to adjust the balance between co-owners. Mere occupation has never been a sufficient basis to levy an occupation rent. The balance between co-owners may require adjustment as a result of the unlawful or inequitable actions of one or more co-owners.

[74] Mangatal J in ***Beverly Simpson v Anslyn Simpson*** supra indicated at para. 37 that:

> In my view, this is a case where, albeit the claimant left the property voluntarily (it not being necessary to establish that she has been excluded from the property), the defendant is bound to pay occupational rent to her. However, since the defendant also paid the mortgage instalments, inference being from March 6, 1995 to April 11, 2006, it is simpler, as in **Byford v Butler** [2003] EWHC 1267 (Ch) [2004] 1 FLR 56, and **Leake v Bruzzi** [1974] 2 ALL E.R. 1196, CA, to regard payment of interest as equivalent to payment of occupational rent.

[75] The dicta of Mangatal J is most apt in the circumstances of this case. On the evidence both parties left the house voluntarily. The defendant however returned there to live a few years after and for the time he has occupied same, he would be required to pay occupational rent to the claimant. However, in this case, since his return, he has been absorbing all the mortgage payments. Accordingly, it is '*simpler to regard the payment of interest as equivalent to payment of occupational rent*' in the circumstances. The defendant would likely also have been responsible for maintenance of the home while residing there. The defendant is therefore not required to pay any occupational rent to the claimant.

ISSUE 5: What interest, if any, is each party entitled to in the 1995 Nissan Sunny motorcar?

[76] The claimant did not claim an interest in the 1995 Nissan Sunny motor car in her Fixed Date Claim Form. However, from her evidence and submissions made on

her behalf, it is clear that she now claims such an interest. The defendant has denied that the claimant has any interest in the motor car and claims a 100% entitlement to it.

The Statutory Framework

[77] The division of property other than the family home is governed by section 14 of the **PROSA**. Section 14 provides that:

> (1) Where under section 13 a spouse applies to the Court for a division of property the Court may-
>
> a. make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or
>
> b. subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),
>
> or, where the circumstances so warrant, take action under both paragraphs (a) and (b).
>
> (2) The factors referred to in subsection (1) are-
>
> a. the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;
>
> b. 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.
>
> (3) In subsection (2)(a), “contribution” means-

a. the acquisition or creation of property including the payment of money for that purpose;

b. the care of any relevant child or any aged or infirm relative or dependant of a spouse;

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

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

i. enables the other spouse to acquire qualifications; or

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

e. the management of the household and the performance of household duties;

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

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

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

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

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

The Evidence

[78] The defendant indicated that he purchased a Daihatsu Charade motor car with the assistance of a loan from Scotiabank, prior to getting married to the claimant, and he had that car at the time of his marriage. The claimant however initially maintained that both parties owned the Daihatsu Charade claiming that it had been acquired through a loan from her mother, together with the defendant's savings.

The claimant however eventually resiled from this position and agreed that the Daihatsu was the defendant's car. The Daihatsu was sold in the year 2000.

[79] The defendant's evidence is also that in 1998 he arranged to have someone import a 1995 Nissan Sunny motor car for him from Japan which he purchased cash. The car bearing registration number 4348 BW was however registered and insured in the claimant's name, as she then worked with UGI and was able to access good insurance rates. He indicated that the insurance premiums and yearly licensing fees were paid by him.

[80] The claimant agreed that the defendant paid the entire purchase price for the 1995 Nissan Sunny but claimed that the 1995 Nissan Sunny motor car was a gift to her from the defendant which is why it was registered in her name. She maintained that it was not registered in her name only to ensure that a good interest rate could be accessed as she was entitled to the same special discounts for family members. The defendant vehemently denied that the claimant told him that she was entitled to family discounts from UGI and that the car was thought of as a gift for the claimant.

[81] The claimant indicated that they sold the Daihatsu Charade in 2001 and the defendant started using the Nissan Sunny motor car exclusively as by then she was not driving on a regular basis. Since, the defendant was using the 1995 Nissan Sunny, they agreed that she needed another car and so the 1999 Nissan Sunny motor car was purchased and registered in her name. The defendant had said that when the 1999 Nissan Sunny was purchased in 2004 it was because the claimant said she would drive, which she did after the purchase was made.

[82] The defendant indicated that the purchase was made with a cash deposit of $100,000.00 from the defendant, with the claimant obtaining a loan from her employers to cover the balance. The claimant however testified that the defendant did not purchase the car but gave her a gift of $100,000.00 which she put together with a loan from her employers to buy the car. She indicated she paid the loan for

this car. This motorcar was also registered and insured in the sole name of the claimant.

[83] The claimant said that since this car was also a gift from the defendant to her it was licensed and registered in her name. The defendant maintained that neither of these two Nissan motor cars was a gift to the claimant. The claimant however insisted that throughout the marriage the defendant gave her gifts, included the two sunny motorcars. The defendant said that the claimant began driving in about 2005 and that between 1995 and about 2005, he had the sole responsibility, with the help of family and friends, to transport the claimant and the children to their various appointments and activities.

[84] The claimant denied this. She admitted that she did not drive for some time because of a phobia but testified that she drove the Daihatsu Charade in 1994 and the 1995 Sunny in about October 1998, after going back to work after the birth of her daughter. She also indicated that she began driving on and off in 1999 and consistently in 2004 and not in 2005 as suggested by the defendant. She however insisted that the defendant never complained about taking them to their respective appointments and activities as he had always expressed that as the man that was his responsibility.

[85] She also admitted that for the years the Daihatsu and the 1995 Sunny were together at the house, on the days the defendant would drive one of the vehicles, the other would be parked. She further agreed that it was not until 2005 that she began driving and assisting with transporting the family. She explained that by then she had built up her confidence and she began driving on a regular basis in 2004 after the acquisition of the 1999 car.

[86] She testified that after separation, the defendant kept the 1995 Sunny and she kept the 1999 Sunny but admitted that since June 2010, she has had possession of both cars. She said she operated a taxi with the 1995 Nissan Sunny from July

2010 to about February 2011 but because it needed repairs she eventually had to sell it for $140,000.00.

[87] The defendant stated that in 2005 he paid the lump sum of $300,000.00 to UGI to settle the claimant's outstanding loan on the 1999 Nissan motorcar by cash of $39,353.45 and JMMB cheque in the sum of $260,646.55 as indicated by the copy JMMB cheque he exhibited. The claimant agreed with this but indicated it was a decision taken in order to reduce the mortgage payments having regard to their respective states of employment at the time. The defendant also agreed that up to the point when he paid off her loan, the claimant had been making car payments.

[88] He said as far as he is aware on June 23, 2010, the claimant, in the company of Police Officers visited his place of residence and took away the 1995 Nissan Sunny motorcar and that she had had both cars in her possession since. The defendant agreed that prior to taking possession of the car in 2010, the claimant had asked for the car in a letter and he contacted his lawyer who had provided a response.

[89] He agreed that his contribution to the children's maintenance may have been insufficient but thought that his wife also had a responsibility and it was very unreasonable to sell the car to take care of the children or to use it to run taxi. He said he relied on the car to take him to training. He had access to no other vehicle and it crippled him as he had to depend on other people to take him around. He said that in June 2009, he caused a mechanical report for the 1995 Nissan Sunny motor vehicle to be prepared by MSC Mckay which he exhibited.

Analysis

[90] The issue between the parties where motor cars are concerned now only relate to the 1995 Nissan Sunny. The Daihatsu has long been sold and in any event the claimant had belatedly admitted that it belonged to him and no claim was made by the claimant on the proceeds of its sale. The defendant did not claim an interest in the 1999 Nissan Sunny and on the evidence, it appears that on a balance of probabilities, it was bought for the claimant's sole use and benefit and was in that

sense a gift to her. According to **Halsbury Laws of England**, Fourth Edition, at para. 43, '*Where the person in whose name a purchase or transfer is taken is the wife, child or adopted child of the man paying the purchase money or making the transfer, there is a presumption that a gift was intended*.' The evidence gives rise to that presumption and the defendant has not sought to rebut it.

[91] Regarding the 1995 Nissan Sunny, I accept the defendant's evidence that he bought this vehicle from his sole resources and it was only registered in the claimant's name so he could access the insurance discount. The claimant's evidence that this car was a gift to her is rejected. Though the parties were together for quite a few years whilst they had possession of the 1995 Nissan the evidence reveals that it was the defendant who always drove it. Further, as soon as the claimant began driving at least on and off, the 1999 car was bought. On the evidence it does not appear that the claimant ever drove the 1995 Nissan while the parties were together. In fact, it is apparent that there was an understanding between the parties that the 1995 Nissan Sunny belonged to the defendant and the 1999 Nissan Sunny belonged to the claimant.

[92] That explains why on their separation, the defendant took the 1995 Nissan Sunny and left the 1999 Nissan Sunny with the claimant. The claimant nonetheless later forcibly acquired possession of the car almost five years after their separation. She used it for a while as a taxi and then sold it, she said, for the sum of $140,000.00. She has however produced no receipt or other documentation to prove the actual sale price.

[93] In the circumstances as outlined any presumption that the 1995 Nissan was a gift is rebutted and the defendant is entitled to the entire interest therein. No evidence was received concerning any earnings the claimant might have received from using the car as a taxi and no claim was made for any such proceeds. The claimant has said that she sold the car for $140,000.00, but there is no documentary proof of that. The defendant did not give any evidence as to what may have been the value of the car when it was taken from him. The evidence from the claimant as to

the sale price of the car is therefore the best available measure of value. The claimant should therefore repay to the defendant the sum of $140,000.00 for the 1995 Nissan Sunny motorcar.

DISPOSITION

[94] The court accordingly makes the following orders:

i) The claimant is entitled to a thirty-three and a 3rd percent (33 1/3%) interest and the defendant to a sixty-six and 2/3rds (66 2/3%) interest in the family home situated at 10 Cave Hill Boulevard, Hellshire Heights in the parish of Saint Catherine registered at Volume 1299 Folio 363 of the Register Book of Title;

ii) Valuation of the family home is to be done by a valuator agreed between the claimant and the defendant and the costs are to be borne equally. If there is no agreement within thirty-five (35) days of this order, then the said property shall be valued by D.C. Tavares and Finson Realty Company Ltd;

iii) The defendant is given the first option to purchase the claimant's interest in the family home at the value outlined in the Valuation Report. The defendant is to exercise this option by paying a ten percent (10%) deposit in respect of the family home and signing an agreement for sale within ninety (90) days of the date of the orders herein;

iv) If the defendant fails to exercise the option to purchase the claimant's interest in the family home, within the time stipulated, the claimant shall have the option to purchase the defendant's interest. The claimant is to exercise this option by paying a ten percent (10%) deposit in respect of the family home and signing an agreement for sale within ninety (90) days of the last day the defendant had to exercise the option. In the event that neither the defendant nor the claimant exercises or wishes to exercise the options open to them, the family home shall be sold on the open market and

the net proceeds of sale divided according to the parties' respective entitlements as declared;

v) The claimant's Attorney-at-Law, is to have carriage of sale in respect of the family home;

vi) Attorneys' costs incurred in the transfer of the family home are to be borne equally between the parties;

vii) In the event that either party fails and/or refuses to sign the agreement(s) for sale and/or instrument(s) of transfer within a reasonable time after having been requested to do so by the attorney who has carriage of sale, the Registrar of this court is authorized to sign for and on behalf of the defaulting party;

viii) The defendant is to account to the claimant by July 31, 2019, for all rental income earned from the family home between the period July 2007 to January 2012, (and beyond if there was rental that continued beyond that date), and to pay to the claimant thirty-three and a third percent (33 1/3%) of the amount so accounted for;

ix) The claimant shall reimburse the defendant Thirty-Three thousand dollars ($33,000.00) being her one-third share of the cost of approximately $100,000.00 spent by the defendant on repairs to the family home in 2007;

x) The claimant is not entitled to any interest in the 1995 Nissan Sunny motor car. The claimant is to pay to the defendant the sum of $140,000.00, the sale price of the 1995 Nissan Sunny motor car, within 90 days of this order;

xi) Each party to bear her/his own costs; and

xii) Counsel for the claimant shall file and serve this order.