



[2019] JMSC Civ 147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV00917

BETWEEN	TIOLYN THOMPSON	CLAIMANT
AND	NORMAN EDWARDS	DEFENDANT

IN CHAMBERS

Mr. Hugh Wildman and Mrs. Sasha-Lee Hutchinson instructed by HS Dale & Co., for the Claimant

Mr. Ricardo Maddan and Mr Andre Earle instructed by Earle & Wilson for the Defendant

Heard: October 31, November 9 and 20, and December 14, 2018, and July 19, 2019

Claim for 50% share in home and other properties – Parties unmarried – Whether Claimant is spouse – Whether parties separated – Whether limitation period applies – Property (Rights of Spouses) Act ss. 2, 4, 6, 7, 11 & 13

LINDO, J.

The Parties

[1] The Claimant, Ms. Tiolyn Thompson and the Defendant, Mr. Norman Edwards, commenced a common law relationship while the Claimant was a teenager. Their union produced two children, T, born on the 6th day of January, 2005 and S, born on the 16th day of January, 2007. The Defendant has children outside of this union. The parties, along with their two children, presently reside at Lot No. 45, St. Margaret's Bay, Moonlight Bay P.O., in the parish of Portland. The Claimant is a housewife and the Defendant is a businessman.

The Claim

[2] The Claimant filed a Fixed Date Claim Form with supporting affidavit on March 21, 2017, under the **Property (Rights of Spouses) Act**, (PROSA; the Act). She is seeking, *inter alia*, declarations that the house at Lot No 45, St Margaret's Bay in the parish of Portland, registered at Volume 1093 Folio 604 is the family home, and that she is entitled to 50% share of same, and that she is entitled to 50% of the business carried on at the same property, as well as two boats, two cars, two trucks and half an acre of land registered at Volume 1087 Folio 122, or 50% share of their value, in addition to 50% share in bank accounts.

The Response

[3] On May 18, 2017, the Defendant filed an affidavit in response to the claim. He states that he commenced a relationship with the Claimant in 2000. He adds that it ended in or around 2004 and resumed in or around 2005 but ended in 2010, and that they "live in separate rooms under the same roof and operate as two separate and distinct households". He states further that the Claimant never operated or aided in any business for which he is responsible as she has no accounting knowledge, having not completed high school and she has never transported fuel for his business. He denies that the Claimant maintains the home and also denies that he has sums of money "in any individual or consolidated account", as claimed by the Claimant.

[4] He avers further that he is in possession of some of the assets identified by the Claimant, but that "the values indicated are inaccurate and remain to be assessed". He however states that the Claimant is not entitled to any interest being claimed as it would be unreasonable and unjust, as his assets were acquired before the commencement of their relationship. He contends that the Claimant did not contribute, improve or assist in maintaining any of his assets and as such is not entitled to any interest in them.

[5] Additionally, the Defendant states that he believes the Claimant would be out of time with her claim under **PROSA** as the period of twelve months has elapsed

since their separation. He indicates also that he intends to apply for custody, care and control of the children.

The Claimant's Case

- [6] At the hearing, Ms Thompson relied on evidence contained in four affidavits filed by her in support of her claim and in response to the Defendant's affidavits in objection to her claim. The affidavits filed March 21, 2017, September 28, 2017, October 30, 2017 and January 12, 2018 were accepted as her evidence in chief and she was cross examined.
- [7] She contends that they lived together at the St. Margaret's Bay address as man and wife and that during her relationship with the Defendant, he fathered two other children with two other women. She states that the Defendant owns a trucking business which she "assisted the Defendant with the day to day running and operation of..." and that in August of 2010, he had an 'incident' at their home which left him partially blind and during this time she attended to him including administering his medication, while at the same time maintaining the home, taking care of their children and "managing the day to day transactions and operations of their business...".
- [8] She avers that she "had taken over the business and did the bills and accounting, transported funds and made deposits to the Bank for the business and transported fuel for the vehicles that worked for their business" and that she was "involved in and contributed to the growth and development of the business". She states that she prepares the meals in the home and that the Defendant eats from what is prepared and that she cleans and does the laundry. She posits that the Defendant bought a 2008 Suzuki Grand Vitara for her to use and to transport the children to school, and that he later transferred it to her in May, 2015.
- [9] In amplification of paragraph 1 of her first affidavit, she said that they were living as man and wife and "we do everything as normal married people would have done. At the time that was being done, I was single, he was single"

[10] Under cross-examination, by Mr Maddan, she admitted that the Defendant financed her re-entry into school in or around the year 2000, and denied that they live in separate rooms. She also admitted that she made no financial contribution to the house at St. Margaret's Bay, the trucking business, nor to the acquisition of the boats and indicated that the Defendant cared for her financially. She insisted that she contributed to the maintenance and upkeep of the house and that she made significant financial contribution towards her children because she saved money which she received from the Defendant in order to do so. She also indicated that she was never employed during the time of her relationship with the Defendant and that she is not employed at this time.

The Defendant's Case

[11] The Defendant relied on affidavits filed on May 18, 2017 and November 23, 2017, which were admitted as his evidence in chief. He called one witness, Vernon Hemmings, whose affidavit filed on November 22, 2017 was admitted as his evidence in chief. His evidence is as stated in his response to the affidavit in support of the application and will therefore not be repeated.

[12] When cross examined by Mr Wildman, Mr Edwards admitted that he assured Ms Thompson repeatedly that her job was to take care of the home and he would provide financial assistance. He admitted being aware of her application for a firearm licence and when asked if he gave a recommendation, did anything in relation to her getting the licence or if anyone spoke to him in relation to it, he replied "not to my knowledge". He disagreed that they resumed cohabitation in 2005, indicating that it was 2006 after counselling. With regard to whether the Claimant assisted in his business, he said "no record have to keep...no bookwork...". He agreed that it would be correct to say that during his relationship with Ms Thompson she was a good common law wife.

[13] Mr Vernon Hemmings' evidence is that he has known Mr Edwards "for over twenty (20) years" and Ms Thompson "for a period of nine (9) years...", but he is not certain of the year the parties started living together and can only attest to seeing the Claimant at the home in or around 2007. He states further that he has known Mr Edwards to "operate a trucking business for over thirty (30)

years” and he assists him with this business. He adds that to the best of his knowledge, Ms Thompson has never assisted with the operation of any of Mr Edwards’ business. He also states that the Claimant had explained to him that she has not been involved sexually with the Defendant since he was discharged from the hospital in 2010, and that over the years, the Defendant has confided in him about extramarital issues affecting his relationship with the Claimant.

[14] When cross examined, he said he was not certain as to the date the parties started living together and that he visited the home and would have seen Ms Thompson there. When asked about the time period that he would have seen her he said, “I could only attest to after 2010”. The first time he said he remembered seeing her living there was “about 2007” and he said started going to the house on a regular basis in 2006.

The Submissions

[15] After hearing the evidence, Counsel for the parties were ordered to file closing submissions, which they did. On December 14, 2018 oral submissions were made before me and the court then reserved the decision.

[16] I have given due consideration to the submissions and the authorities cited in support of each party’s position and will not rehearse or restate them but will make reference to them as I see it necessary to explain the reasons for my decision.

The Issues

[17] The issues which I find arise for determination are:

- I. Whether the Claimant qualifies as a “spouse” within the meaning of the **Property (Rights of Spouses) Act (PROSA)** and, if so,
- II. Whether the parties ceased cohabitation and whether the claim was filed within the time stipulated by the Act, ...or whether the application can be treated as an application under section 11;
- III. Whether the property located at Lot no. 45, St. Margaret’s Bay, Moonlight Bay P.O., in the parish of Portland is the “family home”
- IV. Whether the Claimant is entitled to half share of the “other properties”

[18] In addressing the issues, I have carefully analysed the evidence presented as well as the submissions of Counsel. I have also examined the demeanour of the parties and the witness for the Defendant in order to assess their credibility and reliability, as I note that there were inconsistencies in the evidence on both sides and both the Claimant and the Defendant were evasive.

Whether the Claimant qualifies as a “spouse” within the meaning of the Property (Rights of Spouses) Act.

[19] Section 2(1) of the Act defines “spouse” to include:

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

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

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

[20] The term “cohabit” in the Act means “to live together in a conjugal relationship outside of marriage and ‘cohabitation’ shall be construed accordingly”.

[21] Provided the parties meet the test of being spouses, the court will then have to decide whether the claim has been brought within the time specified by the Act and if so, then decide if the house at St Margaret’s Bay is the family home and further determine if the Claimant is entitled to an interest in other properties and assets she is claiming 50% interest in.

[22] The question whether the Claimant is a spouse is a question of law and fact and the Claimant has the burden to prove, on a balance of probabilities that she is a single woman, the Defendant is a single man, and she has cohabited with him, as if in law he was her husband, for a period of not less than five years.

[23] The Claimant has not pleaded that she is single, neither has she pleaded whether the Defendant is single. It was in amplification of her evidence in chief that she stated that at the time of the commencement of the relationship they were both single. She would then have been fifteen years old, having been born on June 8, 1982. The Claimant stated that they were in a relationship

before they started living together, and that by living together as man and wife she means that they have been doing “everything as normal man and wife would have done”.

- [24] Both parties gave conflicting evidence as to the status of their relationship including the date of commencement and whether it had broken down and was reconciled.
- [25] The Defendant is adamant that the relationship commenced in 2000 when she was eighteen years old. and his version is that cohabitation ceased between them on two separate occasions, the first being in or around 2004, and they resumed cohabitation in either 2005 or 2006, and the second was on or about September 18, 2010, “when she told me then that she was ending the relationship with me”.
- [26] The Claimant’s evidence however, is that “she never terminated her relationship or ceased to cohabit with the Defendant” and that “they have continued to have intimate encounters up until sometime in 2017, when the Defendant expressed the desire to have more children with[her]”. She said that they did not receive counselling, but received “advice” and that all this time she remained in cohabitation with Mr Edwards.
- [27] In attempting to show that cohabitation is extant, the Claimant explained that she only slept in a separate bedroom since 2010, because of the injury to the Defendant’s eye and the fact that their youngest child would sometimes sleep in the bedroom she shared with him and her hand would hit him in his eye. Additionally, she produced a letter dated 2014, addressed “To Whom it may Concern” stating that the Defendant provided same to assist in her application for a firearm at a time when they were still living together as man and wife and by way of cross examination it was sought to elicit information that the Claimant cooked meals for the Defendant and ironed the undershirt he wore to court on the first day of the hearing.
- [28] The fact of cohabitation has been shown on the evidence as I find that the relationship of the parties had “marriage-like intimacy...” (See **Ghaidan v Mendoza** [2004] 3 WLR 113). Additionally, I find that “some signposts of

cohabitation” as identified by Tyrer J, in **Kimber v Kimber** [2000] 1 FLR 384 are present in this case. The parties lived together in the same household, had a sexual relationship, had children together, there was a sharing of daily life between them and there is evidence that the Defendant provided the finances for the running of the home.

[29] The main point of dispute is in relation to the time period of cohabitation. I believe it is reasonable to accept that the parties ceased cohabitation in 2004, as I accept as true, the evidence that the Claimant went to live with her parents and the Defendant was in another relationship which produced a child, who was born around the same time as the Claimant’s first child. I also accept as true the evidence that the Claimant went back to cohabit with the Defendant after giving birth to her first child in January, 2005, and I note that the second child born to them, was born in January, 2007. I also bear in mind that under cross examination by Mr Wildman, the Defendant admitted that he assured the Claimant repeatedly that her job was to take care of the home and he would provide financial assistance and he agreed that during their relationship she was a “good common law wife”.

[30] I find on the evidence that at the commencement of the relationship, both parties were single. I also find as a fact that cohabitation between the parties commenced after the death of the Claimant’s sister, and in or around 2000, as this is the only appropriate time that she could have been “acting in the role of a wife”. I also find that the parties separated in 2004 and this was not just a “cooling off period” as Counsel for the Claimant has suggested. There would therefore have been a break in the period of cohabitation before the Claimant resumed living with the Defendant again in 2005, after the birth of their first child.

[31] The resumption of cohabitation I find, was in early 2005, and it is my view that they continued to cohabit even after the Defendant was injured in August 2010 and was released from the hospital September 18, 2010. Even if the court accepts that cohabitation ceased in September 2010, I believe it is reasonable to find, on a balance of probabilities, that they cohabited for a period of not less than 5 years, by calculating the period from early 2005 to after September 18,

2010, the date he was released from the hospital. I bear in mind however, that the letter to the Firearm Licensing Authority to assist in the Claimant getting a permit to be the holder of a firearm, which I find was signed by the Defendant, provides further evidence of the likelihood, on a balance of probabilities, that the parties were still cohabiting, up to about December, 2014. Even from the evidence of Mr Hemmings, I believe it is reasonable to find that the parties were living together “as husband and wife” and continued to do so up to 2014.

[32] I reject the evidence of the Claimant she never terminated the relationship or ceased to cohabit with the Defendant and find that her attempt to show that she is still cohabiting with the Defendant by providing evidence that she ironed the undershirt he wore to court on the first day of the trial, does not succeed, as that by itself is not sufficient to prove that they are still living as man and wife. I believe the Defendant that they “... operate as two separate and distinct households”.

[33] Considering all the factors, I find on a balance of probabilities that the Claimant has met the requirement of being spouse of the Defendant within the meaning of the Act. I find as a matter of fact and of law that the Claimant was the spouse of the Defendant as I find on the evidence that they are both single and they cohabited for the period recognized by law, as if they were in law, husband and wife.

[34] The Claimant having met the requirement of being spouse of the Defendant, may apply to the court under Section 13(1)(a) for a determination of whether the home is the family home and may apply for a division of the property and other assets on the termination of cohabitation. By virtue of section 6(1)(a) on the termination of cohabitation each spouse is entitled to 50% of the family home unless the court is of the view that this rule should not apply.

Whether the Claim was filed within the time stipulated under the Act

[35] The question as to whether the claim was filed within time stipulated by the Act has to be considered based on the provisions of the Act.

[36] Under **Section 13 (1) of PROSA** an unmarried spouse may apply to the court for division of property. It reads, in part, as follows:

“13.-(1) A spouse shall be entitled to apply to the court for a division of property- (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or;....”

[37] **Section 13(2)** states that an application under subsection (1) (a),(b) or (c) shall be made within one year of the dissolution of the marriage or of the termination of the cohabitation of the parties.

[38] **Section 11** allows for an application to be made during the subsistence of a marriage or cohabitation in respect of property disputes between spouses. It states as follows:

“11.-(1) Where during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property either party ...may apply...to a Judge of the Supreme Court..”

(2) The Judge of the Supreme Court ...may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.”

[39] It is clear from the foregoing that applications made pursuant to section 13 must be made within a specific time, while applications made under the provisions of section 11 are not subject to a time line.

[40] The parties were cohabiting in a common law relationship and as such, pursuant to Section 11, the Claimant could seek an order in relation to the title to or possession of any property owned by either or both of them. Where cohabitation has terminated, the Claimant can avail herself of Section 13 and the provisions of **Sections 6, 7 and 14** would apply. These sections deal with each spouse's 50% entitlement to the family home, the court's power to vary the equal share rule and the factors to be considered, as well as address the division of property other than the family home and factors which the court can consider.

[41] The Fixed Date Claim Form was said to be filed pursuant to **PROSA**. It is noted that no specific section of the Act was pleaded. The Claimant seeks declarations that she is entitled to 50% interest in what is described as the

family home, as well as 50% of other assets, and also seeks consequential orders. When the manner in which the pleadings are framed is examined, it seems to me that the reliefs being sought would be reliefs under section 13, the Claimant having distinctly sought a declaration in respect of “family home” and the division of other assets and properties. Additionally, I note that the Defendant, in his response, indicated that the Claimant is not entitled to any interest being claimed as it would be unreasonable and unjust as his assets were acquired before their relationship commenced. These averments relate specifically to applications under section 13.

- [42]** On an application under section 13, the court has the power to divide the family home, and divide other properties, taking into consideration other factors set out in the Act. Based on the definition of “family home” in section 2 of the Act, the provision in section 6(1), as to the “equal share” entitlement of the family home, and the fact that section 7 of the Act allows the court to vary the equal share rule upon an application by a party, it appears to me that the Claimant is praying in aid the provisions of section 13 and the Defendant has treated with the matter as if it was so brought.
- [43]** The FDCF if filed under section 13, and filed outside the time limited in section 13(2), ought not to proceed without the court granting an extension of time. In this case, there was no application made nor any extension of time granted. The claim is therefore out of time. More than twelve months have elapsed since the date the parties would have ceased cohabitation, as I have found. There has been no application for an extension of time for the claim to be brought.
- [44]** The limitation defence pleaded by the Defendant would therefore succeed as it is a complete defence to the claim. This, in my view, would bring the matter to an end.
- [45]** However, due to the manner in which the claim was presented, the evidence led and the questions put to the Defendant in cross examination, the court is led to believe that, although not stated in the FDCF, the Claimant may have brought her claim under section 11 (1) of the Act.

[46] In the event I am mistaken in relation to the section of the Act the claim is made under, and the Claimant was in fact proceeding under Section 11, the claim could proceed under that section, as there is no limitation period stated there. The Claimant would however have had to show that cohabitation subsists. As she sought to present evidence tending to show that cohabitation has not ceased, contrary to the Defendant's evidence that they are no longer cohabiting, I formed the view that the issue of whether the claim was brought under section 11 was relevant for consideration.

[47] The Claimant testified that "the relationship between herself and the Defendant was never terminated and that she has continued to live with the Defendant as man and wife since 1997...". She tendered in evidence a letter dated December 8, 2014, addressed to the Firearm Licensing Authority, to support this position, and the court has found that it was a letter from the Defendant indicating that she was his spouse.

[48] I am persuaded by dicta in the case of **Diedre Anne Hart Chang v Leslie Chang**, Claim No. 2010HCV03675, unreported, delivered November 22, 2011 where at paragraph [91] of her reasons for decision, Edwards, J (as she then was) states:

"...It is quite possible ...that a claimant may be time barred from proceeding under section 13(1) (c) but could validly proceed under section 11 for which there is no limitation as long as the marriage subsists. ...So a claim filed under the Act might not be able to proceed on an action for division of property, if the time limit has passed and no extension given; but a claimant may validly proceed (if applicable) under section 11 or 13(1)(d) using the same claim form."

[49] There is therefore nothing to prevent a claim proceeding under Section 11 where there is no limitation period, provided cohabitation subsists. In the instant case however, having found that the parties were spouses within the meaning of the Act, and that they had in fact ceased cohabitation, the claim, if made under Section 13, would be out of time having been filed in 2017, and the claim if made under section 11, also could not stand as the Claimant has not shown on a balance of probabilities that cohabitation is still subsisting.

- [50]** Additionally, Section 11 of the Act does not speak to division of property. It appears to me that the relief to be granted under that section is limited to resolving a dispute which cohabiting spouses may have as it relates to “title” to, or “possession” of property. I note also that there are no guidelines to assist the court as to what factors are to be taken into consideration to determine a dispute under this section.
- [51]** In the event that the matter was proceeding under section 11 of the Act, which provides no timeline for making the claim, having examined the statements of case and the evidence presented with a view to determining if the orders sought can be granted, when the substance of the evidence is examined, it can be seen that the Claimant is seeking to show that she contributed towards the acquisition, preservation and maintenance of the home she was seeking to be declared as the family home”, and in relation to other property and assets she is seeking 50% share. The Defendant on the other hand, from the outset, indicated that the claim was brought out of time and he sought to establish that she made no financial or other contribution and specifically indicated that she is not entitled to a share as it would be “unjust and unreasonable”. All of the foregoing, in my view relate to an application made under Section 13 of the Act.
- [52]** Throughout the deliberation of this matter there was therefore uncertainty as to which provisions or section(s) of the Act was being relied on by the parties. The skeleton submissions filed on March 16, 2018 and the closing submissions on behalf of the Claimant, as I understand them, are to the effect that reliance was being placed on section 13 (1)(a) and 13(2). However, I note that in addressing the “appropriateness of the Claimant’s application with respect to time” Counsel for the Claimant submitted that “the Claimant has indicated that her relationship with the Defendant which began in 1997 continued up until sometime in 2016” and that “the Claimant’s application is not out of time, that their relationship subsisted...”. There was no evidence provided from which the court could find on a balance of probabilities that the parties continued to cohabit until 2016.
- [53]** The submissions on behalf of the Defendant also gave the court the impression that the Defendant, as well, was placing reliance of Section 13 of PROSA as the basis on which the claim had been brought, and in the skeleton submissions

filed on March 14, 2018, he emphatically submitted that the “case should not advance as the period which the Claimant should have made an application under the Property Rights of Spouses Act for division has long expired”.

- [54] The challenges to the Claimant’s standing to file the FDCF, by way of cross examination, was as to whether she had received a court order declaring her spouse and whether cohabitation had ceased between the parties. The Claimant would have had twelve months from the date cohabitation ceased to file the claim, unless the court allowed an extension, or she would have had to show that cohabitation was subsisting, in order to place herself under section 11 of the Act. Having found that the parties were in fact spouses within the meaning of the Act, and that cohabitation ceased in or around 2014, the claim having been filed in 2017, is clearly outside of the stipulated period of twelve months allowed under the Act.

Conclusion

- [55] On the evidence presented, I conclude that the Claimant cohabited with the Defendant as if they were in law husband and wife for a period of not less than five years and that their relationship had all the necessary qualities for it to be seen as such. She has therefore shown on a balance of probabilities that she was the spouse of the Defendant for the purposes of the Act.
- [56] Based on the date of the presentation of the claim, the state of the pleadings and the evidence presented in support, this court cannot find that the Claimant has made out a case for entitlement to a share of the properties as claimed, or for the court to make an order in relation to title to, or possession of, property owned by one or either of them.

Disposition

- [57] The Claim is therefore dismissed. There will be judgment for the Defendant with costs to be taxed, if not agreed.