[2014] JMSC Civ. 203

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 06147

BETWEEN	**PRUDENCE BLAKE**	**CLAIMANT**
AND	**HUGHROY BLAKE**	**DEFENDANT**

Mr. Gordon Steer instructed by Chambers, Bunny & Steer for the Claimant

Mr. Barry Frankson instructed by Richmond & Frankson for Defendant

Heard: September 23, 2014 and November 28, 2014

Matrimonial Property – Separation of Parties – Division of Matrimonial Property – Family Home – Equal Share Rule – Property (Rights of Spouses) Act

IN CHAMBERS

DUNBAR-GREEN J(Ag.)

The Claim

1. This matter, under the **Property (Rights of Spouses) Act (PROSA)**, comes before this court by way of Fixed Date Claim Form filed 18th November, 2012. The claimant, Prudence Blake, and the defendant, Hughroy Blake, are teachers. They were married on 2nd May, 2009 and separated in September 2012. The claimant seeks the following orders:

i the claimant is entitled to fifty percent interest in property at 44 Revamp Road, Mineral Heights, May Pen in the parish of

Clarendon registered at Volume 1375 Folio 693 of the Register Book of Titles;

ii. that a report and valuation of the said property be done or alternatively that a valuation be agreed upon by the claimant and the defendant and that the cost of the said valuation be shared equally by the parties;

iii. that if no valuator can be agreed then one shall be appointed by the Registrar of the Supreme Court;

iv. the defendant shall have the first option to purchase the claimant's fifty percent (50%) share of the property. Said option shall be exercised within thirty (30) days of the presentation of the valuation report;

v. that in the event that the defendant is unable to purchase, the said property be put up for sale on the open market or any public auction or by private treaty; and

vi. the Registrar of the Supreme Court be empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unwilling to do so.

[2] The claimant has filed three affidavits in support of her claim. They are affidavits of Prudence Alicia Blake filed 13th November, 2012; 2nd July, 2013; and 30th January, 2014.

[3] The defendant has asked the court not to grant the claimant a fifty percent share in the house but to allow him and his children to live there. In support of that position he has filed, in response, two affidavits on 6th May 2013 and 15th October, 2013.

[4] Both parties have been cross-examined extensively.

[5] The sole issue for the court is whether the claimant is entitled to a fifty percent share in the beneficial interest of the property at 44 Revamp Road, Mineral Heights, Clarendon.

Background

[6] According to the claimant, the two parties met in 2001 and commenced an intimate relationship in 2004. The defendant insisted that it was in October or December 2006 that the intimate relationship began. Nothing turns on this difference.

[7] It is not disputed that in 2006 they began cohabitating at Ingle Mews Drive, Clarendon, at premises owned by the defendant's aunt. Also living with them was the claimant's young daughter from a previous relationship.

[8] At the time they began living together, the claimant was in the process of constructing a dwelling in Palmers Cross, Clarendon, on a piece of land given to her by her mother.

[9] In or about July 2006, the defendant made a deposit on land at 44 Revamp Road, Mineral Heights, Clarendon. The property was transferred to him on 11th January 2007. Also in that year, the defendant commenced construction of a house on the land with the aid of two National Housing Trust (NHT) loans.

[10] With the construction still incomplete, the parties moved into the premises in 2008 and got married in 2009. The union produced two children: Justin Seth born 7th November, 2008 and Dyon Hugh born 3rd June 2012.

[11] The parties continued to reside at 44 Revamp Road until their separation in September 2012.

[12] Consequent on that separation, the defendant moved to his mother's house but continued to pay the mortgage for the Revamp Road property, solely.

Matters In Dispute

[13] There was no agreement on when the construction at Palmers Cross ceased. According to the claimant she began the construction between 2004 and 2005 but discontinued it at the time the parties started living together in 2006.The reason for doing so, she said, was that she had an obligation to pool her resources with the defendant's to construct the dwelling house for the family at 44 Revamp Road. On the contrary, the defendant's evidence is that construction on the house at Palmers Cross continued into 2011, when a half ton of steel was purchased by the claimant. Prior to that he had assisted with the materials towards that construction but stopped in 2008. He offered no explanation for his action.

[14] The defendant contended that it was he alone who paid the deposit for Revamp Road, with the assistance of his mother on a promise of repayment. The claimant, on the other hand, accused the defendant of using her ATM card, unauthorised, to withdraw $25,000.00 from her bank account which he put towards the deposit. She produced no documentary or other evidence to support the accusation, which if is true, might be expected to be available.

[15] The claimant also said that she contributed to the construction at 44 Revamp Road by providing steel pipes and other materials that had been diverted from the construction at Palmers Cross. She also contributed a toilet, basin, tiles and a jaccuzi. The defendant vehemently denied that she contributed anything except tiles in the sum of $3,000.00. He admitted receiving a jaccuzi, but said he had to pay her for it.

[16] The claimant denied that she was asked by the defendant to use her NHT benefit towards the construction of the family dwelling house at 44 Revamp Road and that she

refused. Rather, it was her desire to assist but the defendant was adamantly opposed to the idea, preferring instead to pay the mortgage solely.

[17] When questioned about the absence of her name on the title the claimant's response was, “I wasn’t included in the purchase as it was up to the discretion of my husband, and being he was the person processing, and we were not married I was not included.” She also said, “I was interested in building a partnership and didn’t want it to appear that I wanted something out of the relationship but love.”

[18] The defendant’s position was that since the claimant had refused or failed to put his name on the title at Palmers Cross he felt no sense of obligation to put her name on the Revamp Road title. She, on the other hand, contended that there was no title to the land at Palmers Cross to which she could have added his name and in any event her mother had willed the land to another family member after she had discontinued construction of her house. Neither party provided any supporting documentation or other evidence.

[19] The claimant deposed that she contributed to the payment of utility bills, school fees and the household helper. She also purchased groceries. She had been making some of these contributions since they lived at Ingle Mews. The defendant denied that the claimant made any contribution to the household expenses at Ingle Mews or to the payment of utilities and other expenses at Revamp Road. However, in cross examination he resiled from that position and had this to say:

> *“I am not going to say my wife never purchased anything for the house but I purchased most … she started to pay some of the household expenses from time to time. I can’t remember the exact time she started. She would help at Inglewood but not much. She shared expenses at Inglewood … I purchased most of the groceries at both places … when the house was being constructed she went*

there rarely … one time I needed a back up with tiles and I think she put $3,000.00 for tiles …my wife paid a few utilities bills."

[20] When he was questioned further about whether the claimant bought groceries, he replied:

"*Yes, but not much. One month I would not come up with all the money and she did not take the money. Sometimes she assisted in the groceries. I had to shoulder most of the groceries and the utilities."*

[21] As often happens in these types of family dispute, there was little convergence of evidence. However, on the matter of contribution, I found the defendant to be particularly obfuscatory with his answers, which diminished his credibility. In contrast, I found credible, the claimant's evidence as to why she was not on the title of 44 Revamp Road. Her explanation was consistent with the course of dealing between the parties, since at no point in the relationship, based on the defendant's own evidence, did he appear eager or inclined to involve the claimant in matters pertaining to the property.

Analysis

[22] I turn now to the established principles governing this type of dispute. Section 13 of **PROSA** gives the court jurisdiction to determine property rights of spouses who have separated with no reasonable likelihood of reconciliation and where such an application is brought within twelve months of the separation. Given that the parties were separated in September 2012 and the claim was brought within three months of the separation, in November 2012, **PROSA** applies.

[23] Section 6(1) of **PROSA** in so far as is material provides:

6.(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home -

(a)

(b)

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

[24] Family home is defined by section 2 of **PROSA** as:

> *"...the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time time by the spouses as the only or principal family residence...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."*

[25] Phillips JA in **Dalfel Weir v Beverley Tree** [2014] JMCA Civ 12 para 13 cites with approval the dictum of Sykes J in **Peaches Stewart v Rupert Stewart** Claim No HCV 0327/2007, delivered 6th November 2007, where he expounded on the definition of the family home and said:

> "*...family home means the permanent or usual abode of the spouses...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 they eat, sleep and get dressed for school and (d) receiving correspondence..."*

[26] There was no evidence led on the particulars itemised by Sykes J or the like, but in my view, it follows logically that if there is evidence of the parties residing at a particular place and nowhere else and undertaking the commonplace duties of a household, this would be sufficient to satisfy the meaning of habitual use and principal residence within the meaning of section 2.

[27] The evidence reveals that the parties started living at the 44 Revamp Road in 2008. At that time the home was not completely constructed and it remained so at the

time of hearing. There is no evidence that the family, which include two children for the couple, had since lived together anywhere else until the separation in 2012. During the period, they together maintained the household and developed the property. Accordingly, I find that the premises was used habitually by the spouses as their only family residence and is therefore the family home.

[28] Having determined that 44 Revamp Road is the family home, each spouse is entitled to fifty percent share in the beneficial interest, unless a section 7 factor or an agreement under section 10 applies. For purposes of this action, section 10 is irrelevant.

[29] Section 7 of **PROSA** provides:

> *7. –(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following:-*
>
> *(a) that the family home was inherited by one spouse;*
>
> *(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of co-habitation;*
>
> *(c) that the marriage is of short duration.*
>
> *(2) In subsection (1) "interested party" means –*
>
> *(a) a spouse;*
>
> *(b) a relevant child; or*
>
> *(c) any person within whom the Court is satisfied has sufficient interest in the matter*.

[30] The foregoing section gives the court the power to vary the 50/50 rule in circumstances where it considers it unreasonable or unjust for each spouse to have fifty

percent beneficial interest in the family home. In such instances the presumption of equality would be displaced by the application of a Section 7 factor which makes it unreasonable or unjust for each spouse to take equally. Nevertheless, I am of the view that these powers that are given to the court should be deployed sparingly, as exceptions, so as not to whittle away the solemnity and efficacy of marriage. As Morrison, JA observed in the Court of Appeal decision of **Brown v Brown** [2010] JMCA Civ. 12 para. 38, *"...section 7 provides for the exceptional situations in respect of which the court is given power to vary the equal share rule."*

[31] In **Graham v Graham** Claim No. 2006 HCV03158 (delivered 8th April, 2008) McDonald-Bishop, J, in identifying the philosophy behind the equal share rule, referenced Lord Keith of Kintel in **R v R** [1992] AC 599, 617 and had this to say:

> *"The equal share rule is derived from the now well established view that marriage is a partnership of equals **R v R** (1992) 1 A.C. 599, 617… committing themselves to sharing their lives and living and working together for the benefit of the union" (para. 15).*

[32] From these authorities the proposition emerges that it behoves the court to consider that since the marriage is by its very nature a partnership of equals, then the family home should be shared equally on the demise of that relationship unless exceptional circumstances are shown to exist.

[33] I am also mindful that the factors listed in section 7 are not exhaustive. But, as Brooks, JA opines in **Stewart v Stewart** [2013] JMCA Civ 47, para.34 "...each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the rule." He suggested that some of those elements might be (1) the level of contribution of each party to the matrimonial home (2) their respective behaviour and (3) other property holdings.

What factor if any exists to displace the equal share rule?

[34] Having already decided that the subject property is the family home I now have to determine whether, in the circumstances of this case, it would be unreasonable or unjust to apply the equal share rule.

[35] In making this determination I have considered that the marriage lasted from 2nd May, 2009 to September 2012, a period of only three years. Counsel for the claimant, Mr. Steer, in acknowledging that fact has nevertheless submitted that the court should consider that the parties were in a settled relationship for three years prior to the marriage. In those years prior to the marriage they –

(i) lived together;

(ii) shared expenses;

(iii) had a child together; and

(iv) acquired a property and developed it.

[36] Relying on the dictum of Nicholas Moyston, Q.C. in **GW v RW** [2003] EW HC 611(Fam) (18th March 2003), counsel asked the court to see the parties' relationship over the six (6) years as a seamless one, there being no significant difference between the period before marriage and after.

[37] Nicholas Moyston, Q.C. in assessing the nature of the relationship in **GW**, had this to say:-

> *"I cannot imagine anyone nowadays seriously stigmatizing pre-marital cohabitation as "living in sin" or lacking the quality of emotional commitment assured in marriage. Thus in my judgment where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand, if it found that the pre-marital cohabitation was on the basis of a trial period to see if there is any basis for later marriage then I*

> *would be of the view that it would not be right to `include it as part of the "duration of the marriage". This was the finding made in the recent case of F v F (14 January 2003) by Hartmann J in the High Court of Hong Kong."(para. 33).*

[38] Whilst the force of counsel's argument is unquestionable, I am not persuaded by it. Although I am in agreement with the view expressed in **GW,** I do so with one qualification. The language in 7(1)(c) is clear. The legislators in using the word "marriage" meant just that and not any other relationship. Otherwise, the provision might have used the word "cohabitation" instead of or along with "marriage" as is done, for example, in 7(1)(b).

[39] The word "marriage" as distinct from "cohabitation" can only mean holy matrimony. It is to be expected that in ordinary relationships there is a period of courtship prior to marriage. The conduct of the parties during that period of courtship can be a gauge of their future intentions. But it does not follow from their courtship that marital obligations begin to be formed just as no particular conclusion can be drawn from the fact that the period of courtship is short or long. Having said that, there comes a point when conduct of the parties, such as starting a family and sharing a home, can be evidence of the shift from courtship to cohabitation but certainly not marriage, as contemplated by section 7(1)(c).

[40] **PROSA** did not define a short marriage. However, there is judicial opinion which suggests that anything under five (5) years could be regarded as a short marriage, a view with which I agree. In **Margret Gardner v Livingston Gardner** [2012] JMSC Civ. 54 at paragraph 28 Edwards, J said:

> *"I am not prepared to accept that three years is the bench mark for marriages of short duration. I say this because the law recognizes that domestic relationships require five (5) years of cohabitation*

before a party is considered a spouse in Jamaica … [In] the Jamaican context, any marriage of less than five (5) years would be a short marriage."

[41] Although I find no fault with counsel's analysis that the relationship was a seamless one from start to finish I nevertheless find that the marriage was of short duration, having lasted for only three (3) years. Having so found, the Court is nevertheless reminded that the existence of that factor does not lead automatically to the entire interest being allocated to one or the other spouse.

[42] My interpretation of Brooks JA's judgement in **Stewart v Stewart** (paras. 33,63) is that contribution to the matrimonial home can be considered when deciding whether to vary the equal share rule if one of the factors provides a gateway, which, in this case arises, since this is a marriage of short duration.

[43] Counsel for the claimant, in reliance on **Jones v Kernott** [2012] 1 A.C. 776 submitted that unequal contribution does not itself indicate that a party should have a greater interest in the family home. Rather, the court must have regard to the whole course of dealing when inferring the intent of the parties.

[44] I accept the foregoing as a correct statement of the law and now turn to an assessment of how the parties conducted their affairs over the course of the relationship.

[45] On the defendant's account the deposit on the land was made about July 2006, prior to the relationship. When the title was transferred to him in January 2007, the parties were cohabitating but not married and neither of the children had been born.

[46] After the birth of their first child in 2008, they moved to the dwelling, which was still under construction. By this time, according to the claimant, she was pooling resources with the defendant as a family.

[47] Within a year of moving to the dwelling, the parties got married and subsequent to that their second child was born.

[48] This course of dealing suggests that the land might not have been bought in contemplation of marriage but the dwelling house could reasonably be said to have been constructed in contemplation of continued cohabitation, at a minimum.

[49] There was nothing in this relationship during its subsistence, pre and post marriage, to suggest that this was not a partnership. There is credible evidence that the parties jointly developed the land into a dwelling house.

[50] I find as a fact that the defendant bought the land. I reject the claimant's evidence that she contributed to the purchase price. However, I accept the evidence that she bought tiles and fixtures for the house, and she helped with a variety of household expenses, while the defendant paid the mortgage. Although the defendant asserted that he had to pay the claimant for the jaccuzi she bought, there is no evidence of that agreement or any payment having been made. I do not believe his evidence.

[51] The property was maintained by the joint efforts of these parties. The brevity of the relationship would therefore not justify a departure from the equal share rule and has to be viewed in the context of the claimant's clear involvement in the development of the family home, although contribution itself is not determinative and the "tally sheet approach" has been rejected by the courts.

[52] My decision is fortified by that of Campbell J in **Christian v Christian** [2012] JMSC Civ. 036 where he concluded that a disparity of contribution between the parties is insufficient by itself in proving that equal entitlement is unreasonable.

[53] I find further that there is no evidence that the defendant's mother assisted him with the deposit for the land, and even if she did, that would be irrelevant to the determination of this issue. The title carries only the defendant's name as purchaser.

[54] Counsel for the defendant, Mr. Frankson, submitted that it would be unreasonable for the claimant to benefit from a 50% beneficial interest in the home because she failed or refused to access a loan from NHT to complete the family home. I make the following observations: (i) even in her own personal endeavour to construct a home at Palmers Cross there is evidence that the claimant did not access any NHT loan, so her not doing so in relation to the family home would be consistent behaviour; (ii) at the time the defendant accessed the loans to build they were unmarried and had no children; (iii) there is ample evidence to suggest that the claimant was sharing the expenses to maintain the home; and (iv) the defendant inferred that the claimant was hoarding her money but this has not been supported by the evidence. I therefore make no adverse findings in relation to the allegation that the claimant had failed or refused to contribute her NHT points to the development of the matrimonial home.

[55] In the circumstances of this case, I am not satisfied that the defendant has established any credible evidence which would make it unjust or unreasonable for the claimant to have an equal share in the beneficial interest of the family home.

[56] Before I conclude, there is one other issue to be addressed. The defendant has represented that throughout the time they lived together the claimant had been very abusive and extremely vindictive and on this basis, also, she should not be granted a fifty percent stake in the family home.

[57] I accept the submissions of counsel for the claimant that conduct is irrelevant and adopt the dictum of Lord Denning MR in **Wachtel v Wachtel** [1973] EWCA Civ 10 (08 February 1973) 4,5 :

"If the marriage has broken down irretrievably, let there be a divorce". It

carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them. They divide up the furniture. They arrange the custody of the children, the financial provision for the wife, and the future of the matrimonial home … It has been suggested that there should be a "discount" or "reduction" in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument."

Conclusion

[58] There is no cogent or compelling evidence to rebut the presumption that the parties have an equal share in the beneficial interest of the family home. It is special and more so in circumstances where both spouses actively participated in the family home coming into being. As such, exceptional circumstances would be required to displace the equal share rule. No such circumstance has been shown to exist in this case.

[59] Based on the foregoing, I make the following orders:

1. The claimant is entitled to a one-half share in 44 Revamp Road, Mineral Heights, May Pen in the parish of Clarendon, registered at Vol. 1375, Folio 693 of the Register Book of Titles.
2. A valuation of the said property is to be agreed upon by the parties and the cost shared equally.
3. That if no valuator can be agreed then one shall be appointed by the Registrar of the Supreme Court.
4. The defendant shall have the first option to purchase the claimant's fifty percent (50%) share of the property. The option shall be

exercised within thirty (3o) days of the presentation of the valuation report.

5. In the event that the defendant is unable to purchase, the said property is to be put up for sale on the open market or on public auction or by private treaty.
6. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unwilling to do so.
7. Costs to the claimant to be taxed or agreed.
8. Liberty to apply.