



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 D 02367

B ETWEEN	JACQUILINE ELMAY CHRISTIAN	PETITIONER
AND	OCTAVIOUS CHRISTIAN	RESPONDENT

Mr. Keith Bishop instructed by Bishop and Partners for the petitioner.

Mr. Nigel Jones instructed by Nigel Jones and Company for the respondent.

**Heard 2<sup>nd</sup> July and 30<sup>th</sup> March 2012**

**Family Property – Husband and wife – Family Home – Family Law Reform – Mischief for Correction – Equal Share Rule – Whether Application Unreasonable and Unjust – Relevance of Contributions – Property (Rights of Spouses) Act 2004, SS 6, 7 and 14**

**Campbell, J.**

- [1] The parties, who I shall refer to as wife and husband, met in 1969 and cohabitated until the solemnization of their union in marriage in 1974. The husband was a driver employed at Jamaica Omnibus Service; the wife, a teacher, was acting as a conductress at that same company at the time of their meeting. In 2000, the husband was ordered by the Court to leave the matrimonial home.
- [2] The marriage produced three relevant children, including a child of the claimant, from a previous relationship. The wife had spent several years in the United States during the course of the marriage. She migrated to the United States in 1980 and returned to Jamaica in the mid 1990s. The children, along with the husband made several visits to the wife during her stay in the United States.

- [3] The wife claims, like so many Jamaican parent, who migrates leaving young children in Jamaica, %sent barrels on top of barrels.+ The children, all now adults, appeared to have fared well despite the prolonged absence of the claimant. They all attained tertiary level education and hold senior management positions at large organizations.
- [4] In a Fixed Date Claim Form filed 6<sup>th</sup> May 2008, the wife seeks,
- (a) A declaration that she is the sole owner of Lot 185 Meadowvale, St. Catherine.
  - (b) A declaration that she is entitled to a beneficial interest in 9 Lascelles Avenue, Kingston 2, in the parish of Kingston.
  - (c) A declaration that she is entitled to a beneficial interest in part of the property known as John Common, Stonehenge, in the parish of St. James by virtue of the Family Property Rights of Spouses Act.
- [5] On the 2<sup>nd</sup> June 2009, the husband filed a Notice seeking a declaration pursuant to the provisions of the Married Women's Property Act that he is entitled to one half share in 29 Meadowvale, in the parish of St. Catherine, and consequential orders. There was no issue that 29 Meadowvale was one and the same property described in the application of the claimant's application as Lot 185 Meadowvale. The husband's Notice was amended to seek the orders pursuant to the provisions of Property Right of Spouses Act, 2006

### **Claimant's Case**

- [6] The wife's case is that the parties acquired three proprieties during the course of their marriage. She alleges that herself and her husband built a two- bedroom house on the land at John Common, Stonehenge, and that the property had been owned by the husband before the parties met. In pursuance to an agreement that they would live there together, she gave monies to purchase building materials for the property and to pay the workmen. The parties never resided there. The house was eventually occupied by the husband's parents.

**[7]** It had been purchased before the parties marriage, and whilst they were in a common law union. The Lascelles Avenue property was owned jointly by the husband and his foster mother. According to the wife, it was their first matrimonial home. She often had to make payments to save the property from foreclosure. She testified that it was agreed between the parties that she would take a mortgage from Jamaica Teacher Housing Corporation in the sum of \$20,000.00 to redeem the property which was being auctioned, in return for which her name would be added to the title. The property, 29 Meadowvale was used to secure the mortgage. It was further agreed between the parties, that Lascelles Avenue would be sold and the respondent would contribute his portion to 29 Meadowvale. The wife testified that whilst she was in the United States, her husband sold the Lascelles Avenue property and kept the proceeds for himself, contrary to her beneficial interest.

**[8]** In 1977, according to the wife, in anticipation of a family, she purchased 29 Meadowvale. She contends that her husband refused to make a contribution, on the basis that he already owned a home; nonetheless, she added his name to the title in order to keep her family together. She had no intention of giving him a share in the property. She made the deposit from her savings then secured the closing balance of \$20,000 from the JTA Housing Cooperative Ltd. She states that she was the sole contributor to the mortgage payments. The only banking accounts she maintained were in her sole name.

**[9]** Her husband, having been made redundant, refused to seek work. In 1984, in order to maintain both mortgage payments, she decided to migrate to the United States, to make ends meet. She returned to the island in 1996, and did extensive repairs and expansion to 29 Meadowvale Drive with funds awarded her from an accident she had been involved in the United States. In 2000, the Resident Magistrate Court ordered her husband's removal from 29 Meadowvale Drive. Since then, the claimant has had sole occupancy.

### **The Defendant's Case**

- [10] The property, at John Common is owned by his mother; it was unregistered and was purchased before he met the claimant. The funding for the construction of the house built at John Common was through a loan from the Ministry of Agriculture and Lands Farmers Production Programme. The respondent says the remainder of the funds came from him. The property was occupied by his mother until her death in 1996 and thereafter by his sister.

### **Lascelles Avenue**

- [11] The evidence of the husband was that the property was owned by himself and his foster mother, who died in 1982. A loan was raised from JTAHC for \$20,000.00 to pay off the mortgage. The Meadowvale property was used to secure the loan. There was an understanding that the property would be transferred into the name of his wife. The property was sold instead, and the wife was treated as a joint holder off property, and based on her instructions, the proceeds of sale of Lascelles Avenue were utilized.

- [12] In 1978, the parties jointly purchased property at 29 Meadowvale Drive. The deposit was from their individual savings and the mortgage from JHATC. The husband claimed he took care of all living expenses because the mortgage deductions depleted his wife's salary. He stated that he worked as a bus driver, then as a taxi driver and part time welder.

### **The Property (Right of Spouses) Act, 2006, (PROSA)**

- [13] The PROSA was signed into law on the 1<sup>st</sup> April 2006, some two years after being passed by Parliament.

S24 provides:

The commencement of this Act shall not affect

- (a) any legal proceedings in respect of property which had been instituted under any enactment before such commencement, or
- (b) any remedy in any such proceedings undertaken to enforce or establish a right privilege obligation or liability acquired, accrued or incurred before such commencement.
- (c) Any such legal proceeding or remedy may be continued or enforced as if this Act has not been brought into operation.

[14] Section 24 is a saving clause of the rights, privileges, obligations or liability acquired before the commencement of the Act in any legal proceedings instituted prior to the commencement of the act. It follows by necessary implication therefore that the PROSA can alter and affect rights that existed prior to its commencement in respect of which no legal proceedings in respect of property have been instituted. The law therefore has changed and affected the legal framework regulating any proceeding in respect of the property of the spouses or either spouse. The Court was not advised of any prior legal proceedings in respect of the properties, the subject of these applications, being instituted by either party or any interested party.

[15] Section 4 underscores the scope of the new regulatory framework, by expressly substituting the provisions of PROSA in place of the rules and presumptions of the common law and equity that hitherto governed the division of matrimonial property. S. 4 provides;

**~~T~~he provisions of this Act shall have effect in place of rules and presumptions of the common law and equity to the extent that they apply to transactions between spouses in respect of property and in cases for which provisions are made by this Act, between spouses and each of them, and third parties.”**

[16] The words of S. 4 PROSA are plain and unambiguous, and an intention to affect and alter the common law is clear from the words of the Act, there is no accommodation for an application of the presumption against alterations in the common law. In **Brown v Brown** (2010) JMCA Civil 5, Cooke JA, after

examining several sections of the Act and concluding that its benefits were of retrospective effect said, at paragraph 13;

%have set out these sections in extenso to emphasis the dramatic break with the past as demanded by section 4 of the Act, which directs that it is the provisions of the Act that should guide the Court and not as before, presumptions of the common law and of equity.+

Morrison, JA at para 34;

% introduces for the first time the concept of the family home in respect of which the general rule is that, upon the breakup of the marriage, each spouse is entitled to an equal share (S.6).+

- [17] The law of Trusts was the applicable law in Jamaica when a court is asked to determine the interest of an applicant in whom the legal estate is not vested. The relevant principles were enunciated by Lord Diplock in **Gissing v Gissing** 1979 2 All ER 780 and followed in Court of Appeal in **Azan v Azan**; per Forte JA,

%Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate is not vested must be based on the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trust and in particular, and in kind of disputes between spouses that comes before the court, the law relating to the creation and operation of a resulting trust, implied or constructive trusts and it is unnecessary for present purposes to distinguish between these three classes of trusts.+

- [18] Formerly, in this country, under s.17 of the Married Women Property Act, the court had no power, discretionary or otherwise to vary property rights, they simply declared existing rights. The rights of property were not to be determined according to what is reasonable or fair or just. The same principles apply whether the dispute is between spouses, former spouses or strangers. The application of the settled principles may produce a result that appears unfair. See Bagnall, J. **Cowcher v Cowcher** {1972} 1 W.L.R.425.at 429- 430.

[19] Morison, JA. In **Brown v Brown**, SCCA 12/2009, delivered 26<sup>th</sup> March 2010 at paragraph 26, noted that the committee's general proposal as contained in its report was to give a wide discretion to the court on an application by either spouse to order the division of matrimonial property held between them. It was also proposed that guidelines be established for the exercise of the court's discretion. The legislature did give a wide discretion to the court except with the division of the family home, where the principle of the marriage being a partnership of equals found expression in an equal entitlement of the principal asset of the family.

[20] PROSA S.6 mandates an entitlement in a spouse to a one-half share in the family home, whether the legal estate is vested in the other spouse or not, this is a threshold entitlement, provided for by law without any evidentiary exertions on behalf of the claimant upon the occurrence of events signalling the termination of the marriage or cohabitation. This statutory entitlement in the family home where the relationship is terminated by death and the spouses had owned as joint-tenants, the surviving spouse is entitled to a one-half share, as a dwelling-house which is wholly owned by either or both spouses, and used either habitually or from time to time as the only or principal family residence.

[21] Bagnall, J., in his summary of the relevant law under the provisions of MWPA, stated that, rights are not to be determined according to what is reasonable and fair. However PROSA, Section 7(1) gives the court wide discretionary powers on an application by an interested party in respect of the family home, where it considers it unreasonable or unjust to adhere to the statutory entitlement, the court may make such order as it think is reasonable taking into consideration such factors as the court thinks relevant, including among others, (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 beginning of cohabitation, (c) the marriage was of short duration.

**[22]** Similarly, Section 14 (b) provides that the courts make such a division as it thinks fit, taking into account, inter alia, S. 14 (2) (e), such other fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account. The Court is also empowered, pursuant to S. 15 (1), to make such order as it thinks fit, altering the interest of either spouse, in an application for property.

### **Analysis**

**[23]** In respect of 29 Meadowvale Drive, the wife's application was for a declaration that she was the sole owner of that property. The husband's claim was for a fifty percent share. Mr. Jones submitted that the ownership of 29 Meadowvale Drive in the joint names, creates a presumption that the parties intended to be joint beneficial owners and such a presumption can only be rebutted by evidence showing there was no such intention. Mr. Bishop submitted that a 50/50 split is not automatic; and that the presumption of advancement was also applicable. Therefore, any contribution to the mortgage was to be considered an advancement to his wife. The written submissions of both counsel were silent as to the new terms of PROSA to the proceedings.

**[24]** An application for an alteration of the statutory entitlement of the family home pursuant to s. 14 must prove;

- (1) that the property in question is the family home
- (2) that the condition triggering the statutory entitlement in accordance with S. 6 (1) (a) (b) (c), has occurred
- (3) that it would be unreasonable or unjust for the statutory entitlement to remain, then;
- (4) a reasonable order is made in substitution of the statutory entitlement, considering the relevant factors in S7(1)(a) (b) (c) among others.



## 29 Meadowvale Drive

- [25] The essence of their claims is that the property is wholly owned by the parties or by one of them. The parties are agreed that it was their principal family residence for several years. The wife, in her affidavit dated the 8<sup>th</sup> January 2009, at paragraph 9, says, +That I purchased and we moved to 29 Meadowvale Drive . . . I then advised my attorney-at-law . . . to add the respondent's name to the registered title because I did not want our family to break up.+ It was the home that the family occupied from 1978, it was from that home that the wife left for the United States, and returned to and lives presently. The husband remained there until 2000. No other individual has raised a claim to 29 Meadowvale Drive. That Meadowvale is the family home has not been challenged. I find that it was the family home.
- [26] There must be evidence that the marriage has been terminated, that the condition required by 6 (1) (a), (b) or (c) is satisfied. The parties have been separated since 2000, when the respondent was ordered to leave the home on an order by the court. A decree nisi was granted on the application of the claimant that the marriage has broken down irretrievably. There was no evidence before the court that the decree was made absolute at the time of trial.
- [27] The court next has to consider whether, pursuant to S. 7 (1), it would be unreasonable or unjust for the statutory entitlement of one half share to each spouse to remain, in face of an application by the wife that she is entitled to the entire estate in the family home. The husband's application is for a half share entitlement. In determining what is meant by unreasonable and unjust, in context of S. 7 (1), the development in the law and the mischief that it seeks to correct is of importance. Morrison JA, in **Brown v Brown** applied the principle in **R v Industrial Disputes Tribunal, ex parte Seprod Group of Companies** (1981) 18 JLR 465, as he postulated it at paragraph 18 of the judgment, %hat in construing an enactment, it was not only permissible to consider the state of the

law at the time of the enactment, but also to review the history of the legislation on the subject in order to detect what mischief Parliament wish to correct.%o

**[28]** In a learned review of the development of the law, Morrison, JA. noted that the only legislative predecessor to the 2004 Act in this jurisdiction is the Married Women's Property Act, which came into force on the 1<sup>st</sup> January 1887. The MWPA removed the proprieties disabilities imposed on the married women by the common law (by which the husband and wife were treated as one person, that person being the husband) by providing, among other things for the capacity sued, either in tort or in contract, in all respects as if she were a *femme sole*.

**[29]** Morrison, JA. noted that the law did not recognize %family assets+ and settled disputes between husband and wife for the beneficial ownership of property vested in one or the other by reliance on the law of trusts. In tracing the reform, he recognized the establishment in 1975, of the Family Law Committee, and the Family Court and in indentifying the mischief, noted that the opening comment of the committee was;

%The present law relating to ownership of matrimonial property is unsatisfactory, creates injustice between the parties and is out of touch with the social realities. It recognizes only money contribution to the acquisition and ignores the contribution made by a wife in the performance of her role as a mother and a homemaker.%o

**[30]** Morrison, JA. noted that the Family Law Committee singled out the %family home+ for special consideration, for it was in many cases the principal asset, it recommended that legislation should provide for equal ownership subject to provisions for exceptional circumstances. The committee referred to legislation in Canada, New Zealand, Australia, and Barbados among others.

## Unreasonable or Unjust

- [31] What is meant by "unreasonable and unjust" which in the circumstances of S. 7 (1) may cause the Court to substitute for the one half entitlement with an entitlement that the Court thinks is reasonable and just +
- [32] In **Associated Provincial Picture Houses v Wenesbury Corporation** [1948] 1 K.B. 223 Lord Greene MR, in dealing with the meaning of "unreasonable" as it pertained to an administrative decision, said;
- "lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."
- [33] The factors named in S. 7 (1) (a) (b) (c) are matters, among others, which the court may think are relevant in the determination of a reasonable entitlement, in substitution for an equal entitlement order provided by S. which the court must have determined was unreasonable and unjust. It seems those matters are equally relevant in first determining whether the entitlement provided by law is unreasonable or unjust. To my mind, they are matters, which a court faced with an application pursuant to S. 7 (1) by a spouse, "must call its own attention to which it is bound to consider +
- [34] What is deemed unjust? An act can be said to be unjust when it is not in accordance with justice or fairness. That is the ordinary dictionary meaning of the word "unjust" and the word unjustifiable has a related meaning. Re **Kempthorne Prosser & Co's New Zeal Drug Co. Ltd.** (1964) NZLR 49 at 52.

[35] On an application under S.7 (1), the factors that created the mischief that the legislation seeks to correct, are matters to be generally excluded from the court's consideration.

[36] S14 (1), where, under section 13, a spouse applies to the court for a division of property, the court may;

(b) Subject to section 17.2, divide such property, *other than the family home*, as it thinks fit, taking into account the factors, specified in subsection (2).

[37] Prior to the coming into effect of PROSA, all property that fell to be divided could have been apportioned based on the respective contributions of the spouses. S. 14 (1) (b) by providing that contributions, along with the other factors, in S. 14 (2), may be considered in an application for family property other than ~~the~~ the family home, is deemed to have excluded such contributions from being considered relevant pursuant to S. 7 (1) of PROSA. In my judgment, the principle *expressio unius exclusio alterius* canon of construction can be applied. It evinces a clear intention that the matters mentioned in S. 14 (2), but not in S. 7 (2), were deliberately omitted, and ought not to be applied in an application for a share inconsistent with an equal share entitlement in the family home.

[38] The statutory entitlement provided by S. 6 (1) is to be respected. The Canadian Supreme Court, in **Elsome v Elsome** (1989) CSR, had for examination, S. 43 of the Family Relations Act 1979, which gave an undivided half interest in the family assets to each spouse, as tenants in common and section 51, which enumerated the exceptions that the court could consider if the court were of the opinion that the equal-share entitlement was unfair. S. 51 shared greater similarity with S. 14 2 of PROSA than it did with S. 7 (1) (a) (b) (c), by allowing the court to consider, inter alia;

**S.51.**

(e) the needs of each spouse to become or remain economically independent and self sufficient; or

- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

[39] The Canadian Supreme Court restored the first instance judge's decision, which departed from the equality entitlement rule. The Court in its judgment held;

“Nor does s.51 of the Act require the court to compare the respective contributions of the spouses and to award to each a share proportionate to those contributions. Section 51 confers a discretion on the Supreme Court to depart from the rule of equal division of family assets expressed in s. 43 of the Act where, having regard to the criteria set out in s. 51, equal division would be unfair. **The legislator has decided that each spouse is entitled, in general, to a one-half interest in family assets.** This Court has stated in its recent decision in *LeBlanc v. LeBlanc*, 1988 Can LII 96 (SCC), [1988] 1 S.C.R. 217, at p. 222, **that this principle of equal division must be respected.**” (Emphasis mine)

[40] The parties were married from 1974 to 2004. It is clear that both, by a division of labour, raised the three children quite successfully. It is uncontested that the husband worked as a bus driver until he was made redundant, then, thereafter, as a taxi driver. The wife was a teacher. The parties functioned as an economic unit, agreeing to get another mortgage in respect of Lascelles Avenue. The claimant denied such an agreement in cross-examination. I find that there was agreement for the property to be sold and 29 Meadowvale Drive be purchased. (See paragraph 13 & 14 of 1<sup>st</sup> affidavit of Jacqueline Christian, dated 8<sup>th</sup> January 2009). It is uncontested, and I find that 29 Meadowvale was acquired during the course of the marriage. There was no suggestion to the contrary, that purchase monies were wholly derived from the parties, one or the other, of them. I find, as a fact that whilst the claimant was in the United States, the respondent conducted the affairs of the household, being totally responsible for rearing the children and the maintenance of the household. I reject the unsupported suggestion of the wife that the children often went to bed without meals. I accept the evidence of the husband, in cross-examination, that he contributed to the deposit for the purchase of 29 Meadowvale Drive. I find that the mortgage obtained from Jamaica Teachers Housing Association was secured in the joint-

names of the parties. I accept that the claimant is the only person benefitting from the income derived from renting a section of 29 Meadowvale Drive. It was also stated that he didn't work after he was made redundant from his job at JOS. Even if those suggestions were true, and I make no such finding, it would be impermissible in the circumstances of this case, to find that the statutory entitlement was unreasonable and unjust.

[41] In a case from the Canadian Supreme Court of **M.T. v. J.Y.T.**, [2008] 2 S.C.R. 781, 2008 SCC 50; the respondent sought an unequal partition and excluded the benefits accrued under his pension plan from the property to be included in the partition. He contended a significant age difference between himself and his wife, postponement of his retirement to rebuild his retirement income if she was entitled to one-half. Furthermore, all the property had been accumulated through his effort alone. Equal partition would result in an injustice. His pension benefits should be excluded pursuant to art. 422, which provided;

**422.** The court may, on an application, make an exception to the rule of partition into equal shares, and decide that there will be no partition of earnings registered pursuant to the Act respecting the Québec Pension Plan or to similar plans where it would result in an **injustice** considering, in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them. (My emphasis)

[42] Fournier, J., at first instance, rejected the request for unequal partition. Although he opined, an injustice cannot result solely from the operation of the law itself. The Court of Appeal, however, concluded that equal partition would result in an injustice and ordered that the pension plan be excluded from the partition of the family patrimony. **The Supreme Court was of the view that there has to be demonstrated the injustice wreaked by the application of the equality rule, before the court is enabled to consider art 422, which is the equivalent of s. 7 (1) (a) (b) (c) of PROSA.** The Supreme Court found that the emphasis placed by the Court of Appeal on the disparity in the contributions of the parties was unwarranted. First of all, there is no evidence of economic fault or injustice on

the appellant's part. As the parties had agreed, she studied and worked, often part-time or in unstable or temporary jobs.

**[43]** The court underlined the need to respect the legislation cautioning that a liberal interpretation would jeopardize the principle of equality that is central to the law, Judges should be as shy to depart from the general rule of equal partition. It would mean, in effect, a return to the ad-hockery of the compensatory allowance which the legislature has so explicitly steered courts away from doing. [p. 583]+

**[44]** Mr. Bishop's submission for the entirety of family home was based on the grounds that the husband had not provided the evidence that he had the means to pay the mortgage and that it was the claimant alone who and paid all the necessary bills. He further submitted that the husband had an obligation to maintain the children and whatever he did was in satisfaction of that obligation. He said that a 50/50 split is not automatic by virtue of the PROSA.

**[45]** It is the wife who asserts an exception to the equal entitlement rule. She therefore should prove that the application of the equality rule would be unreasonable and unjust. This, the claimant has failed to do. The fact of a disparity of contributions between the parties is, to my mind, insufficient in proving that an equal entitlement is unreasonable. The husband, for a substantial period of the marriage, had to raise the children by himself, including the wife's child from a previous relationship. It is common knowledge that salaries in the United States are substantially higher than are available in the labour market in Jamaica. It is not unusual for Jamaicans to undertake more menial jobs abroad for higher salaries than they would from higher placed employment at home. No injustice has flowed to the wife for working abroad. In any event, at the outset of the marriage between a college trained teacher and a bus driver, it would not be unreasonable to think that the teacher would have been in a position to earn more than the bus driver, and therefore, able to contribute more to the family. Marriage is regarded as a union of equals.

[46] None of the factors in S. 7 (1) (a) (b) (2) is relevant in demonstrating unreasonableness or injustice in an equal share in this case. The family home, contrary to S. 7 (1) (a) (b), was acquired at the start of a twenty year marriage. The claimant has failed to prove that an equal share in the family home is unreasonable and unjust.

### **John Common**

[47] In an application for property, other than the family home, the court may take into consideration the factors in S. 14 (2).

(2) The factors referred to in subsection (1) are .

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

[48] In respect of John Common, the claimant's application is for a forty percent interest. It is unchallenged that a loan to the husband from the Farm Housing Scheme was used to build the house, and that monies were given by the wife to purchase materials. The parties never lived on this property, which was owned by the husband's mother and was acquired prior to a relationship between the parties. The ownership of John Common was never in doubt, the wife has hitherto, never raised the question of ownership of that property. In her second affidavit dated 23<sup>rd</sup> June 2009, the wife refers to her financial contribution in



respect of John Common as *financial assistance*. The parties had no agreement as to the ownership of John Common. Also relevant is that separate and apart from John Common, there is a family home, with the parties as the registered owners. The wife has been in sole occupation of the family home and has benefitted solely from the rental income derived from that property. Mr. Bishop, standing on this contribution by the wife, urged the court that the claimant is entitled to forty percent of John Common.

[49] The court is permitted, pursuant to S. 14 (2) (e), to consider;

such other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

[50] The property was never owned by either of the parties, and was acquired before the start of their relationship. The contributions of the parties were assistance extended to an elderly parent, a gift to the mother of a man she was in a relationship with. The assistance consisted of building materials which had been acquired to be used at Lascelles Avenue; a portion of that material was given to a friend of the wife. That friend would be most surprised if it were suggested that the assistance extended to him over twenty years ago had morphed into the contributor being entitled to a share in his home. To cause an aged husband to refund or repay that assistance to his mother some twenty years after it was given, in circumstances where there is no evidence of him acquiring any direct benefit, would, to my mind, seem less than just. I find that the wife acquired no entitlement to a share in the property at John Common.

### **Lascelles Avenue**

[51] Lascelles Avenue was used as the principal family residence. However, it was *not wholly owned* by either or both of the spouses as is required to meet the definition of a family home for the purposes of PROSA. Lascelles Avenue was jointly owned by the husband and his foster mother. The wife's claim is for a half share in the property. The husband has not resisted that claim. For an

application pursuant to S. 13, where S. 14 (1) (b) is applied to divide property other than the family home, the factors in S. 14 (2) should take into account contributions made for the acquisition, conservation or improvement of the property by a spouse, whether financial or otherwise, may be taken into account, notwithstanding that the property has ceased to be the property of either of them are defined. It is not denied that the wife made substantial direct financial contributions in securing a mortgage. Apart of the mischief that Parliament addressed with the passage of PROSA is the widening of the %contributions+that may be considered in making a division of family property. The expanded definition, in S. 14 (3) appears unable to admit any further additions, by providing that contributions means, what is contained in S. 14 (3) (a) - (f).

- [52]** The parties are the registered owners of 29 Meadowvale, where the wife presently enjoys sole occupancy. The evidence is that the property is tenanted and the wife is the recipient of the rental income. The wife has done some expansion and repair of the property since her return.
- [53]** The parties were married in 1974 and decree nisi was granted on the 4<sup>th</sup> October 2006. It displayed a division of the labour that was required to have the family function as an effective unit. The wife's migrating was to assist in meeting the financial commitments of the family. The remittances she made are presumed to be of no greater value than the husband's role in singly caring for the children in her absence. Given the historical and cultural factors that have resulted in a substantial number of households being headed by the single female, the husband's contribution in this regard is of significant value. The reform that was effected in the division of family property was directed in correcting the imbalance in weighting given to financial contributions over non-monetary contributions.
- [54]** There was no agreement concerning the ownership and division of property by the spouses made in contemplation of their marriage as provided by S. 10. The wife alleged that it had been agreed that for her securing a mortgaging, that her

name should be placed on the title. I find that there was such an agreement. In the event, her name was not so placed before the property was transferred.

**[55]** The parties demonstrated throughout, that they were equals. I find that the parties each carried out their function in the marriage. He managed the household and performed household duties whilst his wife lived abroad; she, giving up the life of a teacher to work as a house help in the United States in order to better manage the financial needs of the family. The acquisitions of the two properties, the successful rearing of their children, their ability to offer assistance to other family members and to extend charity to the church, and the standard of living they obtained, was by their joint effort.

**[56]** Neither party's behaviour could be deemed to have been unjust in its impact on the family. To my mind, the justice in these circumstances requires an equal share of Lascelles Avenue to both parties.

**[57]** I find that there was an agreement to sell the property at Lascelles Avenue. That the funds derived from that sale was treated as agreed by the parties, that in pursuance of that agreement, the husband made disbursements to the wife's church and paid for trips for himself and the children to the United States. I find that the wife's half share entitlement was recognised, that her share of proceeds of sale of Lascelles Avenue was dealt with in accordance with her orders.

**[58]** On the wife's Notice of Application for Court Orders:

- i. A declaration that the claimant is entitled to a half share in all that parcel of land Cumberland Pen in the parish of St. Catherine being the lot numbered one hundred and eighty-five on the Plan of part of Cumberland Pen now known as Meadowvale deposited in the Office of Titles on the 20<sup>th</sup> day of March 1979 of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Titles registered at Volume 1155 Folio 194 of the Registrar Book of Titles.

- ii. The application for a declaration that the transfer and sale of ALL that parcel of land part of Myers Square known as 9 Lascelles Avenue, Kingston 2, in the parish of Kingston being Lot numbered 20 and part of Lot numbered 21 containing by survey 11284 square of the shape and dimensions and butting as appears by the plan thereof annexed to and being all the land comprised in Certificate of Titles registered at Volume 244 Folio 79 of The Register Book of Titles were obtained fraudulently is denied.
- iii. That the Claimant was entitled to a half share, in 9 Lacelles Avenue, in the parish of Kingston. The claimant has received her share from the proceeds of sale which were expended in accordance with her directions.
- iv. A declaration that the Claimant is entitled to a beneficial interest in part of property known as John Common Stonehenge in the parish of St. James by virtue of the Family Property Rights of Spouses Act is refused.

**[59]** On the husband's Notice of Application:

- v. That the applicant/husband is entitled to a one half share in all that parcel of land known as Cumberland Pen in the parish of St. Catherine now known as 29 Meadowvale Drive.
- vi. That the interest of the parties in 29 Meadowvale Drive be severed and the applicant/husband interest be sold to the wife/petitioner who if she is unable or is unwilling to purchase it within 60 days the entire property shall be sold on the open market at the market or reserved price and the net proceeds distributed equally.
- vii. That the Registrar of the Supreme shall be empowered to sign the documents if the wife/petitioner neglects or refuses to sign the documents required to sell the relevant property within ten (10) days of presentation to her.
- viii. That each party bear their own costs.