



[2013]JMSC Civil 91

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVL DIVISION
CLAIM NO. HCV 01623 OF 2009**

**IN THE MATTER OF THE
MATRIMONIAL CAUSE ACT 1989
AND
IN THE MATTER OF THE (PROPERTY
RIGHTS OF SPOUSES) ACT, 2004**

**BETWEEN KAREN SMITH CLAIMANT
A N D FRANCOIS LAWRENCE DEFENDANT**

**Miss Carol Davis for the Claimant.
Miss Jacqueline Wilcott instructed by Knight, Junor and
Samuels for the Defendant.**

**HEARD: January 13, 20, February 14, 2011, January 5, 2012, June 24
& July 5, 2013**

CORAM: DAYE, J.

Application for custody and maintenance of children – wife – injunction or order against husband from entering matrimonial home – section 10(1)(a) – (e), 20, 23(1)(a) and 25 of the Matrimonial Causes Act, 1989 – Declaration of Property Rights and division of “family home” – Section 2, 6(1)(c), 11, 13(3) and 14(1)(a) of the Property (Rights of Spouses) Act 2004 – Maintenance Act Section 5 and 14, - third party contribution to family home on behalf of one spouse.

Background

[1] On the 31st March, 2009 the Claimant filed an ex parte application in Court to a Judge in chambers for an injunction restraining her husband the defendant from entering and remaining in the matrimonial home, a townhouse, located at 28 Davis Avenue, Apartment 2, Red Hills Manor, Montego Bay, St. James. The wife also claimed interim custody, care and control of the girls of the marriage, age 9 and 7. Further, she applied for interim reasonable maintenance of these two children and interim reasonable maintenance for herself as wife.

[2] On the 3rd April 2009, a Judge in Chambers granted her application for an injunction against her husband and adjourned her claims for custody and maintenance for the children and herself. This was done in order to allow service of the injunction order on the husband who was affected.

[3] On the same day 31st March, 2009 the Claimant also filed a Fixed Date Claim, not for interim remedies, but for the substantive remedies of custody, care and control of the children, maintenance of the children, maintenance of wife, injunction and added the claim that she was entitled to 50 percent interest in the premises or townhouse at 28 Davis Avenue, Apartment 2, Red Hills Manor, Montego Bay, St. James.

Marriage

[4] The Claimant and her husband, the defendant was married on the 1st January 2000 at Montego Bay, St. James. That same month they began living at the townhouse,

28 Davis Avenue. At the time of the marriage the couple was expecting their first child Harley who was born on the 12th February 2000. Then their second daughter Malika was born on the 8th June, 2002.

Separation

[5] Marital differences developed between the couple which commenced at about the time their second daughter was born. These differences gave rise to inter personal conflicts between the Claimant wife and her husband. They were not resolved and in 2006 the Claimant moved out of the matrimonial bedroom and began sharing the bedroom with her daughters. The husband continues to live at the house and pay for the expenses for its maintenance and upkeep. He got home at nights in the early hours of the morning and left home also early with little communication with his wife. The wife complains her husband enter the home forcible at nights, left doors damaged and unsafe for the family and would have forceful marital relations with her.

Injunction

[6] A wife as a party to the marriage has the right to apply to the court for an injunction or other order for her personal protection or the children. She may also seek an interim injunction restraining her husband from entering or remaining in the matrimonial home. This right is separate and independent of any other relief that a wife is entitled to bring before the court. (Section 10 (1) (a) to (e) of the Matrimonial Causes Act, 1989)

Maintenance

[7] A wife who makes an application under section 10 of the said Act may at the same time apply for "reasonable maintenance" for herself and child or children (**Section 25 (1) (a) and (b) of the Matrimonial Clauses Act, 1989**). The Claimant took this action.

[8] Prior to 1995 Couples who share a relationship and live in a home as husband and wife did not have the right to apply to the court for an injunction or Restraining

Order even though a party may face similar imminent threat of violence, harm or risk to their personal safety as a party to a marriage. The reason was that the Matrimonial Causes Act, 1989 only conferred this right on "parties to a marriage". **The Domestic Violence Act, 1995** conferred on such persons who were described as 'spouse' and other class of relatives who lived in a dwelling house as the principal place of residence the right to apply for a protection order, that is, to restrain another spouse from entering or remaining in the household. Further such a spouse can now apply for an occupation order, that is, the right to live exclusively in the household residence. Both these applications which are interim in the first instance can be made **ex parte (section 1, 4 at 7 of the Domestic Violence Act, 1995)**. A spouse residing in a house as the principal place of residence who face violence, threat of force or risk to personal safety, was now on the same footing as 'either party to the marriage' and could equally obtain a restraining order. This temporary or interim relief could be pursued at the Resident Magistrate Court of the parish where the party reside or the Family Court of the parish.

Property (Rights of Spouses) Act, 2004 Jurisdiction.

[9] In addition to filing a Claim for custody, "reasonable maintenance for wife and children under the Matrimonial Causes Act, 1989 a wife is empowered to make a claim for any interest in property or division of property where the husband and wife have separated. This application is to be made within one year of separations. (**Section 13 of the Property (Rights of Spouses) Act, 2004**). A Judge in Chambers has jurisdiction to make orders in such an application (**Section 5(1) (b) of the Act**). The Claimant's application for 50 percent share in the townhouse at 28 Davis Avenue may be regarded as falling within this provision of Section 13 of the Act.

[10] There is a condition that the Claim must be filed within 12 months of separation. Also there the parties must prove there was no likelihood of reconciliation. The parties lived at 28 Davis Avenue up to 31st March 2009. A restraining order or injunction was granted against the husband on 3rd April 2009 and this could be regarded as the date of separation. The claim for division of property rights was filed also on the 31st March, 2009 and thus this claim could satisfy the condition of being filed within

twelve month of the separation (See Rattray J, **Freeman-Wynter v Wynter, Claim 2008 HCV0040 Section 13 of Act and extension of the limit and Sykes J. in Peaches Annette Shirley-Stewart v Robert August Stewart, Claim HCV 0327 dated November 6, 2007 that parties must be separated and there must be no likelihood of reconciliation, and Bernard v Bernard, Claim HCV 01865/2006, dated April 2, 2008 per Straw, J.)**)

[11] I bear in mind that although the Claim was filed in March 2009 to restrain the husband from remaining in the house at 28 Davis Avenue, the defendant husband and claimant wife had been living in separate bedroom since 2006. Although there was a degree of separation I do not find that the Claimant and defendant were living as separate household. The defendant was still responsible for the house and family and still had access to his wife even though she complains this was by force during all this time. The parties to the marriage did appear to hold out hope between 2006 and 2009 that there was a likelihood of reconciliation.

[12] In any event section 11 of the Property (Rights of Spouses) Act 2004 provide either party to a subsisting marriage may apply to Judge of the Supreme Court by summons or in a summary way to determine any dispute about title or possession of property. The Claimants claim for 50 percent share of 28 Davis Avenue was commenced by a Fixed Date Claim Form. The defendant is disputing her claim for 50% share in the home. The parties up to 2009 were still married and the claim would properly be before the court under their section.

[13] A claim by wife for 50 percent of Davis Avenue which both husband and wife describe as the matrimonial home is really an assertion by her that she is entitled to 50 percent or one-half of the "family home." Although the parties may use the term matrimonial home in as inter changeable with "family home" the term "family home" was specifically defined under the **Property (Rights of Spouses) Act 2004.**

Definition of Family Home

[14] Section 2 (1) of Act state "family home" means:

".....the dwelling house that is wholly owned by either or both spouses and used habitually or from time to time by the spouses as the only or principal family residenceand used wholly or mainly for the purpose of the household, but shall not include such dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit"

One Half Rule

[15] This section of the Act provides for the first time in law that each spouse, such as a husband and wife who have separated and have not or are not likely to be reconciled, to be entitled to one half share of the "family home."

Exception to one-half rule

[16] Two exceptions are created to the one-half entitlement of a spouse in the "family home." Under section 7 of the Act, the court is given discretion to vary this one-half entitlement if it would be unjust and unfair in the court's opinion to apply this rule. The legislation prescribes some factors that the court should take into account. They are as follows:

"section 7 (1)

- (a) That the family house was inherited by one spouse;**
- (b) That the family house was already owned by one spouse at the time of the marriage or the beginning of the co habilitation;**
- (c) That the marriage was of a short duration"**

[17] Under section 10 the law recognizes that spouses or couples planning to marry can and do make pre neptel agreements about divisions and ownership of their existing and future property. It also recognizes that spouses during their marriage do make agreements to settle dispute about ownership of division of their property. If these agreements are made in writing and the parties receive legal advice which is

certified and duly witnessed that the court may vary the one-share rule in reliance on the agreement.

Issues

[18] The affidavit evidence of the Claimant and the response of defendant husband raises the following issues in relation to 28 Davis Avenue whether:

- (1) It was the Family Home of the Claimant and her husband;
- (2) 28 Davis Avenue was a gift to the defendant husband by his parents;
- (3) 28 Davis was already owned by the defendant at the time of marriage;
- (4) If the one-half share of the Claimant in the family home is displaced what other share is she entitled to?

[19] Section 6, 11, 13 and 14 The **Property (Right of Spouse) Act 2004** were considered by McDonald-Bishop, J. (Ag.) in **Graham v Graham Claim 2006 HCV 03158**, decided April 2008. She found the Jamaican Legislation like the New Zealand and unlike the U.K. Legislation ensure the equal share rule or 50/50 rule for the division of matrimonial property with scope for the exercise of Judicial discretion. She reasoned that the principle of equality was based on the rationale that marriage was a partnership of equals and each party should share equally in the asset on termination of the union or partnership (paragraph 15 to 19. Supra) She further adopted Lord Nichols of Birkenhead's view in **White v White [2000] 2 F.L.R. 981** that the object of the court is to achieve a fair outcome as far as is possible between the parties (paragraph 16. Supra).

[20] My view is that section 6 of the Act creates a presumption of law that spouses are beneficially entitled to one-half share in the "family home" whether or not a spouse's name was on the legal title to the home, that is, the property. The law then listed circumstances that could rebut the presumption. The Act of 2004 was intended to remove the burden of proof a female spouse faced at common law to establish a beneficial interest in the home the property where her name was not on the legal title to property. In other words the Act sought to relieve the evidential impediment a spouse faced under the common law principles of the law of trust to establish a beneficial

interest in the matrimonial home. I accept the principle of equality based on the concept of fairness would lead to the same result for either spouse whether section 6 is regarded as creating an equal share rule or a rebuttable presumption of equal share in the home of spouses.

[21] In this trial the Claimant assert that 28 Davis Avenue was the family home. The defendant husband was reluctant to accept this though he describes it as the matrimonial home.

[22] The legal title to 28 Davis Avenue, Apartment 2, Red Hills, St. James is in the sole name of the defendant Francoise Lawrence. The property is registered at Volume 1295 Folio 838 and was transferred to him on the 1st September 1999. It was subject to a mortgage registered in favour of Life of Jamaica Ltd., on the 1st September 1999. The Claimant's evidence on affidavit of the 31st March, 2009 is that she became pregnant with the couple's first child in 1999. They got married in 1st January 2000 and moved to 28 Davis Avenue three days after the marriage. This is where she has resided with defendant and their two daughter up to time of filing the instant claim in 2009. The defendant in his affidavit of means dated 28 December 2010 gave his address as 232 Brotton Road which is his parents' family home. He does not challenge that he lived at 28 Davis Avenue right after his marriage 1st January 2000. His evidence about the house is as follows:

"The house in which the Claimant lives was a gift to me from my parents....."

"Although my wife and children live there and it was the family house, the house was not bought in contemplation of marriage as it was always a gift to me the same way my sister got a gift from my parents"

[23] On this evidence he uses the description matrimonial home for 28 Davis Avenue but he is challenging the claim that there was an intention that his wife should share equally or beneficially at all in this home.

[24] Counsel for the Claimant in her written submission dated 2nd March 2011 states that the evidence point to a conclusion that 28 Davis Avenue was the 'family home' within the terms of the Property (Rights of Spouses) Act, 2004.

[25] I accept and find that the dwelling house or townhouse at 28 Davis Avenue, though in the sole name of the defendant, Francois Lawrence as the owner was habitually used as the principal family residence and used main for the purpose of his household. The defendant accepts this in his evidence when he discusses 28 Davis Avenue as the matrimonial home. Up to 2009 his family lived there. He only left this address to go to his parents' home which he describes as the "family home" as a result of a restraining order by the Court. I find 28 Davis Avenue have satisfied the statutory definition of "family home."

Presumption of One Half Share or Beneficial Ownership

[26] The Claimant relies on the premise that 28 Davis Avenue is the family home to claim one half share in it plus her joint contribution to the family and renovation and repairs she made to the house. The defendant resists this claim as he says the house was a gift from his parents.

[27] The court examines the evidence of the Claimant about the acquisition of this house. Under cross examination she testify:

"It is not known what the deposit was in the matrimonial home. I do not know if the deposit of the matrimonial home was given to the defendant by his parents. Yes the defendant has paid the mortgage of the house. I am now aware the mortgage is \$40,500 per month. I disagree the deposit for the house was a gift from Mr. and Mrs. Lawrence. I am not aware that at the time a deposit was made for the house at Red Hills a similar deposit was made for Yonique by Mr. and Mrs. Lawrence"

[28] In the Claimant's fourth affidavit dated the 11th January 2011 she testify in response to the defendant's affidavit of 2nd December 2010 in these terms:

“.....I say that the family home 28 Davis Avenue, Apt. 2 Red Hills Manor was expressed to both Francois parents, at the time of our marriage to be a wedding present to both Francois and myself. I was currently pregnant and the house was purchased with the intent for Francois and me to live in it and raise our child....”

[29] The defendant counsel in a skeleton submission filed on February 11, 2011 submit that on there was no express or implied agreement or common intention that the Claimant should be beneficially entitled to 28 Davis Avenue. She rely on the fact that Claimant know nothing about when the house was purchased, the amount paid as deposit for its acquisition, where it was mortgage, what the mortgage installment was up to 2009 or whose name was on the title. She also submitted it was the defendant through his parents who paid the mortgage and the outgoings such as utilities for the home. She also submitted contribution by the Claimant to the day to day care and welfare of the children and to home was not of such a nature to confer on her beneficial interest in the family home of 28 Davis Avenue.

[30] Counsel for the Claimant Miss Carol Davis submitted that the gift of a deposit to the acquisition of 28 Davis Avenue was a gift of the home. The mortgage was paid by the defendant and the private family company to which the defendant was employed. Further she contends the claimant contributed to the household expenses and she and her husband pooled their resources for the benefit of the home and family. Also the home was acquired close to the date of marriage between the parties and when the couple was expecting their first child and therefore was in contemplation of marriage. She also point to the length of pre-marital relationship of the couple of some 10 years that the home is in dispute.

[31] The purchase of 28 Davis Avenue in September 1999 at a time when couple was expecting their first child and then the marriage of the couple in January 2000 give rise to a reasonable inference that the house was acquired as a provision for meeting the

responsibility of a home for a wife and family. It does not necessarily mean that the home was purchased with a common intention that wife would be entitled to an equal beneficial interest or otherwise in the house.

[32] I agree with the defendant's counsel submission the lack of knowledge of the Claimant about the acquisition of the house, the financing of the mortgage are factors that are more consistent in the circumstances of the use with the fact there was no implied agreement or common intention that a Claimant should be beneficially entitled to the house. I find that the Claimant's lack of knowledge of the transaction concerning the home means she cannot really contest the details of the defendant's evidence that the home was given to him as a gift by his parents.

[33] There is no evidence from the defendant's parents who are available that 28 Davis Avenue was acquired as a gift to their son Francois and his wife Karen Smith in 1999. The parents are engaged in family business and such as are more likely to make financial provision for their children. As responsible parents they would assist their son to make financial provision including that for a wife and children which would include a home. But as business persons if they intended that their son's wife to be beneficially entitled to the home at 28 Davis Avenue they would have ensure her name was placed joint or the title to the premises. I find that 28 Davis Avenue was a gift solely by Mr. and Mrs. Lawrence to their son Francois Lawrence. It means the presumption and claimant is beneficially entitled to one half share in this family house does not come into operation.

Variations of the 50/50 Rule

[34] I further find that this family home at 28 Davis Avenue was already owned by Francois Lawrence at the time of the marriage. This is a factor I take into account to determine if it is reasonable and just that the presumption of law that the claimant is entitled to one half share of this family home 28 Davis Avenue. I

also take into account that the family home was acquired on the day of the marriage.

Contribution/Direct or Indirect

[35] It is necessary to consider any contribution made by the Claimant whether direct or indirect in relation to the family home that would give her a beneficially interest in 28 Davis Avenue in some percentage or proportion less than the statutory one-share interest example one quarter one fifth or one tenth share.

Third Party Contribution to Family Home

[36] Before this examination it is useful to refer to the principle about the effect of third party's contribution to the family home. The contribution of the defendant's parents to the deposit to the acquisition of 28 Davis Avenue and the payment of the mortgage by the family business Eval Limited where he was employed can reasonably be viewed as third party contribution. McDonald-Bishop, J. (Ag.) (Supra) paragraph 32-39 identified and applied the principle in three recent English decisions: **G v G (Financial Provision Equal Division [2002] 2 FLR 1143** and **S v S (Financial Provisions: Departing from Equally) G and G V (Matrimonial Property: Rights of Extended Family [2006] 1 F.L.R. 62** that contribution made by a third party on behalf of a spouse and solely for the benefit of that spouse is a factor to be taken into account whether it is fair to apply or vary its equal share rule or the 50/50 rule or presumption that a spouse is entitled to one share beneficially interest in the family home. Mr. and Mrs. Lawrence contribution of the deposit to acquire 28 Davis Avenue is a factor that in the court consider just and reasonable to vary the one half statutory presumption created by section 6 of the Act.

[37] I return to what other share the Claimant may have at 28 Davis Avenue.

The Claimant's evidence in her affidavit of 31st March 2009, (paragraph 19):

"Since we live in the house I always regarded it as my home. I have spent money all my own effort in improving the property. The

work I have done including tiling the front verandah, painting the interior of the house, fixing broken window, fixing toilets, fumigating the house in replacing the appliances.....”

[38] The defendant challenged these alleged acts of improvement on the family home. The claimant explains in a later affidavit that she purchased the tiles for the renovation of the verandah and kitchen and paid the labour cost for the tiling. She also incurred the cost to transport the tiles. Counsel for the Defendant submit on the decision of **Button v Button [1968] 1 WLR L 57** the type of work the claimant did not give her a share in the home. Lord Denning found the case was one where a wife who did not make any financial contribution to the house was claiming an interest. After citing **Pettit v Pettit** a husband claim to a share in his wife home for making general improvement he stated the following principle:

“The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which the wife does for the benefit of the family without altering the title to or interest in the property.”

[39] I agree and find the improvement and renovation described by the Claimant falls in the type which did not give her an interest in the family home. The day to day contribution to the household expense by the claimant on repairs or general renovation is what a dutiful wife would do for the family. They do not give her a share or interest in the family home. I did not find that the presumption of one half share is displaced by the repairs of 28 Davis Avenue by the claimant. The claimant has not proved an a balance of probability that she has any other share or beneficial interest less than one half in the family home.

Reasonable Maintenance the Children

[40] I hasten to say the decision that the Claimant does not have any beneficial interest in the family home is not an end to her claim or her interest for financial

provision for herself and family. Lord Denning in the same **Button** (Supra) went on to say that "Maintenance is linked to property. If the wife stays in the house her maintenance may be reduced on that account. If she gets a substantial capital sum out of the house, it may affect her maintenance."

The Supreme Court is expressly conferred with a discretion to make a maintenance order where there is an application for division of property under The Property (Rights of Spouses) Act – Sec. 3(2) Maintenance Act, 2005.

[41] Lord Diplock in **Gissing v Gissing [1971] A.C 887** held in dismissing a wife's claim for a beneficial share or interest in the matrimonial home in which she was still living that this would "no doubt affect her claim for maintenance under The Matrimonial Causes Act. 1965. The Claimant has claimed for reasonable maintenance under the Matrimonial Causes Act 1989. She is still living in the family home.

Maintenance of wife or Spouse

The Law provides that each spouse had an obligation to maintain the other spouse to the extent that such maintenance is necessary to meet the needs of the other spouse. (Sec. 4 of Maintenance Act 2005). The principles and guideline a court ought to apply are stated and enumerated in the said Maintenance Act. The Act also confer on the court a discretion to take into account other circumstances as the justice of the case require.

The board of principle that governs a court is stipulated in section 5:

"5 – (1) A maintenance order for the support of spouse shall –

- (a) Contain such provisions as will ensure that the economic burden of child support is shared equally,
- (b) make such provisions as the court considers fair with a view to assisting the spouse to become able to contribute to that spouses' own support."

Then the court must take into account the following:-

"5 – (2)

- (a) the length of time of the marriage or cohabitating ;
- (b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
- (c) the effect of the responsibility assumed during the marriage or cohabitation or the spouse's earning capacity;
- (d) the spouse needs, having regard to the accustomed standard of living during the marriage or cohabitation;
- (e) whether the spouse had 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'

A list of circumstances a court should consider are contained in Section 14 (c) of the Act which read as follows:-

- "14" (4)
- (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 the of the dependant and the respondent and the capacity of each of them for appropriate gainful employment
- (f) the measure available for the dependent 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 that
- (g) the legal obligation of the respondent or the dependant to provide support of 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 pocket 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;
List is not exhaustive as it is further provided that the court can take into account:
- (m) any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account."

Maintenance of child

The same facts and circumstances enumerated in Section 14(4) above that must be taken into account in determining a wife's maintenance must also be taken into account on determining a child maintenance (Section 9 (2) of Maintenance Act). This

legislation specify other or additional consideration for child support. These are hereunder:-

"9 – (1) A maintenance order for the support of a child:-

(a) shall apportion the obligation according to the capacities of the parents to provide support; and

(b) may make an award for the payment of a sum of money for expenses in respect of the child's parental care and birth.

(2) In considering the circumstance of a dependant who is a child, the court shall have regard to the following matters in addition to the circumstances specified in section 14(4) –

(a) that each parent had an obligation to provide support for the child;

(b) the child's aptitude for, and reasonable prospects of, obtaining an education; and

(c) the child's need for a stable environment.

Section 9 (3) and 9(4) of the Act points to a court shall take into account before making a maintenance order for a child that is accepted by a party to a marriage or cohabitation as a child of the family. The factors are that such a party must firstly accept the child as a child of the family and secondly assume responsibility for the child's maintenance. The court must also consider the liability of any other person to maintain the child.

[42] The amount of maintenance to be awarded to the claimant will depend on her expenses, maintenance for the children, her occupation of the family home, her income. This has to be balanced with the income of the defendant, his assets, his expenses, his conduct and the amount of his contribution before the action was filed. The Claimant's income evidence is that she is a manager of a member of the group family business, Exclusive Holiday of Elegance Ltd. She deposed she earns \$50,000.00 per month. She provided ten cheques from this company for the sum of \$50,000.00 for dates in 2006, 2007, 2008 and 2009 in proof of her earnings. The defendant challenges this evidence of income. No pay slip or usual supporting document of income was presented. This reduces the weight that I to attach to her evidence of income. The

same applies to the defendant's evidence of income. He is also employed as a manager to a family business, Efay Ltd., a rent-a-car company. No supporting evidence is tendered to support his claim that his income is \$70,000.00 per month. The accuracy of this evidence cannot be checked. A Social Enquiry Report ordered by the court was included among the evidence before the court. It shows the parties gave no evidence of income when they were interviewed by probation officer. Both parties are guarded in the disclosure of their full income and the full financial position of the respective family business from which they obtain their income. No dispute is revealed in the social enquiry report about the custody, care and control of the two (2) children and daughters of the marriage. They reside with the claimant. Therefore **de facto** custody, care and control is now ordered **de jure**.

[43] Both husband and wife work with family businesses. There is no adequate documentation of the claimant's income. The cheque attached to her affidavit could be payments for allowance or some service or benefit. The Defendant has no proof that he has been receiving \$70,000.00 since 2006 from the company **EFAY Ltd.** for salary. He testifies that he received his salary by cash and fortnightly. There are no statutory returns from the business about this. The claimant in her affidavit of 11th January, 2011 shows that defendant was always the main financial provider for the family. He maintains her and his two children. He paid the mortgage which she accepts was \$40,500 per month and the school fees and holiday. She contends these financial obligations could not have been paid on a salary of \$70,000.00 per month.

[44] She calculates the car rental family business of which he is a manager and a director makes US\$9000.00 per week or \$792,000.00 per week at an exchange rate of US\$1=J\$88 in March 2009. In other words she believes he has other source of income. During cross examination she disputed that the company EFAY Ltd. was in liquidation. No financial statement on annual returns was submitted for examination to the court. So there is limited information to assess the viability of this company. The court is unable to draw any conclusion as to the amount of profit or loss the company has made. It is also unable to use the sum of \$70,000.00 per month as a clear basis to determine the

defendant earning capacity. It does appear however, that the defendant obtains income from other unnamed sources.

[45] In cross examination of the defendant on his affidavit of means counsel for claimant was able to elicit that the defendant did not disclose income from:

- a. a sale of a car he sold in 2009 and the proceed which was deposited into Churches Credit Union in Montego Bay;
- b. he earns \$3000.00 per week for a loan from December 2009 for the crashed car.
- c. that he has a partner savings from which he used to pay some of the children school fee;
- d. he has local credit cards and international credit cards.

[46] The defendant explains the US credit cards were stopped in 2006 and the other credit card were not in use. I find the defendant has not made full disclosure of his financial means. His evidence of his means is unreliable. I am unable to accept his explanations about his accounts. But this does not enable me to put any dollar figure to his income.

[47] Counsel urges the court to approach the defendant's evidence of his means of income by using the approach adopted by Byron J.A as he then was in **Hughes v Hughes [1993] 45 W.L.R. 149** which was an appeal from the Court of Appeal of the Eastern Caribbean. The judge noted where a party has not made full and frank disclosure of his means or assets the court was entitled to draw inferences adverse to third party. He added the burden of proof is on that party who has the knowledge of the facts to be disclosed as they were particularly within the knowledge of such a person. The court went on to explain that assessment make by the court of the party means must bear a genuine relationship to the available asset. I understand this decision to mean that even where a court draws on adverse inference against a party the court is limited as to what amount it can find as the proper amount to the total evidence of his means and capacity.

Expenses

[48] The details of the expense for maintenance of the children and the claimant are tabulated in paragraphs 31 to 35 of the claimant affidavit of 31st March, 2009. The details expenses of the defendant are tabulated in paragraph 15 of his affidavit of means. In both affidavits the expenses exceed the income of the parties. However, certain obligations for the support of the children and home are necessary for promoting the best interest of the children. They are:

- (i) Cost of Accommodation or shelter (mortgage) \$40,500.00 paid by defendant
- (ii) Maintenance for children (2) \$20,000.00 paid by defendant
- (iii) School Fees (Melicia) \$45, 000.00 per term usually paid
- (iv) School fees (Harley) 30,000.00 per term usually paid

[49] There are other necessary incidental expenses for utilities of the house, transportation for the children and extra curriculum activities. I am constrained to address two features relevant to the defendant about maintenance of the children and wife. A sum for maintenance of wife and children should make allowance for the fact that the defendant is paying the mortgage of \$40, 500.00 as for the family home at 28 Davis Avenue. This contribution should bear relationship to the market value of such type of accommodation at time of hearing. When no direct evidence is given of this value then court is only left to make a rough estimate. The other feature is that defendant would be deprived of the benefit of the family home by virtue of a restraining order of April 2009. The loss of the use and occupation of the home will mean that he has additional cost for accommodation. Even if defendant has the privilege of staying at his parents' home, he will incur a reasonable expenses for accommodation. Lord Denning and Diplock in **Button and Gissings** (Supra) agree if the wife stays in the family home it can affect the maintenance. I believe this can affect her maintenance downwards. On the other hand the wife's maintenance could go upwards if she is not given a share or beneficial interest in the home. This may be of particular relevance where a capital sum is sought from the house as an asset of the defendant.

Asset

[50] The defendant has accepted that he has one fifth legal interest in a house purchased in the joint names of himself and a long standing female friend. This transaction was executed in 2005. He explained that he made a contribution to the deposit of the purchase as a loan. His credibility about his means and his income in the family rent-a-car business is called into serious question. He says the company went into liquidation since 2006. This assertion is put further in doubt. How can he be experiencing serious financial difficulties when he is giving loan, the year when the family business are failing, towards the deposit to acquire residential house with a third party. It can only be that he has more means than he claims. He has acquired or jointly acquire an asset as tenant in common in this house at Bouge Village. This asset is therefore taken into account to determine the amount of maintenance for wife and child.

[51] Another factor I consider in relation to maintenance of the wife and children is the **status quo ante**. This means the family of the defendant should be maintained at the same standard of living, as best as possible, they enjoyed before the actions which caused the claim for maintenance. The claimant explains the defendant was the main financial provider up to 2009.

[52] The Claimant has a graduate degree. She is an experience working woman who has is worked in the private sector for years. She has the potential for earning an increase income commensurate to her qualification and this is reasonably anticipated. She is a young woman, not yet middle age and has all the possibilities of re-marriage. These factors I take who account when I consider her claim for maintenance with the fact that she is living in the family home. I bear in mind also she is responsible for the domestic expense of the home. She employs and pays a helper to take care of the children and the home. I have already found that the defendant has not disclosed his total income and he has other sources of income. These factors bear on the amount of maintenance that will award for wife and children.

Conduct

[53] The decided cases show that the conduct of a party can be relevant to the grant of maintenance but only in exceptional cases. Campbell J in Barr – **Meijerink v Meijerink suit no. E178/2001** decided 29th August 2002 followed and applied the reasoning of Rowe, P in **Samuels v Samuels** that under the Matrimonial Causes Act, 1989 section 20 (1) the court will not take into account the conduct that contributed to the breakdown of the marriage when fixing the amount of maintenance. In that case the court had to consider whether the adultery of the wife was a bar to the claim for maintenance. The conduct the court will take into account to modify a right to maintenance is “financial recklessness or some wholly unacceptable social behaviour. Campbell J. found the phrase in all the circumstances of the case” under Section 20 (1) of the Matrimonial Causes Act 1989 was wide enough to consider unacceptable conduct which is “obvious any gross” and could cover adultery.

[54] There is no suggestion of any bar to maintenance to the claimant on the ground of her conduct. What the court has in consider to this hearing is whether the conduct of the defendant in relation to his financial dealing amount to financial recklessness to the extent that it should be taken into account. There is evidence that the defendant continue to live an extravagant life style, travel abroad, patronizing expensive restaurants, drive expensive motor cars. He has not denied these allegations. The defendant now shares a relationship with a long standing female friend. This existed during the time of the marriage. The defendant contributed to the purchase of a house jointly with this friend in 2005. It seems that this extra marital relationship is a major reason for the breakdown of the marriage, but I cannot say it is conduct that it is ‘obvious and gross’ use this to fix a sum for maintenance for the wife and for children. If the conduct results in acquisition of an asset then it is the asset or share on the asset that must be taken into account as one factor to determine the maintenance.

Conclusion

[55] Having considered the affidavit evidence, the cross examination of the parties and the submission of counsel the court hereby order as follows:

- (a). Custody, care and control of Hailey Lawrence to mother Karen Smith and reasonable access to father Francois Lawrence;
- (b). Custody, care and control of Malikea Lawrence to mother Karen Smith with reasonable access to father Francois Lawrence.
- (c). The Claimant is not entitled to any share or beneficial interest in the family home 28 Davis Avenue, Apartment 2, Red Hills Manor, Montego Bay, St. James;
- (d). The Defendant to pay the sum of \$20,000.00 per month for maintenance for Hailey Lawrence; Adjustable for increase in cost of living;
- (e). The defendant to pay the sum of \$20,000.00 per month for Malika Lawrence; Adjustable for increase in cost of living;
- (f). The defendant to pay the sum of \$50,000.00 per month for his wife Karen Smith until their last daughter Malika Lawrence attains the age 18 years.
- (g). The defendant to pay the school fee for Hailey Lawrence of \$45,000.00 per term and any increase;
- (h). The defendant to pay the school fee for Malika Lawrence of \$30,000.00 per term and any increase;
- (i). The Claimant is responsible for the utilities of the family home of 28 Davis Avenue;
- (j). The Claimant and defendant to pay half the medical, dental and optical and extra curriculum expenses of the children Hailey Lawrence and Malika Lawrence.
- (k). Liberty to apply.

Cost to claimant to be agreed or taxed.

Courtney Payne
Pueswe / Jul 10
July 15, 2013