[2020] JSMC Civ. 215

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV00001

BETWEEN	**KAREEN JOHNSON SHIRLEY**	**CLAIMANT**
AND	**COURTNEY GEORGE SHIRLEY**	**DEFENDANT**

IN CHAMBERS

Mr. Curtis Daniel Cochrane, Attorney-at-Law for the Claimant.

Ms. Vinette A. Grant, Attorney-at-Law for the Defendant.

Heard: September 23, 2020 and October 30, 2020

Matrimonial Property - Property Rights of Spouses Act - Home acquired by one spouse before marriage - One spouse resident overseas but stays at home from time to time - Whether home the family home - Whether there is an application under section 7 (1) to vary the equal share rule - Section 12(2) - Date on which share is to be determined - Subsisting mortgage.

C. BARNABY J, (AG)

INTRODUCTION

[1] The Claimant and Defendant were married on the 24th August 2013 and are said to have been divorced on the 10th August 2017 by way of Final Judgment for Dissolution of Marriage obtained in the United States. It remains unchallenged that the Claimant became aware of that judgment when the Defendant filed evidence in these proceedings on 10th June 2019.

[2] Before the parties were ever married however, they had a history some six years in the making. Two of those years were while the Defendant was a married man, which led to the concession at trial that the parties were never common law spouses.

[3] The parties disagree as to the occasion when they first met. The Claimant puts it at late December 2006 while the Defendant contends that it was in the summer of 2007. As it transpires, nothing turns on this particular dispute. It is sufficient to say that having spent less than a day with the Claimant on a previous occasion, the Defendant, who was then in the United States but desirous of purchasing Lot 117, 19 Johnson Crescent, Tryall Estate, Spanish Town, St. Catherine, asked the Claimant to have a look at it. She looked and she liked it.

[4] In early 2008, the Defendant completed the purchase of the property ("Tryall") by way of a mortgage, which has always been and continues to be serviced by him. The property is registered at Volume 1026 Folio 266 of the Register Book of Titles in the Defendant's sole name.

[5] Several months later, in September 2008, while the Defendant was on a visit to Jamaica, the Claimant and her daughter moved into the house at Tryall. From that date until April 2015 when the parties had a quarrel, the Defendant maintained the Claimant and her daughter financially. The Defendant is not the daughter's father and there is no claim that she was accepted by the Defendant as a child of the marriage.

[6] The quarrel between the parties occurred whilst the Defendant was on a visit to Jamaica and was resolved while he remained on the island. On his return to the United States however, he called the Claimant to advise that their marriage was over. The Claimant tried to call thereafter but the Defendant never answered the phone. April 2015 was the last time the parties spoke.

[7] During the marriage and up to April 2015, the Defendant visited Jamaica once annually for about two weeks. On each visit, the Defendant spent time at Tryall,

as well as another home owned by his family in Kentish. The Claimant accompanied the Defendant to Kentish on some of his visits there but preferred to stay at Tryall. Prior to their marriage, the Defendant would come to Jamaica once per year for most of the years, he knew the Claimant, and they conducted themselves on the same basis.

[8] The Claimant continues to live at Tryall with her daughter but their occupation was threatened in June 2018 when the Claimant discovered a notice to quit the premises on the entrance to the house. The notice required her to deliver up possession of Tryall as a *"licensee"* by 13th July 2018 and *"to leave same in the condition in which it was when [she] began living there*." In December 2018, she was served with proceedings issued out of the St. Catherine Parish Court for recovery of possession of Tryall.

[9] By her claim, which proceeds with the permission of the Court pursuant to section 13 of the *Property Rights of Spouses Act (PROSA)*, the Claimant seeks a declaration that the parties are equally entitled to a fifty percent 50% share in Tryall. She contends that it is the family home. She also seeks consequential orders, which would enable realisation of their respective declared interests and costs. She does this by way of an Amended Fixed Date Claim Form filed on 12th August 2019 and supported by evidence on affidavits filed on the 2nd January, 12th August, 29th July 2019 and 28th July 2020.

[10] The Defendant answers the claim by way of affidavits filed on 10th June 2019 and 21st July 2020. He disputes that Tryall is the family home and prays that the Court refuses the orders being sought by the Claimant.

[11] At the hearing of the claim on the 23rd September 2020, both Defendants attended and were cross examined. At the close of oral submissions, judgement was reserved to today's date.

[12] The following three issues were regarded as dispositive of the claim.

(i) Is Tryall the family home?

(ii) Is the Claimant's share in the family home to be determined in accordance with section 6 or 7 of the *PROSA*?

(iii) At what date should the Claimant's share in the family home be determined?

[13] Having considered the evidence and the applicable law, I have concluded that Tryall is the family home for the purposes of the *PROSA,* notwithstanding the infrequency of the Defendant's visits to Jamaica and the length of time spent there on each occasion. Additionally, there being no application by the Defendant to vary the equal share rule, the Claimant is entitled to a fifty percent (50%) share in Tryall in accordance with section 6 of the *PROSA,* which share is determined as at April 2015.

APPLICABLE LAW AND ANALYSIS

Is Tryall the family home?

[14] It was submitted by Counsel for the Defendant that the fact of the latter's citizenship and permanent residence in the United States of America and his approximate two weeks stay at Tryall on each of his visits in 2013, 2014 and 2015, does not admit of a finding that Tryall was the family home of the parties for the purposes of *PROSA*. I do not find favour with the submission.

[15] The term "family home" is helpfully defined at section 2 of the *PROSA* as meaning

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

[16] In light of the concession of Counsel for the Claimant that the parties were never in a common law relationship, the parties' spousal relationship for the purposes of the *PROSA* is therefore referable to their marriage, which was solemnized on the 24th August 2013.

[17] The Defendant, in resisting the Claimant's claim that Tryall was the family home, contends that when he purchased the property in 2008 he intended it to be used as a rental property.

[18] It is not disputed that when the Claimant moved into Tryall in 2008 she occupied the master bedroom and bathroom; and that the other two bedrooms were occupied by a tenant, Ms. Jean. The only facility which the Claimant and Ms. Jean shared was a kitchen. With the exception of two chairs, which were purchased by the Claimant, the Defendant bought furniture including a bed, refrigerator, stove and washing machine to enable the Claimant to settle into the house.

[19] On the Defendant's evidence, about a month after moving to Tryall, the Claimant quit her job. In consequence, she was permitted to use the rent from the tenant to maintain herself and send her daughter to school. This arrangement continued until the tenant removed from the premises in 2012.

[20] The parties married the following year on the 24th August 2013. During the marriage, no part of Tryall was rented. In fact, after the tenant's departure in 2012, the Claimant's mother who was experiencing difficulties, as well as her brother, were permitted to live at the premises rent free, paying only for utilities. They continued to live there until 2015 when the parties fell out and the Defendant asked them to remove.

[21] On the Defendant's own evidence, he came to Jamaica in 2013, 2014 and 2015. His visits were usually ten to fourteen days long. On those occasions, he stayed at Tryall. When he married the Claimant whilst on one such visit to Jamaica in 2013, he spent most of the time with her at Tryall and some time in Kentish

District. The Claimant had gone to Kentish with him a few times. In the years 2014 and 2015 when he visited, he spent approximately two nights and most of the daytime at Tryall and the rest of the time in Kentish District. Again, the Claimant went with him a few times. It was the common evidence that the Claimant did not like Kentish. Further, she was never invited to live and had never lived there. For her part, the Claimant was unable to say how much time the Defendant spent at each place but it was her evidence that he slept and ate at Tryall on his visits to Jamaica. This remains unchallenged.

[22] On the Defendant's account, he only kept a few items of clothing at Tryall, which he would usually give to the person who cuts the yard. It was his evidence that he kept no personal items there. The Claimant says otherwise. It is her evidence that he had a lot of clothes at Tryall which he gave away when he went there in 2017 and that he had other personal belongings there. The veracity of either account remained untested during cross examination but I am inclined to believe the Claimant that the Defendant kept clothes and other personal items at Tryall over the course of his visits.

[23] In any event, as obtained before the parties were married, the Defendant continued to maintain Tryall, the Claimant and her daughter financially up to 2015. It is also the Claimant's evidence that the Defendant generally referred to Tryall as *"our house"* and that she has accordingly tried her best to take care of the property over the years. She freely admitted that she made no financial contributions to the acquisition or maintenance of the property.

[24] It is also the Claimant's unchallenged evidence that the Defendant, in response to her father's suggestion that she should work, had indicated in 2014 that he did not want her to work, as she would be going to the United States soon. She said the Defendant had started the filing for that purpose and she had done the medical. When she went to the United States Embassy however, she was told that the Defendant had withdrawn the petition.

[25] There is no dispute that Tryall which was registered in the sole name of the Defendant was acquired by him by way of a mortgage which still subsists; that it was purchased before the parties were married; and that the Claimant made no financial contribution to its purchase and maintenance from September 2008 when she moved in up to April 2015. The inescapable conclusion on these facts is that Tryall is wholly owned by only one spouse, the Defendant.

[26] It was conceded by Counsel for the Defendant in her written submissions that the only place that the parties ever stayed whilst man and wife, was Tryall. To qualify as the family home, Tryall must have been *"… used habitually or from time to by the spouses as the only or principal family residence…"* It is my view, that in requiring that use of the residence as the only or principal family residence be "habitual" or "from time to time", the legislature has made it clear that the determination of a residence as the family home will not be defeated by the lack of joint permanent use by the spouses.

[27] A man and woman are permitted to arrange their lives as they see fit; and I do not believe it is unusual for spouses who live in separate jurisdictions to arrange themselves as the parties did in this case. The Defendant, as the financially independent spouse, who was able to travel to and from Jamaica, would visit the Claimant as and when he could. When he visited, he stayed at Tryall. The fact that he was not a resident of Jamaica or that his stays at Tryall lacked the permanence of other residential arrangements in some marriages does not prevent a conclusion that it was the family residence. If not habitually, it was certainly used from time to time by the parties as the only marital or family residence.

[28] In addition to its use habitually or from time to time, in order for Tryall to qualify as the family home, it must also be *"…used wholly or mainly for the purposes of the household".* Up to 2012, a part of the property was rented but the income therefrom was used to maintain the Claimant, her daughter and to meet the expenses at Tryall. During the marriage, the property was never rented. It was

occupied by the Claimant and her daughter and at one point, her mother and brother. The Claimant, as the Defendant's wife, was kept comfortable with a roof over her head at Tryall and it was the only place where the parties lived together when the Defendant was in Jamaica. He slept there, ate there and had clothes and personal belongings there. There is no evidence that he was deprived of any of the benefits of married life when he stayed at Tryall.

[29] In all the foregoing premises, I find that Tryall was the family home, it being the dwelling house wholly owned by the Defendant; used habitually or from time to time by both parties during the marriage as the only family residence or marital home; and used wholly or mainly for the purposes of the parties' household.

Is the Claimant's share in the family home to be determined in accordance with section 6 or 7 of the PROSA?

[30] The Claimant's claim is that she is entitled to a 50% share of the family home, pursuant to the equal share rule at section 6 of the *PROSA*. It was contended by Counsel for the Defendant that there was an application in substance, if not in form, for the court to depart from that rule and proceed in accordance with section 7 of the Act. In this regard, she referred to the identical prayer which appears in the final paragraphs of both affidavits filed by the Defendant in this matter which read:

> *"That in the premises I humbly pray that this Honourable Court will refuse to grant the Orders in the Claimant's Fixed Date Claim Form filed herein on January 2, 2019."*

[31] I am unable to agree with Ms. Grant's submission that the prayers which follow the Defendant's averments, which were aimed at persuading the court that Tryall was not the family home, are in substance applications for variation of the equal share rule.

[32] Section 6 provides in part,

> *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.*

Sections 6(2), 7 and 10 are irrelevant to the instant enquiry and accordingly are not reproduced.

[33] The claim commenced on 2nd January 2019, some time after the Defendant is said to have received Final Judgment for Dissolution of Marriage in the United States. This discovery was made by the Claimant when the Defendant filed affidavits in these proceedings. Foreign decrees are recognizable where the requirements of section 24 of the *Matrimonial Causes Act* have been met. No arguments were made on the recognition of the decree but in any event, the matter may be disposed of without that particular issue being probed. The Claimant's entitlement under section 6 remains unchanged whether on the basis of separation where there is no likelihood of reconciliation or on the grant of a decree of dissolution of marriage. The starting point in either case is that each party is entitled to a one-half share of the family home.

[34] As to the basis for the rule, Brooks JA in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47, [19], cited with approval the assessment of McDonald-Bishop J (Ag) (as she then was) in **Donovan Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 03158, judgment delivered 8 April 2008, and I follow suit.

> *15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See R v R [1992] 1 AC 599, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of*

> *equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633.*
>
> *16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation...."*

[35] From the dicta above, it is clear that a departure from the equal share rule is permitted where there is good reason for doing so. It is in that regard that Counsel for the Defendant in the course of her submissions, prays in aid the provisions at section 7 of the *PROSA.* It states,

> *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.*

[36] In her oral submissions Ms. Grant relied on the decision in **Graham** where McDonald-Bishop, J (Ag) (as she then was), determined that whether there is a section 7 application to vary the statutory equal share rule is a matter of form and not substance.

[37] In that case, Mrs. Graham sought to establish her entitlement to a 50% share in two houses, one on Murray Drive and the other on Durie Drive. Mr. Graham conceded that she was entitled to 50% of the property at Murray Drive which was

registered in the both their names but had never been lived in by the spouses prior to their separation. Durie Drive was registered in Mr. Graham's sole name and Mrs. Graham had not contributed to its acquisition. This notwithstanding, the parties moved into the house at Durie Drive and it became their principal residence. Mr. Graham, at the commencement of the hearing, conceded that the Durie Drive was the family home and accepted that Mrs. Graham was entitled to a share in it, but that it should not be half share. The primary issue for the court was whether Mrs. Graham should share equally in accordance with section 6 of *PROSA* or whether the rule there should be departed from on the basis that its application would be unreasonable and unjust.

[38] There was no formal application by Mr. Graham in exact terms that he was applying to the court to vary the equal share rule. Justice McDonald Bishop (Ag), as she then was, nevertheless found that there was an application on Mr. Graham's statement of case. Mr. Graham in acknowledging service of the claim had indicated he would defend it and made no admissions in respect of it. At paragraph 20 of the decision, it is stated that in defending the claim, Mr. Graham had averred in his affidavit that the house at Durie Drive was not acquired to be the matrimonial home and had accordingly prayed as follows:

> *"34. [T]hat in all the circumstances we humbly pray that this Court will declare Murray Drive to be the matrimonial home for purpose of the operations of the Property (Rights of Spouses) Act* ***and make such order as it deems fit and just****."*
>
> ***[Emphasis Mine]***

[39] In the face of that prayer, the court went on to say,

> *20. … There is thus an express application by the defendant that the half share rule be applied to Murray Drive. I find that implicit in this is an application that the rule not be applied to Durie Drive and that in respect of the claim and the matters stated by the defendant in response to it, an order should be made in all the circumstances that would be fit and just.*

> *21. … There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of Durie Drive. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of Durie Drive and for the Court to make an order in the circumstances that is "fit and just". This in my view is tantamount to him asking the court to vary the equal share rule within the provisions of section 7.*
>
> *22. … I find that the defendant has properly put forward on his statement of case that the equal share rule should not be applied to Durie Drive. The claimant would have had ample notice as to the defendant's response to her claim and so could not be taken by surprise or, in any way, be prejudiced by the defendant's continued assertion that the equal share rule not be applied to Durie Drive. There is in substance, before me an application by the defendant for a variation of the equal share rule no matter the form his application might take. It is a fundamental rule of equity that equity looks to the substance and not the form.*

[40] In the circumstances of that case, the conclusion that there was a section 7 application in respect of Durie Drive is unassailable. The court had been asked by the defendant in his statement of case to ***"make such order as it deems fit and just"*** in respect of the claim, and what was said by the defendant in response to it. The court was asked to exercise the discretion which is given to it by section 7 of *PROSA*. No similar entreaty appears in the Defendant's response in these proceedings.

[41] Pursuant to section 4 of the *PROSA*, the provisions in the Act replace the rules and presumptions of common law and equity which are applicable to transactions between spouses in respect of property for which provisions have been made under the legislation. This is as between spouses on the one hand and spouses and third parties on the other. To borrow the words of Brooks JA in **Stewart** [24], *"[d]espite the replacement of the presumptions of equity and at common law,*

sections 6 and 7 of the Act create a statutory framework in respect of interest in the family home…the statutory framework allows less scope for judicial divergence."

[42] The Defendant, in the course of responding to the Claimant's affidavit evidence avers to the acquisition of Tryall in his sole name before the marriage and to the short length of the parties' marriage. Similar averments also appear on the Claimant's evidence. These matters are relevant factors which the court must consider in exercising the discretion reserved to it to vary the equal share rule. I do not believe that the mere existence of these factors give rise to any presumption that the rule ought not to apply or that either party is seeking to vary its application. The documents filed by an interested party must *"… make clear to the court and to the respondent the relief that the applicant seeks",* as was stated by Brooks JA in **Stewart** [46]. There must be an application in substance, even if not in form, by the interested party, for the displacement of the rule.

[43] It is my view that the general prayer of the Defendant asking that the Claimant's claim for a fifty percent share in Tryall and consequential orders be refused, does not amount to an application for variation of the equal share rule without more. In the absence of such an application, the Claimant's share in the family home must be determined in accordance with section 6 of the *PROSA.* I therefore find that she is entitled to a fifty percent (50%) share in Tryall as claimed.

At what date should the Claimant's share in the family home be determined?

[44] It was submitted by Mr. Cochrane that that the Claimant's share in the family home should be determined as at the10th August 2017 when the Final Judgment for Dissolution of Marriage was obtained by the Defendant. Ms. Grant disagreed. It was Ms. Grant's submission that if the Claimant was found to be entitled to a share in Tryall that the said share should be determined as at April 2015 when the Defendant called the Claimant and advised her that their marriage was over. I find favour with Ms. Grant's submission.

[45] Section 12(2) of the *PROSA* states,

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

Section 9 is inapplicable to the issue at hand, prescribing as it does that transfer of interest by one spouse to another is exempt from transfer tax.

[46] It is the Claimant's evidence that during her relationship with the Defendant, it was his habit not to speak to her for months at a time and then resume contact with her. It was also her evidence that even after the Defendant had called her from the United States in April 2015 to say that the marriage was at an end, based on his past behaviour, and the fact that she continued to live at the house, she held the view that the marriage subsisted. The date of the call was not supplied.

[47] While I believe the Defendant behaved as the Claimant has said, and that she formed a certain view as a result, her share in Tryall is to be determined in reference to the date when she and the Defendant ceased to live together as husband and wife. The last occasion on which the parties so lived was April 2015. After that period, communication between them ceased and never resumed. They have not reconciled to this date. In these circumstances, I conclude that Claimant's share in Tryall is to be determined as at April 2015 as contended by the Defendant.

[48] There is evidence before me that Tryall is still subject to a mortgage which continues to be exclusively serviced by the Defendant. Having found that the Claimant's share in the property is to be determined as at April 2015 when the parties ceased to live together as husband and wife, the Claimant should be required to contribute one half or 50% of the mortgage payments which became due after that date, and I find accordingly.

ORDER

[49] It is ordered as follows:

i. The Claimant and the Defendant are each entitled to a fifty percent (50%) share in the property located at Lot 117, 19 Johnson Crescent, Tryall Estate, Spanish Town, St. Catherine which is now registered at Volume 1026 Folio 266 of the Register Book of Titles.

ii. The property is to be valued by a valuator agreed by the parties. If a valuator cannot be agreed within thirty (30) days of the date of this Order, the Registrar of the Supreme Court shall appoint such a valuator and the costs of the valuation shall be shared equally by the parties.

Provided that the parties may, by agreement in writing entered into within the time set for appointment of a valuator, use valuations of the property previously obtained and jointly paid for by them.

iii. Upon the property being valued and the valuation report received by the parties; or there is an agreement in writing to rely on a previously obtained valuation as provided for in Order ii, the Defendant shall have the first option to purchase the Claimant's 50% share in the property, which option shall be exercised within ninety (90) days of receipt of the valuation report or the agreement in writing to rely on a previously obtained valuation.

iv. In the event of the failure of the Defendant to exercise his option within the time limited by Order (iii) above, the property shall be placed on the open market for sale by private treaty and failing that, by public auction.

v. The Claimant's attorney at law is to have carriage of sale of the property and both parties are to bear the costs of the sale equally.

vi. The Claimant is to pay to the Defendant one half or fifty percent (50%) of any mortgage sums paid exclusively by the Defendant in respect of the property after the 30th April 2015, so that the Defendant bears no more and the Claimant contributes no less than one half or fifty percent (50%) of the monthly mortgage payments which became due and payable after the said date, being the date of separation. The Claimant's contributions to the mortgage payments are to be deducted from her share of the proceeds of any sale and paid over to the Defendant.

vii. The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the sale of the property should either party fail or refuse to do so within fourteen (14) days of being required in writing to do so.

viii. Each party is to bear their own costs.

ix. Liberty to apply.