



[2017] JMSC Civ 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 01187

**In the matter of the Matrimonial
Causes Act**

AND

In the matter of the Maintenance Act

AND

**In the matter of the Property (Rights of
Spouses) Act**

BETWEEN

JUNG MEE KIM

CLAIMANT

AND

JIN KUK KIM

DEFENDANT

IN CHAMBERS

Ms. Carol Davis, Attorney at Law for the Claimant

**Mr. Gordon Steer and Ms. Kaye-Ann Parke instructed by Messrs. Chambers, Bunny
and Steer for the Defendant**

Heard: 11. October. 2016 and 12. October. 2016 Delivered: 13. January. 2017

Matrimonial Property □ Division of company property – Family Home – Property other
than the Family Home- Spousal Maintenance- Child Maintenance

BERTRAM LINTON, J

BACKGROUND

- [1]** The Claimant (hereinafter referred to as Mrs. Kim) and the Defendant (hereinafter called Mr. Kim) were married on the the 14th of January, 2007 and separated August 2014. There are two relevant children of the marriage to whom I will refer as H and J. There is no indication that divorce proceedings have been instituted.
- [2]** The couple are Korean nationals who met in Korea while Mrs. Kim was pursuing tertiary education. Mrs. Kim grew up in Jamaica. They moved to Jamaica in 2005 and in 2006 they started a company by the name of Ensung Variety Enterprises Ltd. 10,000,000 shares were issued; 5,000,000 being allotted to Mrs. Kim and 5,000,000 being allotted to Mr. Kim. In 2010, Ensung Variety Enterprise changed its name to SNS Club Limited. At that time, they had started to operate a supermarket.
- [3]** In 2009, they purchased property at Wood Hall, Spalding P.O. in the Parish of Manchester being property registered at Volume 1078 Folio 12 of the Register Book of Titles (hereinafter referred to as Property 1). It was registered in their names as Joint Tenants. Thereafter, they relocated their supermarket/ wholesale renamed SNS supermarket onto the premises. The property was renovated to incorporate the operations of a supermarket on the lower level and residence on the upper level which operated as their matrimonial home.
- [4]** In 2013, they purchased property at Spalding District, Spalding P.O. in the parish of Clarendon being property registered at Volume 1260 Folio 173 of the Register Book of Titles (hereinafter referred to as Property 2). Mr. and Mrs. Kim are registered on the title as Joint Tenants. Profits from the company were used to offset mortgage payments for the property.
- [5]** In 2014, the relationship between the Kims began to deteriorate. Ultimately, Mrs. Kim made the decision not to return to the matrimonial home in August after she

was involved in a physical altercation with Mr. Kim which led to her being hospitalized at Hargreaves Memorial Hospital.

- [6] Between 2014 and early 2015, H and J remained with Mr. Kim until Mrs. Kim was granted temporary custody of the children pursuant to an order of this court. H and J were relocated to Kingston where they now attend school. Mr. Kim has been ordered to pay maintenance to Mrs. Kim for herself and the children over the period which she has had them in the sum of \$150,000.00 per month.

THE CLAIM

- [7] In her Amended Fixed Date Claim Form filed on the 30th of April, 2015 Mrs. Kim requested, among other things, the following orders:
- (a) That sole custody, care and control of H and J be granted to her;
 - (b) A restraining order be granted against the defendant preventing him from coming within 100 yards of H, J and herself;
 - (c) That a reasonable sum be paid to her as maintenance for herself, H and J;
 - (d) That the defendant gives an account for profits earned by the company between August 2014 to present;
 - (e) A determination of each party's interest in property located at Wood Hall in the parish of Manchester;
 - (f) A determination of each party's interest in property located at Spalding in the parish of Clarendon;
 - (g) A determination of each party's interest in SNS Club Limited;
 - (h) An order that the properties and the company be sold and the proceeds be divided in keeping with each party's interest.

- [8] In her submissions, counsel for Mrs. Kim argued that the claimant should be granted permanent custody of the children with Mr. Kim only being allowed supervised visitation until such time that it would be amenable to vary the order. She contends that Mr. Kim is not a stable parent in light of his past drug conviction and allegations of substance abuse during the marriage. Furthermore, she has pointed out that the children are doing well in school and appear happy and well in their present environment.
- [9] As it relates to maintenance for the children, it was submitted that \$300,000.00 was a reasonable monthly sum. This includes costs for school fees, extra curricular activities, therapy for J, food and other miscellaneous expenses. Counsel highlighted that Mr. Kim, in his proposed Deed of Separation, was offering to pay \$US 1000.00 per child per month. Thus, his assertion that he wants to pay less maintenance as he cannot afford to, cannot be maintained. Furthermore, it was submitted by Counsel that Mr. Kim's evidence in relation to his income ought not to be relied upon as his assertions that his expenses are significantly higher than his income is advanced as an attempt to mislead the court.
- [10] It was also submitted that Mr. Kim could afford \$300,000.00 monthly spousal maintenance for Mrs. Kim. Counsel has asked the court to consider that Mrs. Kim's work permit was granted specifically for her to work at SNS Supermarket; the business run by herself and her husband before their separation. Counsel has alluded to the fact that Mrs. Kim is now unemployed and remains so because of her work permit requirements and the fact that her employer would have to make an application for a work permit for her; a process which is tedious and costly. She has asked that maintenance be provided for Mrs. Kim for at least 7 years and would prefer the payment to be a lump sum so as to enable her to start her own business.
- [11] In relation to Property #1 the supermarket and family home, counsel submits that Mrs. Kim is entitled to a half share based on the stipulations of Property Rights of Spouses Act (hereinafter referred to as PROSA). As it relates to Property #2 the

property at Spaulding, counsel submits that the beneficial interest should reflect the legal holding. Lastly, as it relates to the business, it was submitted that each party should be awarded a 50% interest in keeping with their respective shareholdings

THE RESPONSE

[12] Counsel for Mr. Kim argued that the restraining order granted in respect of Mrs. Kim and the children ought to be lifted so as to allow Mr. Kim access to the children. They submitted that the order was granted in respect of conduct of the defendant when the relationship was at the peak of its breakdown. Now that the parties are no longer together and there is evidence of the Kims moving on with their lives, there is no need for a restraining order. Furthermore, it was submitted that the children ought to be able to spend quality unsupervised time with their father as there is no real risk of danger to them.

[13] In relation to maintenance, it was submitted that the figures put forward by Mrs. Kim were unsubstantiated as no receipts were proffered to ground the sum claimed. Further, based on the fact that the nanny's salary was inflated, there exists the possibility that the other figures were also inflated. In this respect, it was argued that \$300,000.00 monthly for the children and \$300,000.00 for Mrs. Kim was excessive as the defendant could not afford to pay that amount

[14] Lastly, as it relates to the properties, counsel submitted that no orders should be made in relation to them since Elder Kim, Mr. Kim's father, contributed money to purchase Property #1 in which the family resided and the supermarket was operated. Therefore, his interest should be determined before any orders are made as granting such orders would possibly be prejudicial to him.

ISSUES

[15] The issues for determination are:

- (a) Whether or not sole care and custody of H and J should remain with Mrs. Kim based the circumstances of the case;
- (b) What would be a reasonable sum for maintenance of the children;
- (c) Is Mrs. Kim entitled to maintenance and in what amount;
- (d) How are the respective interests to be realized in relation to the property at Wood Hall in Manchester;
- (e) How are the respective interests to be realized in relation to the property at Spaulding District in Clarendon;
- (f) What interest does Mr. and Mrs. Kim hold in SNS Club Limited.

ANALYSIS

[16] I have given careful thought to all the submissions presented and all the arguments and case law as cited, I have no intention of reiterating them here in detail but will refer to them as is necessary to explain my reasoning and decision in this matter.

A. Custody

[17] One of the most important issues to consider is whether the current order for custody should remain, that is, that sole custody and care of H and J should remain with their mother while allowing supervised visits with their father. This I believe must be viewed hand in hand with the restraining order granted to Mrs. Kim prohibiting Mr. Kim from '*coming within 100 yards*' of her and the children. Having regard to the circumstances presented before the court, what outcome would be in the best interest of the children?

[18] Section 7 of the Children (Guardianship and Custody) Act (hereinafter referred to as CGCA) gives the court inherent jurisdiction to treat with the custody and care of children. In particular subsection (1) states:

7.-(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.

[19] Further, section 18 of the same act provides that:

18. Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

[20] In interpreting section 18, Harrison JA (as he then was) said, in the case of **Dennis Forsythe v Idealin Jones SCCA 49/1999 (April 6, 2001)**:

This emphasis on the welfare of the child should therefore be the primary focus of a court considering a custody application. However, the court is required to take into consideration, in determining that primary question, the conduct of the parties in all the circumstances of the case...

A Court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare.

[21] It is to be noted that the fact that a restraining order was granted by the court prior to this judgment has been given consideration in the outcome on this issue but this has not unduly influenced the final position arrived at on this issue. In order to properly ventilate the issues at hand, the evidence of Mr. Kim, Mrs. Kim and Angella Thompson (hereinafter referred to as the Nanny) are very important as these persons have an immediate interaction with the children on a daily basis. Therefore, I must weigh each person's account in relation to the lives of the children very carefully in order to determine what aspects of the co-existence with their family are crucial to consider.

(1) The Children's View

[22] In some circumstances, the court has taken into account the children's preference or views in relation to custody. Though this case does not present facts of the children blatantly expressing which parent they would wish to live with, there is some expression of their thoughts in the report *prepared* by Georgette Cotton the Probation Aftercare Officer as to spending time with Mr. Kim and I am inclined to take that into consideration. The report says:

"[H], unlike her younger, more reserved brother was talkative and very pleasant; she too was petite posture but nonetheless healthy looking. She indicated that she is treated well by her nanny whom she fondly referred to as Auntie as well as by her mother. She added that Daddy does not treat Mommy nice and that sometimes he hits [J] on his forehead and that on one occasion he (Daddy) pushed (Joshua) head in the wall. She could not recall the last time she saw her Daddy and indicated that she does not know if she wants to visit him.

She informed that she is comfortable living in Kingston and that she likes the weather better as it is warmer than the weather in Spaulding which is cold."

[23] It is accepted that H's presence during the difficult terrain of her parents' marriage may have coloured her thoughts of her father and this may be why she has expressed that she does not know if she wants to see him as well as the fact that younger children are often influenced by the residential parent. However, one would not wish to force her into an environment for which she is not prepared or which might negatively affect her psychological state of being. It is accepted that for proper development, children need interaction with both parents and her reluctance must be dealt with on that basis.

[24] J on the other hand, appears to be quite a fragile child. The case worker says that he was particularly *'bashful and reluctant to speak... he gave only one word responses or a nod of the head.'* He is also going through a period of speech therapy for developmental delays in that area. He has also recorded to have spoken at school about his father beating his mother. So that in addition to his developmental delays, he appears to be very aware of the abuse that had been

taking place in the home when his parents lived together and may have been adversely affected. In any event, he needs to be carefully managed.

(2) Ms. Thompson

[25] Angella Thompson has been present in the lives of the children since birth. She has been working for the Kims for many years; initially with Mrs. Kim and her family and then with Mr. Kim after the couple were married.

[26] Under normal circumstances, her evidence would have been crucial to the case as she can readily testify to the well being of the children and could provide evidence of relevant factors in their environment which the court ought to give special consideration to. However, it has been tainted by the fact that she says at the hearing in chambers that she made untrue statements in her affidavit to facilitate Mrs. Kim thereby refuting her sworn affidavit evidence.

[27] I find that her evidence cannot be trusted. It is fair to say that some of what she says may in fact be truthful especially when lined up against other evidence in the case. But my assessment of her suggests that it is not possible to say if she lied in her original affidavit or is simply suggestible and has been influenced to change her account of the incidents of which she speaks.

[28] I accept that the Nanny played an integral role in the children's lives especially when Mr. and Mrs. Kim separated. She appears to have been the person who stepped into the role of care-giver; trying as best as possible to maintain the routine that they were accustomed to when Mrs. Kim says she fled for her life. Her recanting of her statements in the affidavit for the court was strange. While giving viva voce evidence in chambers she seemed reticent and almost fearful in her expressions. At one point, her speech dropped to a bare whisper and she had to be repeatedly asked to speak up so that we could hear what she was saying. Hearing her became increasingly difficult even though everything was taking place in chambers and everyone in close proximity to each other in a confined space.

[29] When she described the arguments which took place in the home she resorted to very stilted verbalizing, and even though she would have been present with the children in her care, on most if not all occasions when the couple were arguing or fighting, she was not prepared to give any detail of what she saw happening between the parents and was prepared to say that she never saw the defendant ill-treat his children in direct contrast to her sworn affidavit.

[30] Evidence of the picture she took is also noted and when asked why she took it her response was:

“ Father was busy and the child got tired and lay down there. I took the picture and sent it to his mother. I was just curious and took it just for her to see him under there.”

Whatever contradictions appear in her evidence, cannot overshadow the fact that the picture was taken and sent to the mother in order to underscore something which for the nanny was significant at the time. This appeared to be that the child needed attention that he was not getting while the father ran his business and to convey to Mrs. Kim that J situation needed intervention.

(3) Mrs. Kim

[31] I accept as accurate that either Mrs. Kim or the nanny took care of the children. In her evidence Mrs. Kim has said that she was responsible for getting them ready for school, taking them to school, picking them up from school and helping them with homework. I accept her evidence in this regard to be true as it is corroborated in many ways by the evidence of Mr. Kim and the Nanny.

[32] I find that Mrs. Kim played an integral role in the lives of the children. It is noted that when Mrs. Kim moved from the home, she returned to see the children and often spoke to them on the phone. Later when she was granted custody of them, she enrolled them into school and maintained a routine that they were used to that is, personally dropping them off at school and picking them up.

[33] Based on the social inquiry report conducted by Georgette Cotton on 8th of July 2015, there is every indication that the children are happy and in a stable environment. There is no evidence to suggest that their psychological, social, educational or physical well-being are threatened being in the care of their mother. Notably, there is no evidence that Mrs. Kim brings the children to church, however, it appears that their upbringing is one which is her primary focus as the report highlights that the school has noted that their attendance is outstanding. They appear presentable when attending school and Mrs. Kim liaises with the children's teachers to monitor their progress.

(4) Mr. Kim

[34] During the period of August 2014 to February 2015, the children were in the care and custody of Mr. Kim. Mrs. Kim says that over the period with their father, the children were miserable and were suffering because they missed her. This she says was what the Nanny had told her. She also says that they often had to be 'settled' by her over the phone. This evidence has not been substantiated and the reliability of Ms. Thompson has been brought into question as we have already discussed but I am prepared to accept that Mrs. Kim did all she could at the time given the circumstances.

[35] There is the matter of an incident where Mr. Kim is said to have pushed J's head into a wall at home after chastising him for being naughty. The Nanny says in her affidavit that she saw Mr. Kim commit the act alleged. It is noted that Mrs. Kim says in her affidavit that she was told of it by the nanny. However, the Nanny's evidence is viewed against the backdrop of her sudden change of heart and the fact that her affidavit and viva voce evidence are contradictory. As such, her evidence on this point is viewed with suspicion. Furthermore, it is accepted that Mrs. Kim was not present when this alleged assault occurred and as such I cannot rely solely on what she was told by an unreliable witness.

- [36]** However, it is interesting that H told the case officer that she saw when 'Daddy pushed [J]'s head into the wall.' There is no evidence to suggest that she was told to say this. H was 6 years old, a seemingly intelligent little girl, as the report has expressed, and I accept her account to be truthful. It seems to me that in light of this evidence by the child, we need to consider whether there is the possibility of harm to the children while in the care of their father.
- [37]** There is the issue of the drug charges levied against Mr. Kim leading to his conviction and deportation from the United States of America. This, coupled with the allegations presented by Mrs. Kim of drug use during their marriage is a major concern. Based on the violent behaviour that Mrs. Kim describes of Mr. Kim during their marriage, it would seem that he might be prone to violence. This would have to be viewed against the background of his past indiscretions and whether this will affect his care of the children. I find that this is a significant factor for consideration which would affect them.
- [38]** The Nanny exhibited a photo to her affidavit filed 30th of April, 2015 which shows baby J sleeping at the bottom of a supermarket trolley while he should have been in the care of his father. I reject Mr. Kim's denial of being neglectful of his children and his suggestion that the photo was staged. It is noted that Mr. Kim has admitted to supervising the children at the time the photo was taken, so it does in fact call his vigilance as a parent into question. I accept that this is evidence of the fact that he is somewhat neglectful of the children.
- [39]** I have noted the fact that the animosity which occurred between the couple were often times in full presence of the children especially H who was at the time old enough to understand what was happening. I accept that Mr. Kim was abusive towards Mrs. Kim. The abuse of the children's mother in their presence is, in my view, damaging to their psychological well being and I have taken this issue as it relates to Mr. Kim as the evidence does suggest that he was in fact physically abusing Mrs. Kim. Notably, there is little evidence to show that Mr. Kim was physically abused by Mrs. Kim. I have considered that there may be some

psychological damage to the children because they were present throughout the fights. Further, based on the incident involving J, it would appear that Mr. Kim is prone to getting upset rather easily and this I perceive as not necessarily good for the children.

[40] I have considered the fact that the turmoil in the relationship was at its peak when the physical abuse took place. I reject the evidence of Yashica Gayle-Jang who says that she did not witness the last altercation between the Kims or any injuries to Mrs. Kim after the fight which led to her being hospitalized. I further reject Mr. Kim's assertions that he did not threaten Mrs. Kim with his gun or recall whether she sustained injuries in their last fight. I accept that Mr. Kim is violent and there is every likelihood that there will be a recurrence of Mr. Kim's violent behaviour since there was more than one incident of violence. When viewed together, I find that the safety of the children is of paramount interest and I am not inclined to put them into any situation which might cause them harm. Therefore, I find that Mr. Kim is prone to be violence and this cannot be anticipated and would represent the possibility of harm for the children.

[41] In all the circumstances, I find that Mr. Kim's violent behaviour coupled with his past drug use and lack of vigilance as a parent would warrant supervised visitation as he has not proven that he is a stable parent at this time.

[42] I therefore order that the sole custody, care and control of the children should remain with Mrs. Kim. There is no adverse effect to be considered should they remain with Mrs. Kim. Mr. Kim will be permitted to have supervised visits with the children twice per month. In so doing, the restraining order is no longer needed in relation to the children. All efforts must be made to keep the lines of communication open. These should include online and telephone communication by the father with his children thereby laying a foundation for the opening up of visitation and unsupervised access when the time is right.

B. *Maintenance*

[43] Section 7(3) of the Children (Guardianship and Custody) Act empowers the court to grant an order for maintenance when custody of a child remains with the mother. In particular, the sub-section provides:

(3) Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable.

[44] As well, the Maintenance Act governs maintenance for spouses. Section 4 provides invariably that each spouse has an obligation to maintain the other as long as it is necessary to meet their reasonable needs and the spouse can meet the whole or part of the needs.

[45] Section 5(2) and 14(4) set out the factors which the court ought to consider when determining the issue of maintenance. Section 5(2) provides that:

In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4) –

(a) the length of time of the marriage or cohabitation;

(b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(c) the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;

(d) the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;

(e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;

(f) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;

(g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;

(h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;

(i) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.

Section 14(4) provides that:

In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and

(a) the respondent's and the dependant's assets and means;

(b) the assets and means that the dependant and the respondent are likely to have in the future;

(c) the dependant's capacity to contribute to the dependant's own support;

(d) the capacity of the respondent to provide support;

(e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;

(f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;

(g) any legal obligation of the respondent or the dependant to provide support for another person;

(h) the desirability of the dependant or respondent staying at home to care for a child;

(i) any contribution made by the dependant to the realization of the respondent's career potential;

(j) any other legal right of the dependant to support other than out of public funds;

(k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake

a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(l) the quality of the relationship between the dependant and the respondent;

(m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

(1) The Children

[46] The court is empowered to make orders for maintenance for relevant children by virtue of multiple factors set out in the act including the biological connection to the spouse against whom maintenance is claimed.

[47] This then leads to what expenses ought to be covered for the children and by whom. It is noted that these considerations have to be viewed against the background that the children ought to be maintained in the way to which they are accustomed and in keeping with the means of the parents. It is noted that the maintenance sum must presently include all school related fees, all extra curricular activities in which they are involved, fees for therapy, the nanny and personal care.

[48] Careful note has been given to the expenditure as outlined for the children which, even though we have no documentary support for, as noted by counsel for the Defendant, they seem to be reasonable in these circumstances. The Kims managed a very lucrative business and Mr. Kim is currently operating a similar business which we can presume based on the accounting is just as lucrative.

[49] I accept the expenses provided in Ms. Cotton's Report which outlines the cost of maintenance for Mrs. Kim and the children. I find that these are reasonable sums having regard to the fact that this way of life is one which the children and Mrs. Kim are accustomed and one which Mr. Kim can afford to pay having regard to the findings which I have made below.

[50] Based on the fact that the children are in the immediate care of Mrs. Kim I find that maintenance should be awarded at 300,000.00 per month for maintenance of both

children. In addition, Mrs. Kim and Mr. Kim will each pay one half of all school fees, book expenses, medical including therapy and extra curricular activities in which the children are involved.

(2) Spousal

[51] The main issue as it relates to maintenance of Mrs. Kim is whether it should continue given the fact that she has been maintained for approximately two years and if it is accepted that she should continue to be maintained, how long should the order run for.

[52] Mrs. Kim has asked the court to consider a lump sum payment as she would want to start her own business in order to provide for herself and the children. While this consideration is not one which the court is averse to, I must consider on the one hand the fact that this would mean a clean break between the parties and on the other, whether the defendant can afford to do so at this point in time.

[53] Having regard to the Maintenance Act, I have noted the following: -

(a) The couple married in 2007 and separated in 2014. No divorce proceedings have been initiated so they are still legally married. Even so, I have taken into consideration the amount of years the couple has lived a 'happy married life', that being 4 years courtship and 7 years married and living together. All indications would be that they lived a life mainly trying to build the business and making sure the family was comfortable. I have accepted that this is by no means a marriage of short duration and as such benefits derived throughout were a joint effort to better the family as a whole.

(b) During the better moments of the relationship, Mrs. Kim took care of the children and worked in the business. It is evident that she played a major role in the business as many of the receipts exhibited by Mr. Kim to his affidavit in support of his notice of application filed June 15, 2016 are still addressed to Mrs. Kim. Also, her assertion that she ran the business has

been corroborated by Mr. Kim and the Nanny. It is noted that though she took no money from the business for herself, the supermarket was the income provider for the family. The court has given due regard to the fact that Mrs. Kim helped to build the supermarket. Therefore, the profits which the business started to see was as a result of her contribution of time and hard work. While I do not believe that Mrs. Kim's responsibility of taking care of the children affected her income earning capacity or career development (as she was only permitted to work in SNS Supermarket anyway), I have considered that at the time that the couple just started SNS they were focused on building their life and the business. And I accept that Mrs. Kim pulled her weight in enabling the business to grow to one which produced millions in profit and assets which she was unable to access after the breakup.

(c) Mr. Kim's account of his present financial circumstances is one which the court views as less than honest. I do not accept that he currently spends more than he earns or that his living expenses are subsidized by his family or friends. He has put no documentary evidence to support his assertions or to show that they are in the least credible. Mr. Kim would like the court to accept that:

- i. He earns \$50,000.00 since February or March 2016 and \$100,000.00 monthly prior to that time but is able to donate a sum of up to \$760,000.00 per annum the church. This is all while the business has closed down and he is paying maintenance to Mrs. Kim. As a matter of fact, the evidence adduced showed that Mr. Kim spent an average of approximately \$430,000.00 while earning an income of \$100,000.00 I find that his evidence is unreliable and simply put he is not speaking the truth.
- ii. He has closed down his business but has conveniently developed a relationship with a neighbouring supermarket which he has now sold

all his goods and equipment to and who currently pays him \$10,000.00 per month rental fee for usage of his garage as a storage unit. I do not believe Mr. Kim is being truthful about his existing relationship with this new supermarket; Giant Traders. This calls into question the evidence given by Ms. Luzan Robinson where she was cross examined in relation to texted messages which outlines that Mr. Kim had shares in this same supermarket and was receiving goods at SNS and transferring them to the same new supermarket. I find it strange that Ms. Robinson would deny sending these text from an account which she admits is her own at such a convenient time. I have taken into account that she is under the present employment of Mr. Kim and so her evidence is compromised because she has an interest to serve. In all, I believe this is evidence of Mr. Kim starting a new business, not selling the stock of SNS to cut losses.

- iii. There is evidence to suggest that in 2015 the supermarket made gross profits of 15,873,296.00 while it made 7,601,245 to date. This, even though Mr. Kim claims that business had declined significantly enough to warrant a close down of SNS.
- (d) Mrs. Kims account of the profits which the business was able to make while she was working there are in line with the lifestyle which the Kims maintained and their acquisition of assets. Hers is the only evidence which best accounts for the income scale which Mr. Kim should presently be earning having regard to his new relations with Giant Traders supermarket. Therefore, I accept that Mr. Kim is earning far more than he is claiming.
- (e) I accept that Mrs. Kim cannot be perpetually maintained as the law only provides for maintenance until the dependant spouse is able to adjust to living alone and manage all the expenses which flow from this ordeal. In Mrs. Kim's case, she was unemployed for some time due to a requirement

of a special permit to work in Jamaica. However, based on the fact that she is now a permanent resident in Jamaica, she is no longer hindered from getting a job. She has two bachelor's degrees and is a very intelligent woman as her background shows she has many years experience in business. Mrs. Kim has far more potential of getting a job now. However, though I have given consideration to this, I have also paid close attention to the fact that Mrs. Kim spent much of her married life building the supermarket with her husband and was denied access to its benefits when *'for better became for worser.'* I find it would be unduly unjust for her not to reap the benefits for which she has toiled because of Mr. Kim's strategic business machinations.

- (f) Mr. Kim has asked that Mrs. Kim consider working in her father's business which operates in Linstead. I find that this is an unworkable arrangement having due consideration to the fact that the children are currently settled in Kingston and the journey to and from Linstead is not one which is feasible with two small children to tend to. It is noted that Mrs. Kim will now have to plan her life with her two children and consider how best to support them and herself.

[54] I have reviewed the list of expenses Mrs. Kim has offered for herself and find that these are reasonable and can be afforded by Mr. Kim. Therefore, I find that the sum of 200,000.00 is a reasonable sum for maintenance of Mrs. Kim on a monthly basis for two years or until determination of the marriage whichever comes first. This would be an amount which would assist with her living expenses and also provide her with compensation based on the loss of the income from the SNS business venture.

C. *Property Interests*

[55] Throughout the course of their relationship, the Kims have endeavoured to invest in business ventures/ property which they thought to be beneficial to their family.

In particular, they have bought Property #1 which now houses the supermarket on the lower level and a family dwelling on the upper level and Property #2 which seems to be used primarily as a warehouse/ storage unit for goods that cannot be accommodated in the supermarket itself.

[56] PROSA provides for the division of matrimonial property; particularly, the family home and other property acquired throughout the duration of the marriage. In this instance our first hurdle is that of determining whether or not Property 1 can rightly be considered as the Family and then depending on the outcome, determine how it ought to be divided based on the propositions of the act. We are also left to determine the interest each party has in Property 2 and SNS club.

[57] Of particular importance is the definition of Family Home as expressed by PROSA in section 2(1). It states that:

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

[58] Further, the act goes on in Section 6 to express how the Family Home ought to be divided after the determination has been made as to its existence. The section provides that:

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

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

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

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

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

[59] The act makes provisions for variation of the equal share rule by providing in section 7 that:

7.-(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, 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.*

[60] PROSA also makes provision for the division of property other than the Family Home. In section 14, the act provides that:

14.--(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*
- (c) 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 co-habitation;*
- (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)(u), "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.*

[61] Also PROSA makes provision for the alteration of interests in an property in which one or both spouse has an interest. Section 15 provides:

15.--(1) *In any proceedings in respect of the property of the spouses or of either spouse (other than the family home), the Court may make such order as it thinks fit altering the interest of either spouse in the property including-*

(a) an order for a settlement of property in substitution for any interest in the property;

(b) an order requiring either or both spouses to make, for the benefit of either or both spouses, such settlement or transfer of property as the Court determines; or

(c) an order requiring either or both spouses to make, for the benefit of a relevant child, such settlement or transfer of property as the Court determines.

(2) The Court shall not make an order under subsection (1) unless it is satisfied that it is just and equitable to do so.

(3) Where the court makes an order under subsection (1), the Court shall have regard to-

(a) the effect of the proposed order upon the earning capacity of either spouse;

(b) the matters referred to in section 14(2) in so far as they are relevant; and

(c) any other order that has been made under this Act in respect of a spouse.

[62] With these provisions of law in mind, the interest in each property will be determined in turn.

(1) Property #1

[63] In order to make a determination on the beneficial interest the parties have in Property #1, there are two broad issues to be considered, these being:

(a) Whether the entire property can be classed as the family home based on the definition of the term in PROSA;

(b) Whether talk of Elder Young Kim's investment has merit and ought to be considered in the circumstances as affecting the interest of the parties in the property

(a) *Issue A*

[64] PROSA defines the Family Home as:

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

[65] It is notable that PROSA does not define dwelling house. The Blacks Law Dictionary (*Bryan Garner, 7th Edition, St Paul, Minnesota, 1999*) defines a dwelling house as:

The house or structure in which a person lives; a residence or abode

In keeping with such a definition, it is possible for Property 1 to be described as a dwelling house. I accept that this definition accomplishes the purpose of PROSA as I believe that the act is meant to be more liberal its scope in order to facilitate a spouses claim to property.

[66] The definition of Family home also brings the supermarkets operations into question as it must be classified as an '*...improvement appurtenant to the dwelling house... used wholly or mainly for the household.*' In the case of **Reid v Reid [2014] JMSC Civ. 110**, Dunbar-Green, J applied the definition of appurtenant as defined by Speight J in **Jorna v Jorna (1979) 2 MPC 104**:

"Appurtenant" does not seem to lend itself to rigid definition but instead seems to involve a value judgment based on a number of factors. These factors include the extent to which there is an absence of any physical division such as a fence or wall between the dwelling house and the extras in question, whether the dwelling house and the extras were acquired at the same time and for the same general purpose, whether they are physically contiguous or at least in close proximity to each other, whether they are laid out in a manner suggesting a physical relationship with each other, the previous history of the two properties as separate or combined, the general attitude of the parties to the two properties as separate or combined, whether the extras have had any use or are likely to have any use for any purposes other than that of the household, and whether the extras are on the same certificate of title.

The supermarket and residence are on the same building therefore I accept that the supermarket is appurtenant to the residence. The real issue is whether the supermarket's operations can be classified as being '*used wholly or mainly for the household.*'

[67] In the case of **Jack v Jack** [1987] 1 NZLR 205, involved a two-storey building, the upper levels being used as the family home and the lower level being rented in order to supplement income to run the home. The question the court had to consider was whether the entire premises could be deemed as the family home. It was held that lower level was not apart of the family home and the fact that the rental income was used to supplement the income used to run the home did not mean that the lower level was used for the household.

[68] In particular Lord McMullin said:

“It is possible to think of a number of instances in which a part of premises claimed to be the matrimonial home is used other than as the family residence or where part of the land on which the acknowledged family home is built is used other than as a family residence. ... Whether in one case the dwelling house with all the land around it is to be treated as the matrimonial home notwithstanding that it is used in part for other purposes, or in another case what buildings and what part of the land are to be treated as the family home, will fall to be decided on their facts. The possible factual situations are many. I think it would be unwise to attempt to lay down a general rule to cover all cases....”

[69] I accept this thought that each case ought to be weighed on their own facts. As such I given consideration to:

- (a) Property #1 houses one two storey building which houses the residence on the upper level and the supermarket on the lower level. This property does not have any other buildings attached or on the land and therefore there is only one certificate of title.
- (b) There is no evidence to suggest that the upstairs dwelling is habitual or used only for convenience. It is noted that the supermarket was on the premises first and later the couple completed renovations to include a dwelling area upstairs. Since moving in, the family has resided here. For the most part, the children were brought up in this space and all their clothes, toys and bedding are in this space. There are six bedrooms. When the Kims lived together the couple would occupy the Master bedroom, the children would

each have their own bedrooms and bathrooms and the nanny would have her own room as well.

(c) The ground level of Property #1 houses the supermarket. The couple operates a wholesale and retail business where they trade in food and household items. The profits of the business were used to fund the household and it is easy to infer that the business would have literally fed the family. The home and business are inseparable as there was no evidence of them being treated as separate. It is noted that the utilities or any other like bills were not distinguished.

(d) Furthermore, both parties refer to the property as the family home and thereby conveying their intention that the entire property ought to be treated as the family home.

[70] Therefore, I accept that the supermarket was used wholly for the household. This case is different from that of **Jack** because in that case only the rental income benefited that family and there was no consideration of the property being apart of the home. In this case, the Kims have at all times treated with the property as though the entire property were their home and as such I find that Property #1 is the family home.

[71] There is no evidence that the family home was inherited by one spouse or that it was owned by one spouse before the marriage. It is also clear that the marriage is not one of short duration. In the circumstances, I find that Mr. and Mrs. Kim have an equal share in the family home in keeping with section 6 of PROSA as there is no need to vary the equal share rule.

(b) *Issue B*

[72] Another consideration that has come to the fore is the fact that Elder Young Kim has asserted in an affidavit that upon the couple's marriage, he '*loaned*' then money to purchase the property and start the business. There is affidavit evidence

to suggest that when the supermarket was being renovated, he was present at intervals to see to the work being done on the premises. Though there is some dispute as to the sum, there is no doubt that Elder Young Kim now wants to claim an interest in the property or be reimbursed the sum which he has says lent. There are a few sub-issues which arise out of this element; these being:

(a) Can a resulting trust be created in the circumstances to create an interest for Elder Young Kim;

(b) Can a presumption of advancement arise to rebut the resulting trust even though moneys lent can be considered as a tidy sum;

(c) How does this outcome affect the property interest holdings in Property #1

[73] In the case of ***Re Vanervell Trustees Ltd (No 2)*** [1974] EWCA Civ 7, it was held that a resulting trust is formed in circumstances where the legal estate rests with A who in law is merely holding this interest on behalf of B because he provided the purchase moneys. It stands to reason therefore, that if Elder Young Kim produced the whole sum for the purchase of the property, a resulting trust could be created in his favour.

[74] This can be rebutted by a Presumption of advancement or in other words, the fact that the money was a gift to his son and his family. In the case of ***Clover Robinson v NCB*** [2015] KMCA Civ 3 it was held that a presumption of advancement can exist been immediate family members and not only in the case of husband and wife. Therefore, I accept that a presumption could so arise on the facts presented.

[75] The next consideration is the sum which is at stake. It is noted that Elder Young Kim claims that he lent the couple \$500,000 United states dollars while his son states that only 3 million Jamaican Dollars was borrowed. I find that the sums being claimed by each individual is markedly different. I must point out that this claim is rather timely, only coming to the fore towards the end of the trial of this matter as it is said that Elder Young Kim has brought a claim. I find the circumstances

surrounding this loan to be spurious and suspicious at best; one which could have been colluded out of bad faith to deny Mrs. Kim an opportunity to lay a claim to the business which she has spent a considerable amount of time building.

[76] Needless to say, there is no evidence of this loan being one that the couple considered repaying. There is no evidence of this being a formal loan albeit such a tidy sum; being between 3 to what is now 65 million Jamaican dollars. There is not even evidence of a monthly payment towards this sum in the form of moneys being repatriated to Elder Kim even though the business was clearly making a profit. I therefore find that this was, if it existed, a purely familial gift to his son and his new family. Therefore, I will not take it into account in the division of matrimonial property.

(2) Property 2

[77] Property 2 is being used as a warehouse to store goods. Notably, a mortgage is registered against the title as such any order made in respect of this property will be subject to the lien against the property.

[78] Notwithstanding this, property 2 would warrant section 14 considerations that is it would be classified as property other than the family home. As such I have taken the following into contemplation:

(a) Again, the Kims have been married since 2007 and there is no indication that divorce proceedings have been put into motion though they have been separated since 2014. What is important in this determination is how long the couple has been cohabiting and building the union. It is this set of time and actions of each throughout in relation to producing benefits for the family that will count.

(b) A mortgage was taken out to finance the purchase of the property. The parties have agreed that the mortgage instalments are being settled from income derived from the supermarket; the business which both parties have

been working to build. It would be safe to say that since they both put in time and effort into building the business, this would equate to their contribution to the payment of the mortgage.

(c) I have noted that the certificate of title is registered in the names of Mr and Mrs. Kim as joint tenants. This I believe suggest the intention for them to hold the property together equally.

[79] I find that there is no reason to depart from the legal interest as recorded on the title for the property. Therefore, I find that Mrs. Kim has a 50% interest and Mr. Kim a 50% interest in Property 2. Their interest in the property is of course subject to the fulfilment of the mortgage.

(3) The Company

[80] SNS Club Limited is company incorporated in Jamaica by the couple. It issued 10,000,000 shares; of which the couple owns equal shares. The sub-issues are:

(a) whether or not the shareholdings in the company ought to be altered; and

(b) what was the parties' intention when allotting the shares;

[81] Section 15 of PROSA gives the court the power to treat with and alter interest in property should the circumstances so require. It is to be noted that this must be done only when it is just and equitable to do so. Naturally, in order to embark upon such an evaluation, each case turns on its on facts.

[82] In was noted in ***Gardner v Gardner** [2012] JMSC Civ. 54* the court assessed the conduct of the parties to determine their intentions in relation to the different company share holdings.

[83] In this case, the evidence placed before the court suggests that SNS Club Limited operates as the supermarket SNS Supermarket (now known as Betta Betta Supermarket) and owns motor vehicles. It is accepted that the company had

various accounts with National Commercial Bank (NCB) for which Mr. and Mrs. Kim were signatories. The evidence suggests that these accounts were used primarily for the operation of the supermarket and it is noted that they both played a role in the day to day operations of the business. There is no evidence to suggest that the business was meant to be controlled by one individual over the other. As noted earlier, several of the accounts which the business has with their suppliers are in fact in Mrs. Kim's name. So, although Mr. Kim tried to downplay Mrs. Kim's role in the day to day operations, it would appear based on the circumstances presented that she indeed worked in the supermarket continuously.

[84] It stands to reason that there is no ground which justifies the alteration of the beneficial interest in the company. Therefore, I find that Mr. and Mrs. Kim have a 50% interest in the company in keeping with their share holdings. In concluding, I find that Mr. and Mrs. Kim an equal beneficial interest in the company as illustrated in their share allotment.

CONCLUSION

[85] In conclusion, the orders granted are:

1. Custody orders

- (a) The Claimant is granted sole custody, care and control of Hannah Shai Kim and Joshua Jin-Young Kim;
- (b) The Defendant is granted supervised access to Hannah Shai Kim and Joshua Jin-Young Kim twice per month at a location to be approved by Mrs. Kim until further orders;
- (c) The Defendant, his servants or agents be restrained from coming within 100 yards of the Claimant, Jung Mee-Kim.

2. Maintenance Orders

(a) In relation to maintenance of Hannah Shai Kim and Joshua Jin-Young Kim, it is hereby ordered that:

- i. The Defendant is to pay the sum of \$300,000 per month to the Claimant's account at the Bank of Nova Scotia Jamaica Limited, New Kingston Branch Account # 50195/634535 as maintenance for the two children of the marriage;
- ii. This sum is to be paid on the 31st day of January 2016 and thereafter on the last day of each succeeding month until the children attain the age of 18 years or where the court orders otherwise.

(b) In relation to the maintenance of the Claimant, it is hereby ordered that:

- i. The Defendant is to pay the sum of \$200,000.00 per month to the Claimant's account at the Bank of Nova Scotia Jamaica Limited, New Kingston Branch Account # 50195/634535 as spousal maintenance;
- ii. This sum is to be paid commencing on the 31st day of January 2016 and thereafter on the last day of each succeeding month until the Claimant or the Defendant has obtained a Decree Absolute ending the marriage or for two years whichever comes first.

3. Property Orders

(a) In relation to property located at Wood Hall, Spalding P.O. in the parish of Manchester being property registered at Volume 1078 Folio 12 of the Register Book of Titles, it is ordered and declared that:

- i. The Claimant is entitled to a 50% and the Defendant a 50% interest in the Property;
- ii. The Defendant is at liberty to purchase the Claimant's interest in the property at the proportionate market value thereof. The Defendant shall exercise his option by notice in writing from his Attorney at Law to the Claimant's Attorney at law within 120 days failing which the property is to be sold on the open market and the proceeds shared in keeping with the party's interest in the property;
- iii. A reputable valuator is to be agreed and a valuation of the property done;
- iv. The cost of the valuation is to be borne equally by the Claimant and the Defendant;
- v. All taxes and cost associated with the sale and transfer of the Property shall be shared equally by the Claimant and Defendant; and
- vi. The Claimant's Attorney at Law is to have Carriage of Sale of the Property.

(b) In relation to property located at Spalding District, Spalding P.O. in the parish of Clarendon being property registered at Volume 1260 Folio 173 of the Register Book of Titles, it is ordered and declared that:

- i. The Claimant is entitled to a 50% and the Defendant a 50% interest in the Property;
- ii. The Defendant is at liberty to purchase the Claimant's interest in the property at the proportionate market value thereof. The

Defendant shall exercise his option by notice in writing from his Attorney at Law to the Claimant's Attorney at law within 120 days failing which the property is to be sold on the open market and the proceeds shared in keeping with the parties' interest in the property;

- iii. A reputable valuator is to be agreed and a valuation of the property done;
- iv. The cost of the valuation is to be borne equally by the Claimant and the Defendant;
- v. All taxes and cost associated with the sale and transfer of the Property shall be shared equally by the Claimant and Defendant; and
- vi. The Claimant's Attorney at Law is to have Carriage of Sale of the Property.

(c) In relation to the company SNS Club Limited, it is hereby ordered and declared that:

- i. The Claimant has a 50% interest and the Defendant a 50% interest in the company
4. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of this Honourable Court if either party is unable or unwilling to do so within 30 days of being given a request in writing.
 5. Liberty to apply
 6. Cost to the Claimant to be agreed or taxed.