



[2017] JMSC Civ.12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 02862

BETWEEN	ICILDA ELIZABETH CHAMBERS	CLAIMANT
AND	HARRY SEYMOUR CHAMBERS	DEFENDANT

IN CHAMBERS

Jacqueline Cummings instructed by Archer, Cummings & Co, for the Claimant

Lawrence Phillpotts-Brown instructed by Lawrence Phillpotts-Brown & Co, for the Defendant

Heard: 10th January 2017 & 27th January 2017.

MATRIMONIAL PROPERTY – Division of the Family home – Variation of the equal share rule – Section 7 factors

CRESENCIA BROWN BECKFORD J.

INTRODUCTION

[1] The Claimant, Icilda Elizabeth Chambers and the Defendant, Harry Seymour Chambers were married on the 16th day of December 1978. The parties cohabited until 2009 and a petition for dissolution of marriage was filed consequent on the breakdown of the marriage. Mrs. Chambers is seeking to have the court declare her entitlement to one half of the family home. Mr. Chambers has resisted her claim on the basis that it is unjust and unreasonable. The court finds in conformity with section 6 of Property Rights of Spouses Act

(PROSA) that Mrs. Chambers is entitled to one half of the Family Home. She is also entitled to receive spousal maintenance.

BACKGROUND

- [2]** Mr. and Mrs. Chambers cohabited for some thirty eight years having lived together in a common law union for seven years prior to their marriage. Their union produced four (4) children, who were all adults at the commencement of the proceedings. The Defendant also fathered four (4) children outside of the marriage. They are now both retired.
- [3]** In the course of the marriage, they purchased a three bedroom house situated at 1491 Levens Avenue, Cumberland, Gregory Park P.O in the parish of Saint Catherine and registered at Volume 1211 Folio 386. This was with the aid of a mortgage acquired through the Jamaica Teachers Co-operative Housing Limited. Both the Claimant and the Defendant were registered as joint tenants on the Certificate of Title on the 10th July 1994. The property was one of several specially reserved by the Government of Jamaica for public sector workers. At the time of the purchase, the Defendant was a teacher in the public school system, therefore making him an eligible candidate to purchase the property.
- [4]** A few years after the property was purchased, additions were done to the house including the addition of a two (2) bedroom self contained apartment complete with its own bathroom, kitchen and living space.
- [5]** Since the breakdown of the marriage, Mrs. Chambers has lived apart from Mr. Chambers. The Claimant's evidence is that she temporarily moved out of the home to reside with relatives in the United States of America. In 2010, she returned to Jamaica to find that the Defendant had allowed his female companion to reside in the premises. In 2013, the Claimant again travelled to the United States of America and on her return, was prevented from accessing the property as she was locked out. She has not resided at the property since that time as she

claims to have been prevented from so doing by the Defendant. This account has not been denied by Mr. Chambers.

- [6] On the 9th of October 2012, the Claimant commenced proceedings by way of a Fixed Date Claim Form seeking inter alia:

"A Declaration that the Claimant and the Defendant are each entitled to 50% interest in the premises situated at 1491 Levens Avenue, Cumberland, Gregory park P.O in the parish of Saint Catherine, registered at Volume 1211 Folio 386 of the Register Book of Titles.

The Defendant pay to the Claimant half of all rental proceeds collected for the said premises from 2000 to present or as this Honourable Court sees fit and just.

The Defendant do pay to the Claimant half of the value of the Toyota Hilux Surf motor vehicle registered 0657EZ, which is part of the matrimonial property.

The Defendant do pay spousal maintenance for the Claimant at such monthly sums as are determined by this Honourable Court."

THE SUBMISSIONS

A. The Claimant's Case

- [7] The Claimant's case is that she is entitled to one half of the Family Home by virtue of the operation of section 6 of PROSA. By way of response to the Defendant's claim that she is not so entitled by virtue of section 7, she argues that there are no applicable section 7 factors. The property was not inherited by the Defendant, in fact, the Claimant's evidence is that the property was acquired approximately 14 years after the parties were married. The Claimant further submitted that it is not proven that the property was acquired by the Defendant alone, neither can it be disputed that the marriage was long in duration. On these grounds, she argued that the section 6 presumption should apply since the Defendant has disclosed no cogent evidence to show that a factor listed in section 7 of the Act exists in all the circumstances of the case. On these grounds, the section 6 presumption of the equal division should apply.
- [8] The Claimant's evidence is that she aided the acquisition of the matrimonial property since she paid the closing cost to secure the purchase of the house

using the resources she garnered doing business as an Informal Commercial Importer. In the course of the marriage, she contributed to the household from her earnings even as the Defendant was responsible for the mortgage payments. The Claimant also accepted that improvements were carried out on the property, however she alleges that she made substantial contributions to those enhancements. The Claimant states that these structural improvements to the matrimonial home were made with the shared understanding and intention that a part of the property would be rented out when the parties were retired to supplement their income.

[9] Despite her financial contribution it was submitted on behalf of the Claimant that section 7 does not allow for contribution or any other circumstances to entitle the court to consider a departure from the equal share rule unless a factor as listed in section 7 existed. Then, fairness would require the court to have regard to *“all the circumstances of the case”* to decide whether an unreasonable situation existed that should lead to a departure from the equal share rule. In support of this argument, Counsel cited Langrin JA in the case of **Marjorie Barnes v Richard Barnes** SCCA No.77/2001, delivered on July 5, 2002.

[10] The Claimant relied on the case of **Brown v Brown** [2010] JMCA Civ 12 to highlight that the *“composite approach”* is to be taken toward the Family Home. The dicta of Brooks JA at paragraph 20 of **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47 was also relied on by the Claimant to support the argument that even if a section 7 factor is shown to exist, the court must be very reluctant to depart from the equal share rule.

[11] Lastly, the Claimant submitted that the Defendant's argument to vary the section 6 presumption on the basis that the property was acquired because of the Defendant's profession as a teacher in the public school system falls short of the factors listed in section 7 of PROSA.

B. *The Defendant's Case*

[12] The crux of the case for the Defendant is the fact that though the property was transferred in the names of both parties, the purchase of the said property occurred by virtue of his status as a public sector school teacher. This is in circumstances where the property was one of several specially reserved by the government of Jamaica for public sector workers. The Claimant therefore not being a public sector worker, would have been unable to acquire this property but for him. In light of this, the Defendant submitted that it would be unreasonable and unjust for the Claimant to share equally in the property.

[13] The Defendant accepted that the home is in fact the “family home” and this would generally warrant the application of the section 6 presumption. Like the Claimant, the Defendant relied on Morrison JA’s (as he then was) dicta in **Brown v Brown** regarding the “composite approach” which must be taken in relation to matrimonial property. Counsel for the Defendant submitted however, that section 6 is made subject to section 7 of the Act.

[14] Counsel further submitted that in light of the cases of **White v White** [2001] 1 All ER 1 and **Stewart v Stewart**, the aim of PROSA is to achieve fairness in property adjustments upon the dissolution of marriage or the termination of cohabitation. Counsel also relied on **Graham v Graham** Claim No. 2006 HCV 03158 (delivered the 8th April 2008) and **R v R** [1992] 1 AC 599 to support this argument. The Defendant therefore was entitled to the adjustment in the equal share rule in his favour to achieve fairness.

ISSUE

[15] The questions that fall to be considered are:

1. What criteria should the Court use in determining whether a given situation is a section 7 factor. Given the particulars of this case, I would rephrase that to say that the issue to be resolved is what circumstance could not be a section 7 factor.
2. Is the status of the Defendant as a teacher a section 7 factor.

THE LAW

[16] This claim is brought under The Property (Rights of Spouses) Act "PROSA," which is described in the preamble *"An Act to make provision for the division of property belonging to spouses and to provide for matters incidental thereto or connected therewith"*. PROSA replaces all previous rules relating to the division of matrimonial property providing in section 4 as follows:

"The provisions of this Act shall have effect in place of the rules and presumption of the common law and of equity to the extent that they apply to transactions between spouses and each of them ..."

The only exception recognised by PROSA as per section 3(1), is *"... after death of either spouse ..."*, in which event, *"every enactment and rule of law or equity shall continue to operate and apply in such case as if this Act had not been enacted."*

[17] PROSA defines the expressions of "Family Home and "property" as follows:

Section 2

In this Act-...

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

... 'Property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled...

[18] Section 6 of PROSA deals with the entitlement to the family home and provides that:

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

(a) On the grant of a decree of dissolution of marriage or the termination of cohabitation;

(b) On the grant of a decree of nullity of marriage;

(c) Where a husband and wife have separated and there is no likelihood of reconciliation;

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

[19] Section 6 thus requires the court to make a determination firstly, whether the property in question was indeed the family home. Upon that question being answered in the affirmative, each spouse, subject to the named sections, would be entitled, by virtue of this section, to a half share of the beneficial interest in the family home except where an application is made under section 7 to vary what has become known as the equal share rule. Where there is such an application, the burden of proof rests on the party so claiming to prove on a balance of probabilities that it would be unjust or unreasonable to apply the equal share rule.

[20] Section 7 sets out the factors for the court's consideration when determining whether to vary the equal share rule. It provides as follows:

7.-(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-

(a) That the family home was inherited by one spouse;

(b) That the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) That the marriage is of short duration;

(2) In subsection (1) "interested party" means-

(a) a spouse;

(b) a relevant child; or

(c) any other person within whom the court is satisfied has sufficient interest in the matter.

[21] Brooks JA in **Stewart v Stewart** identified three factors applicable to the operation of section 7. He said:

(27) "At least three things are apparent from section 7(1):

- a. *The section requires the party who disputes the application of the statutory rule, to apply for its displacement.*
- b. *The use of the word “including”, implies that the court is entitled to consider factors other than those listed in section 7(1).*
- c. *The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.”*

[22] The statutory basis for the equal share rule as stated by McDonald- Bishop J (Ag) (as she then was) in **Graham v. Graham** was endorsed by Brooks JA in **Stewart** in which he stated:

(19) ...*“She assessed the statutory basis for the equal share rule at paragraphs 15-16 of that case, thus:*

“15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. (See R v R [1992] 1 AC 599, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633.

16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation....”

[23] After reviewing a number of authorities Brooks JA identified the philosophy behind the statutory concept of the family home stating that:

“The philosophy is that the contribution that a spouse makes to the marriage entitles that spouse to an equal interest in the family home”

[24] Recently, in the case of **Selma Clarke v Edward Clarke** [2016] JMSC Civ. 45 which concerned the rebuttal of the equal share rule in circumstances where the husband claimed an interest of 75% on the basis that the land on which the house was built, was acquired solely by him prior to the marriage and based on his calculation of the wife’s contribution to its improvement, Bertram-Linton J (Ag) underscored that particularly in a marriage of long duration, in that case approximately 31 years, that the „disparity in financial contribution’ is not a section 7 factor. She said that:

“disparity in financial contribution is just something that happens in ordinary marriages, there is nothing unusual about one party owning property and both pooling to develop it and make a life there while raising a family. On the contrary it reflects a stark normality that would characterize a 31 year relationship.”

I find favour with the view expressed by the Learned Judge.

[25] It is a well established principle that the section 7 factors are not exhaustive. In the case of **Graham v Graham**, McDonald-Bishop J (Ag) (as she then was) noted that:

“the category of factors is not closed by the statute is taken mean that the court may take into account other considerations that arise in the circumstances in determining whether the application of the 50/50 rule should be departed from. Under section 14(2) certain factors are listed as relevant when the issue concerns division of property other than the family home. None of these factors are expressly stated as being applicable under section 7, it is for the court, in its own discretion, to determine what considerations in the circumstances would be relevant in order to produce a fair and just result. I conclude that had the legislature sought to provide a closed statutory list of relevant considerations in respect of the family home, then that might have resulted in a fetter on the exercise of judicial discretion in determining what is reasonable or just under section 7. The legislature, clearly, did not so intend.”

[26] This principle has been consistently applied and in the case of **Denise Harriott-Simms v Leroy Simms** [2016] JMSC Civ 125 paragraph 31, it was noted by Anderson J that:

“it becomes apparent from s.7 that the triggering events which could cause the court to find that it would be unreasonable or unjust for each spouse to be entitled to one half the family home is not exhaustive; the court is entitled to consider other factors.”

[27] The approach that the court should take was suggested by Brooks JA when he stated in **Stewart v Stewart** that:

The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists.

If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure (the principles mentioned in Graham v Graham and Jones v Kernott, mentioned above). Before the court makes any orders that displace the equal entitlement

rule it should be careful to be satisfied that an application of that rule would be unjust or unreasonable.'

[28] The court is also guided by Morrison JA (as he then was) in **Brown v Brown** who said that:

"...section 7 provides for exceptional situations in respect of which the court is given powers to vary the equal share rule."

ANALYSIS

(1) Family Home

[29] That the property in question is the Family Home, it being the home in which the spouses resided immediately before separation, is not in dispute. Therefore, section 6 of PROSA now known as the equal share rule is applicable unless any section 7 factors exist which would displace it. Section 6 applies unless as the Defendant has claimed, section 7 is applicable.

[30] The submissions of the Claimant would suggest that the section 7 factors are only those specifically mentioned. As seen from the foregoing authorities, the list is not a closed one. The Defendant's contention therefore merits consideration. As Brooks JA said in **Stewart**, *"the use of the word including implies that the court is entitled to consider factors other than those listed in section 7(1)."* The situations are infinite. The Court must embark upon a consideration of what is unreasonable and unjust.

[31] First for the Court's consideration is whether a section 7 factor exists. For all intents and purposes, the property was treated as being for the benefit of the couple right up to the time of separation. It was conveyed in their joint names, they contributed to the purchase (the Defendant through acquisition of the mortgage, the Claimant through payment of the closing cost) and they have jointly made improvements to the property over the years with a view of it being beneficial to both parties after their retirement. This has not been denied by the Defendant. This evinces an intention to partner for their joint benefit and accords with McDonald-Bishop's J (Ag) (as she then was) view in **Graham** that *"it is*

recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals.”

[32] It is noted that the Defendant has not claimed that he will be financially or otherwise worse off by the application of the equal share rule. His sole basis for the displacement of the equal share rule is that the property was acquired by virtue of his employment as a teacher. He is therefore suggesting that there is no unique circumstance existing between the parties to displace the equal share rule. The question could be asked, what if the Claimant had paid the purchase price, would he still be entitled to a greater share by virtue of the acquisition being due to his status as a teacher?

[33] The fact of the Defendant procuring the benefit by reason of him being a government employee could not be deemed as a situation peculiar to this claim solely. This would be applicable to any other situation where government employees are entitled to this particular benefit. This would create a class of property which would be exempted from the operation of section 6. This exemption has not been expressly or impliedly sanctioned by Parliament. For the Court to embark upon such an exercise would exceed the discretion given to the Court to consider the circumstance of a particular case and would be an act of judicial activism. This is inappropriate given the deliberateness with which the Legislature approached the issue of the Family Home (see judgment of Morrison JA (as he then was) in **Brown v Brown** in which he discusses the development of the law). I am of the view that had Parliament intended to exempt this class of property from the operation of the equal share rule as a section 7 factor, then it would have done so explicitly. I find specifically that the class of property being only offered for sale to teachers, is not a section 7 factor.

[34] In these premises, the Defendant has not satisfied the court on a balance of probabilities that it would be unjust and unreasonable to apply the equal share rule. The court will therefore, not embark on a determination of the relative

contributions of each party to the acquisition and improvement of the Family Home.

(2) Other Property

[35] In the course of argument the Claimant indicated that she is not pursuing her claim to any interest in the Toyota Hilux Surf motor vehicle registered 0657EZ.

(3) Maintenance

[36] Though not pursued in oral submissions the Claimant has made a claim for maintenance. There is an interim order of \$10,000.00 in place. There has been no dispute concerning the relative earning of the parties. There also has been no dispute concerning the current financial impecuniosity of the Claimant. Her evidence is that she has no income of her own and is dependent on her children's benevolence. The Defendant admits he receives a monthly pension which in his affidavit sworn on 15th April, 2014 is given as \$59,001.20 Teacher's Pension and \$6,933.80 for Old Age Pension. Neither party has stated the rental income from the property. However, it is noted that the rented section of the property includes a two bedroom self contained apartment with own bathroom, kitchen and living space. A means report was not forthcoming from either party despite being so ordered.

[37] In these circumstances however, the Claimant should receive some form of assistance from the Defendant until she can be self sufficient. This can be met from the rental income from the property of \$10,000.00 as previously ordered and one third of the pension received by the Defendant.

ORDERS

[38] In the circumstances, the court makes the following orders:

- (a) The property located at 1491 Levens Avenue, Cumberland, Gregory Park P.O in the parish of Saint Catherine and registered at Volume 1211 Folio 386 is the Family Home.

- (b) The Claimant, Icilda Elizabeth Chambers, is entitled to 50% and the Defendant, Harry Seymour Chambers, 50% interest in the Family Home.
- (c) A reputable valuator to be agreed and valuation of the Family Home to be done within 30 days. If there is no agreement then the Registrar of the Supreme Court is to decide on the valuator.
- (d) The cost of the valuation of the Family Home to be borne equally by the Claimant and the Defendant.
- (e) The Defendant is to pay to the Claimant 50% of the current market value of the Family Home as determined by the valuator within 120 days of the date of the valuation report in exchange for the Claimant signing a transfer of her interest in the said property to the Defendant.
- (f) Where the Defendant has not complied with order (e), the Family Home is to be sold on the open market and the net proceeds divided equally between the parties.
- (g) All taxes and cost associated with sale and transfer of the Family Home shall be shared equally by the Claimant and the Defendant.
- (h) The Claimant's Attorney-at-Law is to have Carriage of Sale of the Family Home.
- (i) The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of the Honourable Court if either party is unable or unwilling to do so.
- (j) The Defendant is to account for and pay to the Claimant one half of the rental collected in respect of property from the February 2013 to 31st of January 2017 within 120 days of this order.

(k) The Defendant pays to the Claimant the sum of \$30,000.00 per month as spousal maintenance from the 1st of February 2017 until the Claimant is paid for her interest in the Family Home.