



[2014] JMSC Civ. 177

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05806

BETWEEN	DENISE CHEVANNES-VOGEL	CLAIMANT
AND	NEVILLE WALLACE	DEFENDANT

Mr John Graham and Miss Janice Behari instructed by John Graham & Co., for the Claimant

Mrs Shawn Wilkinson instructed by Wilkinson & Co., for the Defendant

Claimant and Defendant present

Heard: June 5, 6, 12 and 26, and November 19, 2014

Matrimonial Property - Parties separated - Entitlement to family home - The equal share rule- Whether application of equal share rule unreasonable or unjust- The Property (Rights of Spouses) Act

Lindo J. (Ag.)

[1] This is a Fixed Date Claim Form (FDCF) filed by the claimant pursuant to the Property (Rights of Spouses) Act (PROSA) (the act). She is seeking declarations that she is the beneficial owner of 75% of property known as Lot 522 Lantana Close, Long Mountain, Kingston 6 in the parish of Saint Andrew, registered at Volume 1365 Folio 705 of the Register Book of Titles and that the defendant is beneficial owner of 25% of the said property. The FDCF also claims an order that a valuation of the property be undertaken by a reputable valuator agreed by the parties, the cost of which is to be borne equally by the parties and that the defendant have the option to purchase the claimant's 75% share of the property and such other reliefs as the court deems fit.

[2] At the hearing on June 5, 2014, Counsel for the claimant made an application for certain amendments to be made to the FDCF and the following amendments were

granted: The word "defendant" in line one of the item numbered 5 was deleted and the word "claimant" substituted therefor and the words from "the" in line one to "of" in line two deleted and "any equity which the defendant is adjudged to possess in" substituted therefor.

[3] On June 6, 2014 the other orders were made as follows:

1. That the defendant pays the sum of \$68,497.25, being his half share of the costs of the valuation and surveyor's report on or before June 13, 2014
2. Costs for one day to the claimant to be agreed or taxed
3. Matter adjourned to June 12, 2014 at 10 am
4. Claimant's Attorney-at-law to prepare, file and serve order.

[4] The case for the claimant is set out in seven affidavits filed by her in the matter while the defendant's case is set out in the affidavit in response to the affidavit in support of the FDCF, and two further affidavits in response to the second to seventh affidavits of the claimant. Permission was granted for affidavits filed out of time to stand.

[5] The claimant's evidence is that she got married to the defendant on May 28, 2005 and in June 2006 she purchased the property known as 522 Lantana Close, Long Mountain, Kingston 6, registered at Volume 1365 Folio 705 of the Register Book of Titles, in her name only. She states that the deposit on the purchase price of the property, \$2,250,000.00, was advanced to her by Consoft Group Limited, (Consoft) a company to which she was employed and was also a 50% shareholder and a director and that the further payment on the deposit and the closing costs were paid by her solely.

[6] She indicates that the balance of the purchase price was financed by a mortgage to First Caribbean International Bank Limited by her on the security of the said property and "all the mortgage payments were made by Consoft Group, Consoft Technologies, the defendant and me up to November, 2011".

[7] The claimant's evidence further is that she worked at Consoft from November 2003 to August 2007 and her gross salary was \$450,000.00 per month (check this) and that at the time the company advanced the deposit on the purchase price of the property, salary which had accrued was due to her. Additionally, she states that between June 2006 and August 2007 the company advanced some of the mortgage instalments and that in 2009 the mortgage fell in arrears and she applied to the National Housing Trust for a loan to refinance the mortgage to First Caribbean International Bank and settle the arrears.

[8] She states further that there is one child of the family, her daughter from a previous relationship, who lived with the parties between June 2006 and November 2011 and that during this time the electricity and cable charges as well as the majority of the maintenance in respect of the property were paid by her. She indicates that they separated in November 2011 and the defendant has been in exclusive occupation since then and the mortgage is presently in arrears and the defendant has never paid any monies on account of property tax or contributed to the payment of peril insurance in respect of the property.

[9] Under cross examination by Mrs. Wilkinson, the claimant stated that the property was purchased when they were married for just over a year and that the understanding was that it was for them both, but that the question of ownership "didn't come up specifically in my recollection". She agreed that expenses were shared between herself and Mr. Wallace during the marriage and that there were times 'during the time they enjoyed normal marital relations' that Mr Wallace would give her money to pay the mortgage.

[10] The claimant agreed that since February 2012 she has not paid any sums towards the mortgage and that during the time they enjoyed normal marital relations, the mortgage fell into arrears "from time to time". She also agreed that since she left, she has not paid anything toward the maintenance on the property as Mr Wallace has been in sole occupation.

[11] The defendant's evidence is contained in three affidavits sworn on June 28, 2013, November 15, 2014 and January 31, 2014. He indicates that it was agreed between the claimant and himself that he would be entitled to 50% share in the property and that the deposit and other obligations related to the purchase of the property were funded primarily by Consoft and that "other expenses including food and household furniture were taken care of by me".

[12] Mr Wallace's evidence further is that after the breakdown of the marriage, payment of the mortgage has been his sole responsibility as he is still living at the property and that mortgage arrears have been paid by him up to December 2013 and he has also been solely responsible for the payment of the maintenance since the departure of the claimant.

[13] Under cross examination by Mr Graham, Mr Wallace indicated that Consoft is not now operating and that in February 2006 he was not in charge of the day to day running of the company but was chairman of the board. He indicated that he became an employee of the company from its inception which was about November 2003 and apart from being chairman, he did not have a job title and did not get a specific salary, but the company assisted in paying his personal bills. In response to a question about his claim to being owed salary by the company, Mr Wallace stated that "on the basis of she stating that amounts owing, if she owned 50% and I owned 50%, there would be outstanding to me as well".

[14] Mr Wallace further stated that the claimant was employed as Chief Executive Officer (CEO) but became Chief Operations Officer (COO) about January 13, 2006. When pressed by Mr Graham, he said between 2003 and the date of the writing of the letter (February 20, 2006) she was CEO and further that she became COO at the time of signing of the letter and that the time gap between the writing and signing of letter was a "week or so". He further stated that she became COO for the purpose of the letter. This letter (Exhibit DCV 6) was written to the First Caribbean International bank in order that the claimant could qualify for the mortgage.

[15] Mr Wallace denied that the claimant's salary was \$450,000.00 and admitted that he lied in the letter to make the claimant qualify for the mortgage and for him to obtain interest in property, "for the marriage, to get a house".

[16] On behalf of the claimant, Mr Graham submitted that there is no dispute that the property, the subject of the proceedings, is the family home. He expressed the view that the equal share rule which applies by virtue of Section 6 of PROSA is subject to modification in the discretion of the court when the circumstances are such that it would be unreasonable and unjust to apply it. He indicated that the Act does not give an exhaustive list of factors which the court should consider in departing from the equal share rule and in this regard the court's discretion is unfettered and the court may take into consideration such factors as the court deems relevant.

[17] Counsel referred to the cases of **Graham v Graham 2006 HCV 03158 (unreported) delivered 8th April 2008**, **Gardner v Gardner [2012]JMSC Civ. 54.** and **Robinson v Robinson Claim No. 2009HCV 06127 (unreported) delivered 24th February 2011.**

[18] He noted that McDonald-Bishop J, in **Graham**, stated inter alia *"...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..."* and that Edwards J, in **Gardner**, at paragraph 19 stated: *"Where section 7 is being considered questions of contributions...whether financially or otherwise will become relevant. Factors similar to or such as those in section 14 may also be considered."* Counsel also submitted that in the cases of **Gardner and Robinson**, the duration of the marriage was one of the factors taken into account.

[19] Mr Graham suggested that in determining whether or not to depart from the equal share rule, the court should consider that the claimant's evidence that she earned \$450,000.00 per month should be preferred and that this evidence confirms that at the time the sum of \$2,250,000.00 was paid by Consoft on account of the deposit, the

company was indebted to the claimant for unpaid salary and further that the evidence shows that the claimant paid \$981,620.00 towards the deposit and closing costs.

[20] It was further submitted on behalf of the claimant that the court should consider that by constructing an extension to the property without building approval, the title to the property is less marketable and the court would be entitled to infer that this will negatively affect the value of the house and if the property were to be placed on the open market, the sale may be delayed because marketability has been impaired.

[21] Counsel indicated that if when the house is sold the price is insufficient to liquidate the mortgage, the liability to FCIB would be exclusively the claimant's and added that if the claimant were to be given the option to purchase the defendant's interest in the property, the expenses related to the application to modify the restrictive covenants or to secure building approval will be additional expenses that the claimant will incur so as not to be in breach of her obligations under the mortgage and under Section 32 of the Town & Country Planning Act.

[22] Additionally, Counsel indicated that liability to the family home attaches exclusively to the claimant as it relates to National Water Commission, property taxes, peril insurance, maintenance to Long Mountain Country Club and mortgage payments due to FCIB.

[23] Mrs Wilkinson also submitted that there is no dispute that the property was the family home and as such the equal share rule ought to apply. She indicated that in order to succeed on her claim of an entitlement to more than half, the claimant would have to prove that apportioning 50-50 between herself and the defendant would be either unreasonable or unjust.

[24] Counsel noted that the equal share rule should not be departed from solely because the property is registered in the name of the claimant or that the claimant was

the one who took out the relevant mortgage loans in order to satisfy the purchase price of the property.

[25] She quoted from **Stewart v Stewart JMCA Civ. 47** where Brooks JA said:

"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".

[26] She submitted that sole contribution of one of the parties does not, without more, preclude the operation of the equal share rule as PROSA provides that the property may be considered to be the family home even where it is wholly owned by one of the parties. She referred to the case of *Lambie v Lambie* 2006M 00296, unreported, decision delivered August 12, 2008 which stated inter alia:

"the principle of equality in relation to the matrimonial home is not based on the balancing of financial or other contributions, but is based on a legislative decision that the equality of the marriage relationship should be demonstrated by giving parties an equal share of the family home"

[27] She added that PROSA, as a whole, establishes that a distinction is to be drawn when dealing with the family home as against other property and noted that factors set out in section 14 which deals with the distribution of other property are notably absent from section 7 which sets out some of the factors to be considered when departing from the equal share rule. She therefore submitted that if it were the legislators' intention that contribution to the acquisition of the family home were to be a factor to be considered by the court when departing from the equal share rule, it would not be unreasonable to infer that contribution would have been a consideration expressly set out in section 7.

[28] I find on the evidence that the property in question comprised the family home, as defined by PROSA, as it was the parties' principal place of residence during the subsistence of the marriage and as such the issue falls to be determined by the provision of Section 6 of PROSA.

[29] Section 6 (1) of PROSA provides as follows: *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 a 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.*

[30] It is clear from the section that each spouse is entitled to 50% of the beneficial interest in the family home, despite the manner in which the legal interest is held and I am satisfied that the interests of the parties were defined at the time of the acquisition of the property as I accept the evidence that it was bought for them both although the claimant under cross examination had stated that the question of ownership "didn't come up specifically in my recollection".

[31] The courts power to vary the equal share rule as contained in section 7 is as follows:

(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 (sic) 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 was of short duration.*

[32] I am guided by the decision in **Stewart** where the CA stated 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. Further, the Court of Appeal has stated that in considering whether the equality rule has been displaced, the court should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution and that the court is to consider that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation and post separation contributions cannot disturb the entitlement at separation.

[33] Additionally, the case of **Deidrick v Deidrick**, unreported, SCCA No. 4/2008 (delivered July 15, 2008) also provides guidance. There the family home was registered in the husband's name alone and in assessing the husband's assertion that the equal entitlement rule should not apply, Cooke JA having reviewed the experience of that family and finding that the premises was the family home and that the wife undertook the "normal and natural incidents of living in a family home" the court found that the judge at first instance was correct in finding that there was no good reason to disturb the statutory rule of an equal share to each of those parties.

[34] In light of those decisions, in assessing the claimant's claim to 75% of the family home, I find that Mr Wallace's evidence as to his contribution to the family, which has not been contradicted, cannot be considered to be so small as to cause an equal division to be unreasonable or unjust.

[35] Further, the court's approach in considering whether there should be a departure from the equal share rule has been that if a factor stated in Section 7 of PROSA is credibly shown to exist, the court should be reluctant to depart from the rule and 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.

[36] Having considered the three factors stated in the section, I am satisfied that none of them exist in this case. The parties were married for just over a year when the property was acquired and the marriage lasted approximately six years which I do not consider to be a marriage of short duration. Further, no factor similar to the factors stated in Section 7 has been shown by the parties to exist.

[37] The parties seemed to have been placing emphasis on their financial contributions towards the property and although it has been shown on the evidence that there is some disparity in the contributions between the parties, that is not sufficient to prove that equal entitlement would be unreasonable or unjust as contribution by itself cannot be used as a factor for displacing the equal share rule and no other factor has been put forward by the claimant therefore there is no basis for this court to consider a departure from the equal share rule.

[38] I accept as true, the evidence of the claimant of her financial contribution, towards the purchase of the property. I also accept as true the evidence that the defendant contributed to the family, by paying expenses including food and household furniture and that he also made payments towards the mortgage during the subsistence of the marriage and after the separation. Further, I have taken into consideration the

fact that the deposit towards the purchase price and subsequent payments towards the mortgage came from Consoft, the company in which the parties at the time were joint shareholders, in equal shares.

[39] The claimant has not satisfied me on a balance of probabilities that it would be unjust or unreasonable for each party to have an equal share in the family home as she has not demonstrated any cogent or exceptional circumstances that could cause me to displace the presumption.

[40] I have had due regard to and have considered all the evidence presented in this matter as well as the submissions made by both counsel and guided by the authorities and the statutory provisions and having regard the circumstances of this case, I do not believe this is a fit case for the court to displace the statutory rule.

The order of the court is therefore as follows:

- (1) it is hereby declared that the claimant Denise Chevannes-Vogel and the defendant Neville Wallace are equally entitled to the legal and beneficial interest in all that premises known as Lot 522 Lantana Close, Long Mountain, Kingston 6 in the parish of Saint Andrew registered at Volume 1365 Folio 705 of the Register Book of Titles.
- (2) That Allison Pitter Realty Co. be requested by the claimant's attorney-at-law within 7 days of the date hereof to undertake a valuation of the property to determine the current market value and that the cost of such valuation be borne solely by the defendant and that within 7 days of being so requested by Allison Pitter Realty & Co. the defendant allows access to the said property.
- (3) That the Claimant shall have the first option to purchase the defendant's half share of the said property within (90) ninety days of the date receipt of the valuation report failing which the defendant shall have the option to purchase the claimant's half share within (60) sixty days after the date of the claimant's failure to exercise her option

- (4) That in the event the parties are unable or unwilling to purchase the property within the time specified, the property is to be sold on the open market.
- (5) That the proceeds of sale are to be divided equally between the parties.
- (6) That if either party refuses or fails to sign the documents necessary to effect a registrable transfer of the property within fourteen days of being requested to do so, the Registrar of the Supreme Court is empowered to sign the documents on behalf of that party.
- (7) That the claimant's Attorneys-at-law shall have carriage of sale
- (8) Each party is to bear his/her own costs of these proceedings.
- (9) There shall be liberty to apply
- (10) Claimant's attorney-at-law to prepare, file and serve order.