



[2020] JMSC Civ 203

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV00096

**BETWEEN
AND**

**MARLENE MILLER
LEROY GRAHAM**

**CLAIMANT
DEFENDANT**

CHAMBERS

Ms. Vinette Grant and Mrs. Eileen Felix instructed by Margarett Macaulay for claimant.

Mr. Ravil Golding instructed by Lyn-Cook, Golding & Company for the defendant.

October 17, 2018, November 6, 2019, January 31, 2020, October 9, 2020.

CLAIM FOR 50% SHARE IN PROPERTY NOT THE FAMILY HOME- PARTIES COHABITING – WHETHER SPOUSES – TERMINATION OF COHABITATION - DIRECT AND INDIRECT CONTRIBUTIONS TOWARDS ACQUISITION OF PROPERTY NOT THE FAMILY HOME – PROPERTY RIGHTS OF SPOUSES ACT SECTIONS 13(1)(a), 4(1)(b), 14(2), 14(3) & 14(4)

HENRY-MCKENZIE, J

INTRODUCTION

[1] This matter was originally brought before the court by way of a Claim Form and Particulars of Claim, which were filed outside of the twelve months limitation period prescribed by the Property (Rights of Spouses) Act, (PROSA.) The claimant was granted an extension of time to bring the claim under PROSA, thereby allowing the Claim Form to be accepted as filed within the time period. However, on April 4, 2018, the Claim Form was ordered to be converted to the appropriate Fixed Date Claim Form, with an additional order requiring a supporting affidavit to be filed and served by April 20, 2018. The claimant was also granted permission to file and rely on a further affidavit to support her Fixed Date Claim Form.

[2] In the Fixed Date Claim Form and supporting affidavits, the claimant seeks a declaration that the defendant holds 50% share of land registered at Volume 1223 Folio 392 in trust for her, and in the alternative, an order that the defendant refunds to her the total sum of \$1,257,900.00 which she expended to her detriment. The breakdown of this figure is as follows:

- Preparatory School fees for the child Christina 2001-2006 \$675,000.00
- Payments towards mortgage from her salary \$519,900.00
April 2003-July 2008
- High School fees for Christina \$63,000.00

[3] The defendant filed affidavits in response disputing the claimant's alleged entitlement to 50% share in the land and her contribution towards the mortgage. As to the monies expended towards Christina, the defendant argued that this is the responsibility of the claimant as a parent, and as such, has asked the court to dismiss the claimant's application for the relief sought.

BACKGROUND

- [4] The claimant and the defendant met each other in 1986 whilst they were attending High School. They later became involved in an intimate relationship of longevity, spanning approximately 16 years. They started living together in 1992 in the parish of St. Catherine and thereafter they moved to several places in the parish of St. Andrew, up until 2008, when the relationship came to an end.
- [5] The union produced two daughters, Kimberly, born on the 8th October 1989 and Christina born on the 23rd April 1996. Both daughters resided with them up until the termination of their relationship in 2008.
- [6] The defendant at the material time was in the construction industry and had his own business, whilst the claimant was a secretary and worked from time to time with different companies. There is no contest to the fact that at all material times the defendant earned substantially more than the claimant and as a consequence, he bore most of the expenses of the family.
- [7] In early 2001 whilst the parties were still living together, the defendant purchased land in his sole name, and in and about 2003, he began to construct a dwelling house on the land. The land, subject of this claim, is registered at Volume 1223 Folio 392 of the Register Book of Titles, with civic address at 43 Lady Hamilton Drive, Chancery Hall, Kingston 19 in the parish of St. Andrew. The construction of this dwelling house was completed in and about 2016.
- [8] The claimant has brought this claim contending that she is entitled to 50% share of the value of the land, given the length of period of cohabitation between herself and the defendant and her financial and non-financial contributions to the property and to the union in general. The defendant refutes the claim and is opposed to the grant of any such order. The defendant's case is that all the money used to purchase the lot of land and to construct the dwelling house thereon, was from loans accessed by him and his personal funds and that the claimant did not

contribute in any way, shape or form, to the acquisition of the lot of land or the construction of the dwelling house.

Claim to interest in Land Separate from the Dwelling House

[9] Before dealing with the substantive issues under PROSA, I must address a point deserving of attention, that is, whether the dwelling house is separate from the land on which it stands. The claimant has made a claim for 50% interest in the land, separate from the dwelling house. Following from that, she has also sought an order for the land to be valued so as to determine its value separate from the dwelling house.

[10] Attention is drawn however to the principle “*quic quid plantatur solo, solo cedit*”, that is to say, “whatever is attached to the soil becomes part of it”. In practical terms, this would mean that if the house is permanently affixed to the land, then it would have become a part of it. However, the claimant has seen it fit to bring the claim in respect of the land only and has asserted no claim in respect of the dwelling house. This being the case, my task therefore, is to consider the claim as filed and to make a determination in respect of the claimant’s share, if any, in the land.

[11] I will now address the main issues.

THE APPLICABLE LAW AND THE EVIDENCE

[12] Essentially, the claim is being brought under PROSA and as such, the appropriate starting point would be a consideration of the relevant provisions under the Act.

[13] In the circumstances of this case where the claimant is alleging that she was in a common law union with the defendant, I will start off by looking at the definition of “spouse”. Under section 2 of PROSA:

“Spouse” includes-

(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;

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

immediately preceding the institution of proceedings under the Act or the termination of cohabitation, as the case may be.

It is also necessary to look at the meaning of “cohabit” under the Act.

“Cohabit” means to live together in a conjugal relationship outside of marriage and “cohabitation” shall be construed accordingly;

[14] Section 13(1)(a) of PROSA, entitles a spouse as defined under the Act, to apply to the court for a division of property upon the termination of cohabitation. Section 14(1)(a) empowers the Court to divide property described as a family home. In the circumstances of this case, it is not contented that the property in question was the family home, as it does not fall within the definition of family home under the Act. The relevant section therefore is 14(1)(b).

[15] Section 14 (1)(b) states:

14-(1) “Where under section 13 a spouse applies to the Court for a division of property the Court may-

(a)....

(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).

[16] Under section 14(1) (b) therefore, the family home is to be considered and treated differently from other property. It is the other property, not the family home, that

the court is concerned with in this matter. The section therefore allows the court to divide property other than the family home, as it thinks fit, taking into account certain specified factors. The factors referred to in accordance with section 14(2) 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 ...

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 circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

[17] The expression “contribution” as referred to in subsection(2)(a), is construed by section 14(3) as:

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 infirmed relative or dependent of a spouse;

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

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

i) enables the other spouse to acquire qualifications, or

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

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

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

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

h) the provision of money, including the earning of income for the purpose 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.

[18] With that said, firstly, to qualify for entitlement under PROSA, the parties must be proven to fall within the definition of spouse and so one of the pertinent questions to be determined in this claim, is whether the parties are spouses, so as to fall within the ambit of the legislation. This requires the claimant to therefore prove on a balance of probabilities, that (i) both parties were single, and (ii) they cohabited for at least five years.

[19] The undisputed evidence is that the parties were once involved in an intimate relationship which produced two children, namely Kimberly and Christina. There is no dispute that the parties lived under the same roof at various places from 1992 to October 2008, being approximately 16 years. It is further not in issue, that when the relationship commenced, both parties were single and that they remained

single up until the relationship ended in 2008. However, there seems to be some dispute on the nature of their relationship while living together. This dispute is centred around whether they cohabited, that is to say, whether they were in a common law union as the claimant puts it, or simply lived together as man and woman under the same roof, as the defendant asserts.

[20] It is widely accepted, that the expression 'spouse', is not only limited to married couples, but captures other domestic arrangements such as common law unions of a certain duration. Now the courts have gone some distance in fine-tuning the indicia of a common law union. It has been described as a relationship that bears the likeness to marriage, in that, the interaction between the parties must be such as if they are married to each other. In ***Millicent Bowes v. Keith Alexander Taylor***

2006HCV05107 (January 19, 2009), McDonald-Bishop, J accepted some 'signposts' of cohabitation distilled by Tyner, J in ***Kimber v. Kimber [2000] 1 FLR 384***, which offer guidance in determining the nature of a parties' relationship. They were identified as:

- i. Living together in the same household.*
- ii. A sharing of daily life.*
- iii. Stability and a degree of permanence in the relationship; that is, not a temporary infatuation or passing relationship such as a holiday romance.*
- iv. Finances, that is to say, is the way in which financial matters are being handled an indication of a relationship?*
- v. A sexual relationship. vi. Children.*
- vii. Intention and motivation viii. The 'opinion of the reasonable person with normal perceptions'.*

- [21] Ms. Grant in her submissions argued that there is clear evidence from which the court can conclude that the parties were cohabiting as defined under PROSA. The claimant's evidence is that throughout the 16 years of living under the same roof at numerous places, she shared a common law union with the defendant. She indicated that this union did not come to an end until the defendant left their shared rented apartment at Surbiton Road in St. Andrew in 2008, after he became intimately involved with another woman.
- [22] On the other hand, the defendant's evidence as to whether the parties were cohabiting, is at best conflicting. The defendant, in his affidavit filed on October 12, 2018, accepted that the parties were in a common law union which continued until October 2008. However, he seems to deny in other evidence presented by him, that the parties shared a common law relationship. In an earlier affidavit filed on April 12, 2017, the defendant accepted that the parties lived together under the same roof from 1992, but denied that they shared the same bedroom at any of the addresses at which they lived. Indeed, the defendant went on to assert in cross-examination, that he and the claimant had their separate rooms at all times, whilst at the same time admitting in cross-examination, that they had once been in a common law union.
- [23] The defendant was questioned in cross-examination about the length of time he was in the common law union with the claimant, but he indicated he was unable to estimate the time period. He further indicated that he did not see the relationship at the time as a common law union. When questioned about his admission in his affidavit filed October 12, 2018, that he was in a common law union with the claimant, his response was that the affidavit was vague and misleading and that he did not admit that a common law union existed. He asserted that there were shortcomings that made the relationship not come within the category of a common law union. When asked in re-examination by his attorney, Mr Golding what his definition of a common law union was, he responded, "*when two parents or two people share or participate in whatever the circumstances might be, financial, support of children, emotional, helping with the bills and playing a more active role*

with the children, if there are children of the union.” His response says to me, that he appreciates what a common law union is. I note with interest however, that in the submissions filed by his attorney on behalf of the defendant, it was acknowledged that the claimant would fall within the definition of spouse under section 2(1) of PROSA.

[24] In contrast, the claimant was at all times firm and resolute in her position that the parties were in a common law union. However, it is quite obvious that the defendant was less than forthright as to the nature of this relationship and was evasive, his answers constantly changing from a denial to an admission. This wavering tone in his responses, shows an attempt to mislead the court. This had the effect of undermining his credibility and the reliability of his evidence. I find the claimant’s evidence to be more credible and convincing. I therefore, accept the claimant’s evidence in relation to the parties’ relationship.

[25] The evidence of the claimant has demonstrated that the parties’ lives were intertwined. Not only did they live together for approximately 16 years, sharing the same bedroom, but the union produced two children for whom they were both responsible. The claimant gave evidence of the sharing of tasks and obligations by the parties, with her taking on the cooking, washing, ironing and cleaning of the house on several occasions. She admitted that the defendant earned a higher salary than she did, and that he bore most of the financial responsibilities. As such, he paid the helper who worked three days a week, paid the utility bills for the most part, paid the rent, purchased food, paid in part for the children’s education, paid their medical expenses, paid for their trips overseas, for their clothing and provided them with lunch money. She however, pointed out that this did not mean that she too did not have to bear expenses relating to running of the household and in relation to the children, but acknowledged that it was on a small scale when compared to the defendant’s contribution. She alleged paying the utility bills on occasions, assisting at times in purchasing food and indicated that she was

responsible for paying Christina's preparatory school fees and even contributed to her high school fees.

[26] The assertions of the claimant are materially substantiated by the defendant, even in the face of the challenge by him that he did not share a common law union with her. He acknowledged that they both performed household duties such as cleaning the house and cooking and that they both looked after and provided for the children and assisted them with their school assignments. However, in his affidavit filed on May 19, 2016, the defendant disputed the claimant's assertions that she paid any utility bills, bought groceries or even spent on the children. In his viva voce evidence however, he indicated that the claimant did in fact contribute to the utility bills, when he did not pay it in full. In a later affidavit filed on April 12, 2017, he also contradicted himself, when he stated that the claimant was only responsible for the rare and insubstantial expenses that she contributed towards the children. He, denied that the claimant was solely responsible for Christina's school fees, as alleged by her, specifying that she only paid portions of the fees and any outstanding amount there was, he had to pay on occasions when the claimant could not.

[27] Overall, there are strong indicators that there was a mutual involvement of the parties in each other's daily lives. The evidence shows the relationship of two consenting adults living together for over a decade, raising their two children, making a life together in numerous places until they finally settled at Surbiton Road, where they shared the responsibilities that come with living together in a union. I am of the view that the evidence presented by both parties is indicative of a common law union. The defendant in denying this union, has failed to provide any explanation as to why the parties had continued to live together for so many years at different locations, if not being in a common law union. It is difficult for the court to believe in these circumstances, that they were simply sharing the same space as man and woman without any further involvement. There has further been no evidence, that the claimant or defendant presented any other party as his or

her spouse. In light of the evidence of the parties sharing their daily lives and responsibilities, I am convinced that over the period in question, the parties cohabited in much the same way as if they were husband and wife and were therefore spouses within the meaning of the Act.

[28] Having been satisfied that the parties fall within the definition of spouses so that they come within the jurisdiction of PROSA, the task at hand now, is to determine the parties' interest in the land. The relevant factors to be considered are at sections 14 (2)(a), (b), (c), (e) and sections 14 (3)(a), (b), (e), (h). Section 14(4) is also pertinent. I will first turn my attention to section 14(2)(a), that has to do with the contribution of each spouse to the acquisition, conservation and improvement of the property.

[29] It is the claimant's evidence, that around 2001 while both she and the defendant were still living together at Surbiton Road, the defendant purchased the land registered at Volume 1223 Folio 392 in his sole name. On the evidence of the defendant, the purchase price was Three Million Dollars (\$3,000,000.00). This was funded by the defendant, substantially from a mortgage with Victoria Mutual Building Society for Two Million One Hundred and Thirty Thousand Dollars (\$2,130,000.00) and to a lesser extent his personal funds. This evidence was unchallenged.

[30] The purchase came as a surprise to the claimant, she having become aware of it only when the defendant informed her after the fact. Though she had no knowledge of the purchase, she still alleged being involved in the defendant acquiring it. She indicated that she contributed directly to the mortgage payments from rental allowance cheques drawn from her salary which were put in the name of the defendant. These cheques were in the sum of Ten Thousand Dollars (\$10,000)

per month, up to Twenty Thousand Eight Hundred Dollars (\$20,800.00) and spanned the period 2003-2008. She however, admitted in cross-examination, not being able to state the amount borrowed by the defendant, or to correctly state the cost for which the defendant purchased the property. She assessed her

contribution by way of these cheques, as being a total of three hundred and sixty five thousand dollars. (\$365,000.00). The defendant whilst challenging that the cheques were the claimant's contribution towards the mortgage, indicated in his affidavit filed on October 12, 2018, that the claimant in fact, over a period of three years, contributed a total of Four Hundred and Ninety-nine Thousand, Five Hundred Dollars (\$499,500.00) towards the rent.

[31] The claimant also mentioned in her evidence, an occasion when she was asked by the defendant to pay the legal fees associated with the land transaction, but said that the money she advanced for this purpose, was used instead to pay two months' rent in order for the defendant to pay the legal fees.

[32] Even more so, it is the claimant's evidence that she had to take on additional expenses and responsibilities whilst the parties lived together, so as to allow the defendant to focus on the construction of the house, as it was intended to be for the benefit of the whole family.

[33] The claimant was challenged, as I already intimated, in her claim that she played a role in the acquisition of the land and the construction of the house. In fact, the defendant asserted, that the claimant made no financial contribution directly or indirectly to the acquisition of the land. He indicated that the mortgage payments and all other payments associated with its acquisition were made solely by him, without any assistance from the claimant. He asserted that the cheques given to him to be encashed were never used towards mortgage payments, but were used for the payment of rent, and too, for the claimant's own use and benefit. He further asserted, that though the claimant had contributed to the rental payments, this only made up less than one-third of the total rent and this was not received every month. The claimant herself had agreed that the cheques would not cover the full rent, but only one-third of the amount for the month, but she remained adamant that the cheques were used for the payment of the mortgage. I must pause here to say that the claimant has provided no proof that the rental cheques were used towards the mortgage. The evidence of the monies being used towards the rent is more

convincing. I am, therefore, more inclined to accept the evidence of the defendant, in the absence of any evidence to the contrary, that the rental allowance cheques were used towards the rent, when given to the defendant.

- [34]** The defendant, in order to bolster his argument of being solely involved in the process of the acquisition of the land and the construction of the house without any participation of the claimant, indicated that she did not set foot on the land, nor was she ever taken to the property by him. The claimant refuted this, and indicated that she went to the property five times, three times with the defendant and two times on her own. He also insisted that the claimant had never cooked a meal for the workmen. This the claimant denied. Further, that she never purchased any materials to build, paid any labour costs, paid any utility bills or performed any task so that he could pay the said mortgage or do anything in relation to the said property.
- [35]** When I assess both accounts, I find the claimant to be more credible than the defendant, given the several inconsistencies in the defendant's account. The claimant has shown that she was more forthright and unpretentious in giving her evidence. I find that she was fair in highlighting the responsibilities undertaken by her as opposed to those by the defendant. She indicated where the defendant strengths were in the relationship and where her shortcomings existed. Her demeanour also impressed me. Overall, I find her evidence to be more reliable. The defendant, on the other hand, sought to paint a picture where he alone made any substantial input towards the family and that the claimant's contribution was so insignificant, almost to the point of non-existence. I found the defendant to be insincere at times, and his evidence far less reliable.
- [36]** However, given the dichotomy between the parties' evidence, I have to carefully scrutinize the evidence and do my own assessment of it, paying keen attention to factors such as the arrangements that existed between the parties and their share of responsibilities in the union, in order to ultimately determine the claimant's share, if any, in the land.

[37] There is no doubt that the defendant carried the major financial responsibility of the family. I also accept that as it relates to the acquisition of the land and construction of the house, the defendant bore the financial burden and by himself did all the necessary work for the completion of the house. I am mindful however, that the claimant's claim is only in respect of the land and not the house. I find that the claimant made her input to the expenses of the family, albeit on a much smaller scale than the defendant. I must bear in mind that her income as a secretary was much less than the defendant's, he being a construction engineer, but from her obviously small income, she still contributed. She had paid on occasions the rent, utility bills, bought groceries and had also incurred expenses in relation to the children. I accept that the claimant had the responsibility of her younger daughter's school fees and that she contributed partly to other expenses in relation to the children. Mr. Golding was emphatic in his cross-examination of the claimant and in his submissions, that it is the duty of both parents to look after their children and to ensure that they have a good education, so the court should not countenance the claimant's emphasis on this, or her desire to be compensated for sums she may have expended in this regard. I would say however, that the law as it now stands under PROSA, indicates that the court in assessing the contribution of a party in relation to the division of property, should have regard to factors such as the care of any relevant child. I am constrained therefore, to consider this as part of the claimant's contribution. I find that the claimant's contribution, no matter how small, assisted the defendant and enabled the defendant to be better able to pay the mortgage on the property.

[38] I find however, that the majority of the claimant's contribution, seems to have been be centred around household activities and the caring of the children. Both parties however, played a significant role in the upbringing of their two children. Both assisted with their assignments, took care of them when they were ill, prepared their meals as well as other parental duties. The parties admitted to employing the services of a helper to assist with household duties, however, her services were only rendered at an average 3 days per week. During those periods in which the

helper did not work, the household duties would have had to be performed, whether by the claimant or the defendant. I am, however more inclined to believe that these activities were mostly rendered by the claimant, as she said. I also consider that the union was of longevity, spanning some 16 years and that the claimant would have dedicated years of her life to the relationship and to taking care of the family. All of this cannot be discounted, and at times can be immeasurable.

[39] I am mindful that section 14(4) of PROSA stipulates that there shall be no presumption that monetary contribution is of greater value than non-monetary contribution. However, from all indications, the defendant was the provider for his family. Financially, he contributed far in excess of what the claimant did towards his family. He himself also made non-monetary contributions to the well-being of the family. As far as the acquisition of the land is concerned, he put himself in millions of dollars of debt to purchase it and had the responsibility of paying the mortgage. When I consider all the relevant factors and the circumstances of this case, I am of the view that the ends of justice would best be served, by dividing the land, the subject of the claim, in such a way as to reflect the vast financial contributions made by the defendant, when compared to that of the claimant, to the acquisition of the property and to the family unit in general. However, the claimant's contribution ought not to be discounted. I am content in all the circumstances, in finding that the claimant is entitled to 30% interest in the land.

[40] I therefore make the following declarations and orders:

THE ORDERS

- (1) It is declared that the claimant is entitled to 30% interest in the land registered at Volume 1223 Folio 392 of the Register Book of Titles.
- (2) The land, separate and apart from the dwelling house, is to be valued by a valuator to be agreed between the parties, and if the parties cannot agree

to a valuator, the Registrar of the Supreme Court is hereby empowered to select one, on the application of either party. Both parties are to bear equally the cost of the valuation.

- (3) The defendant is to have first option to purchase the claimants 30% share in the land, such option to be exercised within 120 days of the date of this order.
- (4) If the defendant fails to purchase the claimant's 30% share in the land, then the property is to be sold on the open market and at the end of such sale, the defendant is to pay to the claimant the value of the 30% share in the land within 14 days of the completion of the sale.
- (5) The Registrar of the Supreme Court is authorized to sign all and any documents, to give effect to this order, if either party refuses to sign, within fourteen (14) days of being requested to do so.
- (6) No order as to costs.
- (7) Liberty to Apply.
- (8) The execution of the Judgement is stayed for a period of 4 weeks from the date of this order.

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Hon. G. Henry- McKenzie