IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 0327

BETWEEN PEACHES ANNETTE SHIRLEY-STEWART CLAIMANT

AND RUPERT AGUSTUS STEWART DEFENDANT

IN CHAMBERS

Georgette Scott instructed by Townsend, Whyte and Porter for the claimant
Wendell Wilkins instructed by Robertson Smith Ledgister and Company for the defendant

October 9, 10, 16 and November 6, 2007

DIVISION OF PROPERTY, SECTIONS 2 AND 13 OF THE PROPERTY (RIGHT OF SPOUSES) ACT

SYKES J.

1. Mrs. Peaches Shirley-Stewart is claiming 50% of a house located at 22 West Strathmore Drive, Kingston 8 ("the disputed property"). She is the wife of Mr. Stewart. The house is owned solely by Mr. Stewart. She has acknowledged that she did not contribute to the acquisition of the house. The basis of her claim is the Property (Rights of Spouses) Act ("the Act"). Under that Act if the property is the family home and is owned by one or both spouses, then on the happening of specified events a spouse may be entitled to receive 50% interest in the property (see sections 6 (1) and 13 (1) (c)). Mr. Wilkins submits that the disputed property was not the family home and therefore cannot be the subject of Mrs. Shirley-Stewart's claim. In addition, he submits that this court has no jurisdiction to hear this claim because the alleged facts took place well before this statute came into force. I shall take the jurisdiction point first.

Jurisdiction

2. Mr. Wilkins contended that there is nothing in the Act that permits this court to entertain a claim under the Act when the facts

which have given rise to the claim took place at a time when Act was not in force. If this is correct then it concludes the case in favour of Mr. Stewart. The Act came into force on April 1, 2006.

3. Miss Georgette Scott submitted that the court has jurisdiction because the conditions under section 13 (1) (c) have been met. She adds that the second limb of section 13 (1) (c) occurred in November 2006. She contended, in the alternative, that if she is wrong, then the court has the discretionary power to extend the time within which the claim can be brought. I disagree with both of Miss Scott's submissions and I say why. Let me begin with an examination of section 13 and in particular section 13 (1) (c). Section 13 states:

> *(1) A spouse shall be entitled to apply to the Court for a division of property -*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or*
>
> *(d) ...*
>
> *(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant*

4. In looking at section 13 (1) (c) it seems to me that both conditions have to be met before the court can have jurisdiction to hear an application on the ground stated in the provision. There must be both a separation **and** no reasonable likelihood of reconciliation. As an aside, I cannot help but observe that section 6 (1) which entitles each spouse to a half share on the happening of any of the events listed in paragraphs (a), (b) and (c) of section 6 (1) are identical to section 13 (1) (a), (b) and (c) save in one respect. The word "reasonable" appears in section 13 (1) (c) but not in section 6 (1) (c). Is this difference significant?

5. I shall examine both conditions of section 13 (1) (c) beginning with the meaning of the word *separation*. Separation in this context cannot be restricted to physical separation, that is to say, there is no necessity for one of the parties to move from any property in which they are both living. There can be separation even if the parties are in the same house. What *separation* suggests, in this context, is separation from the marriage. That is, there is a breakdown of the marriage. The breakdown of the marriage does not have to be regarded as irretrievable for there to be a *separation*. Separation here means that the either one or both parties have formed an intention to sever the marital bond and have acted on that intention. If the party or parties have a subsequent change of heart, it does not mean that there was no separation. All it would mean is that the separation has ended. If one person forms the intention to sever the marital bond and acts on it then the intention of the other party is irrelevant when determining whether there is separation. The fact that one party to the union may wish the marriage to continue cannot change the fact that the other party has separated from the marriage. The acting on the intention is important because that is the most tangible expression of what the person has already decided. There is no such thing as separation occurring only in the mind. It is not necessary that the separating party actually says or uses words to suggest that he or she has separated from the marriage. It is sufficient if the person acts in a manner as if the marriage relationship has been broken.

6. Whether there is separation or not depends on the facts of each marriage and how that particular marriage functioned. This means that evidence of how the parties related to each other before separation, during and after the separation is admissible so that the court can have a picture of the particular marriage before the court. Each marriage is organised as the parties see fit. What is strange in one marriage may be quite normal in another. Despite this, there are some acts, when done, that are so inconsistent with the notion of the marriage still subsisting that those acts in and of themselves may prove decisive of the issue of separation. After such a decisive act, any conduct or behaviour being relied on to suggest that either the separation has ended or there is a reasonable likelihood of reconciliation must be just as striking as the act indicating separation.

7. Regarding the second condition, it seems to me that whether there is any likelihood of reconciliation cannot be viewed from the stand point of one party alone. If one party wishes to be reconciled and the other party does not wish this to happen then there can be no reconciliation. Again, it is not necessary that the words, "I do not wish to be reconciled be used", for there to be a finding that there is no likelihood of reconciliation. Conduct inconsistent with reconciliation efforts is sufficient. When there is a separation and there is no likelihood of reconciliation then the marriage is well and truly over. It is when this occurs that the application can be made under section 13 (1) (c). I now examine the facts of the case.

8. On this aspect of the case, I have examined only Mrs. Shirley-Stewart's evidence because in my view she has failed to discharge the evidential burden on her to show that the conditions necessary to ground jurisdiction under section 13 (1) (c) took place after April 1, 2006. I therefore assume that all she has said is true.

9. There is evidence that by 2002, the relationship "turned sour" (see para. 16 of Mrs. Shirley-Stewart's first affidavit dated August 13, 2004). She added that "the occasion that culminated on a total breakdown in the marriage was the event that occurred on 5th April, 2004" (see para. 21 of affidavit). According to Mrs. Shirley-Stewart, she had planned a birthday party for her husband and he had the effrontery to come to his birthday party with a female companion. The female companion showed scant regard for Mrs. Shirley-Stewart and in fact was quite impertinent. Mrs. Shirley-Stewart moved to put an end to this brazen conduct of her husband and his female companion. She decided to ask the female companion to leave. Mr. Stewart defended the honour of his female companion at the expense of his wife. He told his wife that she ought to apologise to his female companion. It does not appear that the apology was made.

10. This tripartite confrontation ended with Mr. Stewart telling his wife that since she "was running his girlfriend ... he would also run [her] from his house" (see para. 23 of affidavit). Her husband, according to her, told her that he was a powerful man and she "would soon see what he was talking about" (see para. 23 of affidavit). This is a clear indication that Mr. Stewart had separated from the marriage.

11. What this threat meant was revealed during 2004/2005. At the time of this confrontation, Mrs. Shirley-Stewart was staying at an apartment located at Oxford Manor, Kingston 5 in the parish of Kingston. The legal owners of this apartment were Mr. Stewart and a Miss Jacqueline Rhodes. They held the registered proprietor ship as joint tenants. In May 2004, Mr. Stewart and Miss Jacqueline Rhodes (described by Mrs. Shirley-Stewart as a former girlfriend of her husband) initiated recovery of possession proceedings in the Resident Magistrate's Court for the Corporate Area in respect of the apartment. This action failed. The reasons for the failure are not important but what is clear is that Mr. Stewart had acted and continued to act, based on Mrs. Shirley-Stewart's account, in a manner that showed he had separated from the marriage. This was hardly the act of a man contemplating reconciliation with his wife.

12. I should add that Mrs. Shirley-Stewart said that they were sent for counselling by the Resident Magistrate. Mr. Stewart did not attend a single session. This is another indication of his view of the marriage.

13. The failure to recover possession was only a temporary set back. One year later, in May 2005, Miss Rhodes initiated another recovery action. This time there was success. How did Miss Rhodes accomplish single-handedly what the joint efforts of herself and Mr. Stewart failed to accomplish a year earlier? It turned out that Mr. Stewart transferred his interest in the apartment to Miss Rhodes thus making her the sole registered proprietor, thereby placing her in a position to remove his wife from the apartment. This was the apartment that Mrs. Shirley-Stewart said that her husband told her he would transfer his half interest to her.

14. It seems to me that Mr. Stewart's act of joining the recovery of possession claim by Miss Rhodes against his wife is indeed an unambiguous act indicating that he had separated from the marriage. These acts, in my opinion, merely confirmed what had been decided in the mind of Mr. Stewart. The act of aiding and procuring the removal of his wife from property in which he placed her is a signature act which unambiguously showed that Mr. Stewart regarded the marriage as at an end. If this is correct, then Mr. Stewart would have separated from his wife in 2004 but if a later

date is need it would be the transfer of Mr. Stewart's interest, by way of gift, to Miss Rhodes, which appears to have been done in 2005. That date is not stated but it would be after the conclusion of the first recovery of possession proceedings. It would seem to me as well that this act of transferring the interest to Miss Rhodes would show that there was not prospect of reconciliation. If Mrs. Shirley-Stewart is truthful when she says that he promised her his interest in the apartment then obviously he had reneged on that promise. He made no other provision that would have substituted for his interest in the apartment. This is not the conduct of a husband seeking to be reconciled with his wife.

15. The fact that Mrs. Shirley-Stewart held out some hope of reconciliation cannot of itself negate that finding that there was no reasonable likelihood of reconciliation. The word *reasonable* qualifies or modifies *likelihood* in section 13 (1) (c). It imports an object requirement. The test therefore is not the subjective view of the parties but whether a reasonable person looking on would conclude that there was a reasonable likelihood of reconciliation. It would seem to me that on this basis the necessary condition to ground jurisdiction occurred at least one year before the Act came into force.

16. It is significant that when Mrs. Shirley-Stewart was removed from the apartment she went to live with her mother and not at 22 West Strathmore Drive and there is no evidence that Mr. Stewart provided any other living accommodation for her. It would seem to me that these acts also show that there was no prospect of reconciliation. It is true that Mr. Stewart was cordial to his wife and even provided her with road licences to operate a minibus but those acts are not sufficient to overcome his active assistance in removing his wife from the apartment. It is also true that he kept contact with her after the separation and even went to visit her at her mother's home where she was now staying but as Mr. Wilkins submitted, civility is not reconciliation.

17. There is one more factor that puts the issue beyond question. Mr. Stewart changed the locks at 22 West Strathmore Drive. There is a body of evidence that suggests that Mrs. Shirley-Stewart had keys to the house. Mr. Stewart was making sure that she could never enter the house.

18. Miss Scott submitted that his visits to his wife and sexual relations with her after the alleged separation show that there was prospect of reconciliation. Miss Scott also referred to Mr. Stewart's promise to fix the house at 22 West Strathmore Drive as soon as he got money from the pending settlement with the government arising from the take over by the government of the transport system in the city of Kingston. These acts are not sufficient to displace the conclusion I have come to on the issue of separation and reasonable likelihood of reconciliation.

19. The wording of section 13 (2) also puts the matter beyond doubt. It permits an application under the Act when the specified events of section 13 (1) have occurred. If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it came into force. Courts do not lightly conclude that a statute has retrospective effect. I conclude that Mr. Wilkin's submission that I have no jurisdiction to hear the matter, for the reasons given, is well founded.

20. I do not think I have the power to enlarge time to accommodate a claim under a statute to give the court jurisdiction over a state of affairs that would have given rise to a claim under the Act had the Act been in force at the time of the occurrence of the specified acts but which, unfortunately for Mrs. Shirley-Stewart, was not in force at the material time. However, if I am wrong I will consider whether 22 West Strathmore Drive was the family home.

Was 22 West Strathmore Drive the family home?

21. The crucial definition for the purposes of this claim is *family home*. Family home is defined in these terms in section 2 (1):

> *"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. (My emphasis)

22. It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended. A harsh result does not necessarily mean that such a result was not intended. The Act was not conferring a general power to reorder property rights in all kinds of property owned by the spouses. The Act confines itself to the family home.

23. It should be noted that the adjectives *only* and *principal* are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. *Only* means sole or one. *Principal* means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression *family residence*. Indeed, even the noun *residence* is qualified by the noun *family* which is functioning as an adjective in the expression *family residence*. Thus it is not any kind of residence but the property must be the *family residence*. The noun *residence* means one's permanent or usual abode. Thus *family residence* means the family's permanent or usual abode. Therefore the statutory definition of *family home* means the permanent or usual abode of the spouses.

24. It is important to note that in this definition of family home it is vital that the property must be used *habitually* or *from time to time* by *the spouses*, as *the only or principal family residence*. The adverbs *habitually* and *from time to time* tell how the property must be used. The definition goes on to say that such a property must be **used wholly** or **mainly** for the purposes of the household. Thus using the property in the manner indicated by the adverbs is crucial. The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, "Is this the dwelling house where the parties lived?" In answering this question,

which is clearly a fact sensitive one, the court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items; (c) if there are children, where to they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items.

25. Turning now to the facts. On this aspect of the claim as I did earlier I examine the evidence of Mrs. Shirley-Stewart alone and I assume that what she has said is true. There is no dispute that Mr. and Mrs. Stewart were married on July 7, 1999. It is equally undisputed that they met in 1993. It is agreed that she and her daughter moved into 22 West Strathmore in November 1998. She alleges that she moved out in March 1999 and went to the apartment because of her daughter's allergic reaction to the carpet. Mr. Stewart says that they both moved out the very next day after they arrived. I shall assume that the date of departure from West Strathmore was March 1999.

26. It was Mr. Stewart who removed his wife and her daughter to the apartment. The evidence from Mrs. Shirley-Stewart is that her daughter went to school each morning from the apartment. In fact, she and her daughter were at the apartment from March 1999 to 2006, when she removed in obedience to the possession order. Since moving to the apartment there is no doubt that Mrs. Stewart and her daughter lived at the apartment. From the evidence, after March 1999 the daughter never slept at West Strathmore except on weekends. There is no evidence that after Mrs. Shirley-Stewart and her daughter moved to the apartment that either of them kept clothes or personal items at the disputed property. The evidence suggests that the clothes and personal items of mother and daughter were kept at the apartment. I did not get the sense that Mrs. Shirley-Stewart was the kind of mother who would wish to be separated from her daughter. Where her daughter was there she would be also. Home for the daughter would undoubtedly be the apartment. If I am correct in this, then that would be Mrs. Shirley-Stewart's home as well.

27. Mrs. Shirley-Stewart testified that she cooked for her husband at the apartment. She even said at one point in the cross examination that her husband lived at the apartment with her and her daughter.

28. Miss Scott sought to circumnavigate my conclusion that West Strathmore was not the family home by submitting that it must be the family home because the law imposes a duty on the husband to provide for his wife. From this premise and based on the evidence, the argument went, there are two properties that could qualify as the family home. One is the West Strathmore property and the other is the apartment. The apartment was never wholly owned by Mr. Stewart. Therefore the apartment could not have been intended to be the family home. This leaves the West Strathmore property. Thus the legal obligation on Mr. Stewart to provide for his wife added to the fact that only one property is now available to satisfy the statutory definition, the family home must necessarily be 22 West Strathmore Drive. I cannot agree with this. The statutory definition of family home does not depend on the husband's obligation to provide a home for his family. The definition asks the court to find which property was **used** as the primary or only family home and such a home must be owned by one or both parties.

29. Miss Scott also relies on Mrs. Shirley-Stewart's testimony that she visited the West Strathmore property nearly everyday that she lived at the apartment. Mrs. Stewart also alleges that she was responsible for the daily management of West Strathmore including, cooking, cleaning and washing. The claimant says that she supervised the domestic assistant who worked at the disputed property. She alleges further that after her daughter was taken to school she and her husband would go to the disputed property. This was being put forward by the Mrs. Shirley-Stewart as the foundation to rely on two cases cited by Miss Scott. These are ***Williams & Glyn's Bank Ltd. v. Boland*** [1981] A.C. 487 and ***Kingsnorth Finance Co. Ltd v. Tizard and Another*** [1986] 1 W.L.R. 783. In the first case the issue before the House of Lords was whether a wife was in "actual occupation" for the purposes of section 70 (1) (g) of the Law of Property Act 1925. The House held that the expression "actual occupation" simply meant physical presence and not some entitlement in law. The second case had to decide whether a wife was in

occupation of the house at the time the mortgage was granted by the husband over the property. The house was in the husband's name alone. The court held that she was in occupation. The judge relied on Lord Wilberforce's judgment in ***Williams & Glyn's Bank***. On the facts the judge, Judge John Finlay Q.C., sitting as a judge of the High Court, said this at page 788:

> *Mrs. Tizard was, in my judgment, in occupation of Willowdown notwithstanding that Mr. Tizard was living there also; and notwithstanding the fact that on numerous occasions she slept elsewhere. The "physical presence" to which Lord Wilberforce refers does not connote continuous and uninterrupted presence; such a notion would be absurd. Nor, indeed, do I consider that the requisite "presence" is negatived by regular and repeated absence. I find that Mrs. Tizard was in Willowdown virtually every day for some part of the day; that her life and activities were based on her presence, interrupted though it was, in Willowdown; there she prepared herself for work; there she cared for her children; there she looked after the house and the concerns of herself and the children; she went in the morning and returned in the evening to discharge her duties as housewife and mother. It is clear that prior to the time, November 1982, when she ceased always to sleep in the house when her husband was there, she had been in occupation; and, in my judgment, she did not cease to be in occupation simply because she made that change in her habits, significant though the change was.*

30. From this Miss Scott sought to say that even if Mrs. Shirley-Stewart lived at the apartment, that fact is not inconsistent with the disputed property being the principal or only family residence. It is my view that the cases cited deal with the question of when a person is in occupation of a house. The discussion is helpful so far as it is undoubtedly true that one must occupy a dwelling house before one can say that it is used habitually or from time to time as the only or principal family residence. On the facts before me, it cannot be said that the disputed property was the **only** family residence. This is so because on Mrs. Shirley-Stewart's own evidence

she lived at both the disputed property and the apartment. Thus if the disputed property is to be declared the family home it cannot be on the basis that was the **only** family home; it would have to be on the basis that it was the **principal** family home. The issue is therefore further narrowed to whether the disputed property is the principal family home.

31. Miss Scott's submission seems to be predicated on the proposition that where a spouse owns a dwelling house and the family are currently residing at property not wholly owned by one spouse or jointly owned by them then the property owned by the spouse must necessarily be the family home because it could not be the intention that the property at which they are staying would be the family home. The weakness of this proposition is that ignores the statutory definition which depends on use and not intention. This makes perfect sense in light of what the legislature wanted to achieve. The legislature opted for a test that is capable objective assessment. That test is that the property must be **used** in the manner and for the purpose indicated in the statutory definition.

32. Mrs. Shirley-Stewart's evidence does not lead me to conclude that the disputed property was the principal family home. This means that Mrs. Shirley-Stewart also fails on the merits of the case. From Mrs. Shirley-Stewart's evidence most of the family activities, took place from the apartment. She left the apartment to go to the disputed property and then returned to the apartment. The apartment was her base of operations. It seems to be that on a balance of probabilities the apartment was the primary residence of Mrs. Shirley-Stewart from the date of the marriage to 2006.

Conclusion

33. The claim is not permitted under the statute because the condition being relied on give the court jurisdiction took place before the Act became law. There is nothing in the Act to say that it operates retrospectively.

34. On the evidence presented by the claimant 22 West Strathmore Drive was not the family home.

35. The claim is dismissed with costs to the defendant to be agreed or taxed.