[2024] JMSC Civ 97

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV02801

IN THE Estate of Dehon George Facey a.k.a Dehon Facey deceased (Probate).

AND

IN THE MATTER of The Wills Act.

AND

IN THE MATTER of the Property (Rights of Spouses) Act

BETWEEN	**JOYCE FLORENCE FACEY**	**CLAIMANT**
AND	**COMALA DIANE REMOGENE** a.k.a Comala Vassell (Executrix of the Estate of Dehon George Facey, deceased)	**DEFENDANT**

IN OPEN COURT

Miss Jamila Thomas instructed by Lambie-Thomas and Co for the Claimant in Counterclaim

Mrs. Enid Lee Clarke Bennett and Ms. Renae Robinson instructed by Kingdom Chambers for the Defendant in Counterclaim

Heard: 4th June and 31st July 2024

Challenge to Probate-uncertified prenuptial agreement- Section 10 of Property (Rights of Spouses) Act

L. SHELLY WILLIAMS, SNR P, J

BACKGROUND

[1] The Claimant filed a Fixed Date Claim Form on the 10th of June 2021. The Fixed Date Claim Form was later converted to a Claim in which Particulars of Claim were filed on the 10th of June 2021 seeking the following orders:

AND THE CLAIMANT CLAIMS:

i. An injunction restraining and preventing Comala Diana Remogene from obtaining a Grant of Probate in the Estate of Dehon George Facey a.k.a. Dehon G. Facey a.k.a Dehon Facey, Settlement Officer and Driver, formerly of 27 Portmore Park, Bridgeport P.O., Saint Catherine but late of 6502 Charter Way, Lithonia, Georgia 30058, Unites States of America, deceased, testate.

ii. An Injunction restraining and preventing Comala Diana Remogene and her servants and/or agents from meddling and/or dealing in the Estate of Dehon George Facey a.k.a Dehon G. Facey a.k.a. Dehon Facey.

iii. The Estate of Dehon George Facey a.k.a. Dehon G. Facey a.k.a. Dehon Facey, Settlement Officer and Driver, formerly of 27 Portmore Park, Bridgeport P.O., Saint Catherine but late of 6502 Charter Way, Lithonia, Georgia 30058, United States of America, deceased, testate be Administered.

iv. Joyce Florence Facey (nee Fraser) be allowed to commence an administration claim in respect of the Estate of Dehon George Facey a.k.a. Dehon G., Facey a.k.a. Dehon Facey, Settlement Officer and Driver, formerly of 27 Portmore Park, Bridgeport P.O., Saint Catherine but late of 6502 Charter Way, Lithonia Georgia 30058, United States of America, deceased, testate.

v. That the Last Will and Testament of Dehon George Facey dated the 24th day of February 2017 be declared null and void on the basis that is a forgery and does not bear the signature of Dehon George Facey.

vi. A Decree that the Last Will and Testament of Dehon George Facey dated 24th day of February 2017 be declared null and void.

vii. Costs be awarded to the Claimant to be agreed or taxed.

viii. Such further or other relief as this Honourable Court deems just.

[2] The Defendant filed a Defence and Counter Claim on the 20th of October 2021 indicating that:

(a) there was no intermeddling of the properties of the Claimant and the deceased Dehon Geroge Facey (the deceased).

(b) The Claimant had no interest in the estate of the deceased.

(c) That the property in Georgia USA was the subject of a Trust deed.

(d) That the Claimant and the deceased had entered into a prenuptial agreement prior to the marriage.

(e) The Counterclaim also sought a declaration that the prenuptial agreement should have effect in whole.

[3] The Claimant filed a Reply to the Defence and Counterclaim in which she pleaded that:

(a) the estates had been intermingled and that she had an interest in the estate of the deceased.

(b) She challenged the Trust which applied to the estate of the deceased.

(c) Agreed that she did execute a prenuptial agreement but challenged the agreement on the basis that she had not received legal advice and that

it had not be witnessed by a Justice of the Peace (Sections 10(3) and 10(4) respectively of Property Rights of Spouses Act (PROSA).

(d) The Claimant also indicated that the Court ought not to grant the declaration sought in the Counterclaim.

[4] The Claim, after a Case Management Hearing, was set for trial on the 17th of April 2024. The Claimant informed the Court on the trial date that she had recently retained Counsel and as such was unable to proceed with the trial. The witnesses for the Defendant had not been informed prior to the trial date that the Claimant was not able to proceed. A new trial date was set for the 3rd to the 5th of June 2024. The Trial Judge made an unless order against the Claimant that the cost relating to the trial date in the sum of US $3,252.72 and Jamaican $165,480.00 was to be paid to the Defendant by the 9th of May 2024, failing which the Claimant's case would stand struck out.

[5] The Claimant failed to satisfy the cost order in the prescribed time and then filed a notice of discontinuance on the 22nd of May 2024. The Claim having been discontinued, what remained before the Court was the Counterclaim and Reply to the Counterclaim.

[6] The issue to be decided on the counterclaim was whether the prenuptial agreement signed between the Claimant and the deceased on the 16th of October 2014 should be given its full effect.

THE LAW

[7] The starting point in relation to a prenuptial agreement (the agreement) is to analyse the contents of the agreement and the way it was executed. Section 10 of PROSA dictates the prerequisites that must be satisfied for the Court to conclude that a prenuptial agreement has been properly executed. Section 10 of PROSA states that:

(1) Subject to section 19- Agreements in respect

(a) spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect to the ownership and division of their property (including future property) as they think fit;

(b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

(2) Without prejudice to the generality of subsection (1), an agreement may-

(a) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation;

(b) provide for the calculation of such share and the method by which property or part thereof may be divided.

(3) Each party to an agreement under subsection (1) shall obtain independent legal advice before signing the agreement and the legal adviser shall certify that the implications of the agreement have been explained to the person obtaining the advice.

(4) Every agreement made pursuant to subsection (1) shall be in writing signed by both parties whose signatures shall-

(a) if signed in Jamaica, be witnessed by a Justice of the Peace or an Attorney-at-Law;

(b) if signed in a country or state other than Jamaica, be witnessed by-

(i) a person having authority by the law of such country or state to administer an oath in that country or state; or

(ii) a Jamaican or British High Commissioner or Ambassador, as the case may be, or a Jamaican or British Envoy, Minister, Charge d'Affairs, Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consul Agent exercising his functions in that country or state.

(5) Subject to subsection (7), an agreement to which this section applies shall be unenforceable in any case where

(a) there is non-compliance with subsection (3) or (4); or

(b) the Court is satisfied that it would be unjust to give effect to the agreement.

(6) An agreement made pursuant to subsection (1) by a minor and every instrument executed by such minor for the purpose of giving effect to any such agreement shall be valid and effective as if the minor were of full age.

(7) Notwithstanding subsection (5) (a), the Court shall have jurisdiction to enquire into any agreement made under subsection (1) and may, in any proceedings under this Act or on an application made for the purpose, declare that the agreement shall have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance mentioned in that subsection has not materially prejudiced the interests of a party to the agreement.

(8) In deciding under subsection (5) (b) whether it would be unjust to give effect to an agreement, the Court shall have regard to-

(a) the provisions of the agreement;

(b) the time that has elapsed since the agreement was made;

(c) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;

(d) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;

(e) any other matter which it considers relevant to any proceedings.

(9) Nothing in this section shall limit or affect the capacity of spouses to agree to acquire or hold any property jointly or in common (whether or not with any other person), and whether legally or beneficially.

(10) Any property to which an agreement under this section does not apply shall be subject to the other provisions of this Act.

(11) It is hereby declared that an agreement made pursuant to subsection (1) by persons who cohabit shall not be void as against public policy.

(12) In subsection (6), "minor" means a person who is sixteen years of age and over but below the age of eighteen years.

[8] Section 10 of PROSA stipulates that a prenuptial agreement should satisfy the following prerequisites:

a. Be in contemplation of marriage.

b. It should indicate that the parties are contracting out of the provision of the PROSA.

c. Identify the property owned by the parties.

d. The parties shall obtain independent legal advice.

e. Should be in writing.

f. Should be signed in this case a Justice of the Peace.

[9] Section 10 (7) specifically states that where Section 10(3) and (4) have not been complied with, then the prenuptial agreement should be deemed unenforceable. The failure to comply of these sections would not amount to a death knell for a prenuptial agreement, as the Court is allowed as per Section 10(7) of PROSA to enquire into whether the agreement and deem it or parts of it valid are enforceable once the interest of the party has not been materially prejudiced. There is no definition of what amounts to material prejudice in the statute. The Court would then have resort to assistance from the common law.

[10] Blacks law dictionary defines prejudice as **'a fore judgment; bias; preconceived opinion**. A leaning towards one side of a cause for some reason other than a conviction of its justice.'

[11] The United Kingdom Maintenance Act does not include any provisions for prenuptial and antenuptial agreements. The Privy Council as well as the United Kingdom Supreme Court has had to address these agreements and has given guidance as to the approach to be taken when such agreements were entered into by the parties. In the case of **Macleod v Macleod** [2008] UKPC 64 Baroness Hale of Richmond in delivering the decision of the Board at paragraph 31 opined that prenuptial agreements were against public policy whilst the antenuptial agreements may be valid in certain circumstances. Baroness Hale stated that: -

> The Board takes the view that it is not open to them to reverse the long standing rule that antenuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common

law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances.

[12] There has been an evolution of the position of the English Courts- especially Family Courts on the position of pre and post nuptial agreements, often referred to as separation agreements. In the case of In **Edgar v Edgar** [1980] 1 WLR 1410 Ormrod LJ in addressing the issue of separation agreements gave some guidelines as to how the Court should approach the issue. He stated at paragraph 1417 that: -

> ***To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their***

> ***agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."***

[13] A similar approach was adopted in the case of **Camm v Camm** (1982) 4 FLR 577 at page 579, where Sir Roger Ormrod, in addressing the issue of a separation agreement stated that: -

> ***"It has been stressed all through those same cases that the Court must attach considerable importance, the amount of importance varying from case to case, to the fact that there was an agreement, because the Court, naturally, will not lightly permit parties who have made a contractual agreement between themselves, even if it is not legally enforceable, to depart from that contractual agreement unless some good reason is shown."***

[14] The case of **Crossley v Crossley** [2007] EWCA civ 1491 [2008]1 FLR 1467. Concerned a case of ante-nuptial agreement. The parties in that case had been independently wealthy, the marriage was of a short duration and the parties had not resided together. The wife sought to set aside the agreement on the basis that there had not been inadequate disclosure by the husband. Thorpe LJ at paragraph 15 of his decision stated that:-

> ***the marriage was a childless marriage of very short duration, for a substantial portion of which the parties were living apart; the marriage was between mature adults, both of whom had been previously married and divorced; both parties had very substantial independent wealth; the ante-nuptial agreement provided for the retention by each of the parties of their separate properties and division of joint property (of which there was in fact none). He accepted that the combination of these factors gave rise to a very strong case that a possible result of the section 25 exercise would be that the wife receives***

no further financial award, and concluded (at para 15):

"All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the Court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case …"

[15] The case of **Radmacher v Granatino** [2010] UKSC 42 (**Radmacher**) dealt with the issue of whether property, acquired prior to the parties entering the marriage, could be the subject of a prenuptial agreement. Lord Nicholls opined in his decision that the Court in addressing the contents of a prenuptial and antenuptial agreements should, among other things, give weight as to whether the agreement was fair. He stated a paragraph 28 that: -

> ***When a marriage ended each was entitled to an equal share of the assets of the partnership unless there was good reason to the contrary, albeit that the yardstick of equality was to be applied as an aid, not a rule. One good reason might be the difference between "matrimonial property" generated during the marriage and "non-matrimonial property" - property brought by one party to the marriage or inherited by or given to one party during the marriage.***

[16] The case of ***Radmachar*** was referred to in the case of **Versteegh v Versteegh** [2017] EWCA Civ 1050 where Lady Justice Laing at paragraph 178 of the judgment, outlined the markers as well as the approach to be adopted in deciding whether a prenuptial agreement should be upheld as being binding. The learned Judge at paragraph 178 stated that: -

> i) Whether a PMA is contractually binding or not is irrelevant. The Court should apply the same principles whether or not a binding contract has been made: [63]

ii) There is no need for black and white rules about the process leading up to the making of a PMA. What matters is whether each party has all the information material to his or her decision, and that each should intend that the agreement should govern the financial consequences of the marriage coming to an end: [69]

iii) Factors which would vitiate a contract will negate *any* effect that the PMA might otherwise have had: [71]. But factors falling short of those which would vitiate a contract may *reduce*, rather than eliminate, the weight to be given to the PMA: [72]

iv) If the terms of the PMA are unfair from the start this will reduce (not eliminate) the weight to be given to it: [73]

v) If the parties to the PMA are nationals of a state in which PMAs are common and binding, that will increase the weight to be given to the PMA: [74]

vi) In principle, if parties have made a PMA there is no reason why they should not be entitled to enforce it: [52]

vii) Thus, the Court should give effect to a PMA that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement: [75]

viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family [77]; or if holding them to the agreement would leave one spouse in a "predicament of real need": [81]

ix) But in relation to the sharing principle the Court is likely to make an order reflecting the terms of the PMA: [82], [177] – [178].

Analysis

[17] The Defendant in the Counterclaim has indicated in her witness statement, as well as in her oral evidence that she had not received legal advice prior to signing the prenuptial agreement, neither was it signed before a Justice of the Peace. This was not refuted by the witness for the Defendant. There was therefore an admission that Section 10(3) and 10(4) had not been complied with. The issue to be decided is whether, despite the shortcomings in the agreement, it is still valid and should be given its full effect.

[18] The Court then has to decide whether the Defendant had been prejudiced by the prenuptial agreement. The Defendant raised a number of issues to imply that the agreement had been prejudicial to her. These included: -

a. That she had read the agreement prior to signing it.

b. That she had not received independent legal advice prior to signing the agreement.

c. That the agreement had been witnessed by the sister of her now deceased husband.

d. That she had expended money on the property of her deceased husband.

e. That her husband had been in a position of economic superiority and as such she had been disadvantaged.

The circumstances of the creation of the agreement along with the contents of the agreement would have to examined to decide whether the Defendant had been prejudiced.

[19] The first issue that needs to addressed was whether the Defendant had read and the agreement prior to signing it and as such was unaware of its contents. In approaching this issue I first perused the contents of the agreement. The agreement states that: -

> *This Agreement, made this 16th day of October 2014 is between Dehon George Facey, a Driver of 27 Portmore Park, Bridgeport, P.O. St. Catherine (hereinafter the "Prospective Husband") and Joyce Florence Fraser a businesswoman of 262 38 Central Silverstone, Greater Portmore, St Catherine (hereinafter the "Prospective Wife").*
>
> *The Prospective Husband and the Prospective Wife in contemplating of being married in the near future wishes to establish their rights and responsibilities regarding each other's income and property prior to marriage.*
>
> *The Prospective Husband and the Prospect Wife have made a full and complete disclosure to each other of all of their financial assets and liabilities.*
>
> *The Prospective Husband and the Prospective Wife waive the right to the division of property as currently held specifically, 27 Portmore Park, Bridgeport P.O. St. Catherine owned by the Prospective Prospective Husband and 38 Central Way, SilverStone, Greater Portmore, St. Catherine owned by the Prospective Wife in the event of termination of the marriage by divorce. These properties acquired prior to marriage by the parties.*
>
> *The agreement also contemplates the termination of the marriage by death. The Prospective Husband and the Prospective Wife remain free to devise as much or little of the properties, the subject of this agreement, to each other or any other person or persons. If the Prospective Husband or the Prospective Wife does not devise either or both of the properties, the presumption is not raised that the other party is entitled to claim it but that it should pass to any child or children of the deceased party. Thus upon death each party's property would go directly to their child or children if there is no Will.*

[20] This agreement specifically details the property that had been acquired by both parties prior to the marriage. The agreement then sought to protect the interest in these property by each party waiving their rights to any claim of the said properties. There is no indication that the Defendant's property was made vulnerable as a result of the agreement. This was just a case of either party having acquired

properties prior to the marriage, reduced in writing, their intention not to make claims of each other's property. The Defendant sought to imply in her evidence that she had been prejudice as she had failed to read the agreement prior to signing it. I find it remarkable that the Defendant, who is described as a 48-year-old marketing representative on the marriage certificate, could have signed an agreement, that concerned property that she had acquired prior to her marriage without reading it.

[21] The next issue raised by the Defendant was that she had not received independent legal advice prior to signing the agreement. This would have been of importance if the Defendant had presented evidence to indicate that the Claimant had himself received independent legal advice. That would have placed the Claimant in a more advantageous and better-informed position than the Defendant. No such evidence was produced to the Court. The parties appeared to have been on equal footing in relation to the issue of independent legal advice and as such this cannot be deemed to have been prejudicial to the Defendant.

[22] The next anomaly raised by the Defendant was that the agreement had been signed in the presence of her soon to be sister-in-law, who later witnessed their signature. The Defendant submitted that this amounted to or might be viewed as undue influence. There was no direct evidence from the Defendant that she felt threatened, intimidated or pressured to sign the agreement due to the presence of the sister of her deceased husband. The evidence surrounding the signing of the agreement came only from the Defendant. The Defendant produced no documentary evidence concerning this, neither did she give any oral evidence about any undue pressure or intimidation. I do not find that the Defendant has satisfied the Court that the signing of the agreement in the presence of the deceased husband's sister had led to any prejudice.

[23] The Defendant then indicated that she had expended sums in relation to the repair of her deceased husband's property. This evidence was advanced before the Court to suggest that the parties had changed their position as noted in the

agreement. I took the opportunity to peruse the documents presented to the Court in relation to these repairs. All the documents, except for one receipt, were estimates of proposed repairs to be done on the property of Mr Facey. The only receipt produced by the Defendant was for the sum of $140,875.00 dated the 17th of September 2019.

[24] In deciding whether the payment of this sum illustrates that the parties had changed their position in relation to the agreement, I took into consideration the following: -

a. The parties never resided together. There was evidence presented to the Court that the parties visited each other, however there was no evidence proffered that the parties ever lived together longer that a few weeks at a time.

b. The deceased husband's property was not the matrimonial home. The parties have never resided at that house together.

c. Mr Dehon George Facey created a will devising his property in Portmore to his children from 24th of February 2017. This was less than 3 years after the parties exchanged vows.

d. There was agreement presented to the Court which indicated that the Defendant was not to benefit from the estate of the deceased husband.

I find that at best, the Defendant, may be able to a make a claim on the estate of her deceased husband in relation to any sum she claimed she had expended on this property. I do not find that this expenditure indicates that the parties had deviated from the prenuptial agreement.

[25] The Defendant then made mention of the fact that the Claimant had 2 properties, only one of which was the subject of the agreement. The Defendant implied that she was in an inferior bargaining position at the time that the agreement was

created. I note that Mr. Facey did have 2 properties, with only one being the subject of the agreement. This, of itself, does not equate to the Defendant being relegated to an inferior bargaining position. In the case **Edgar** Ormrod LJ opined that what the Court should take into consideration is not that one party had a superior financial position than the other, but whether it led to the: -

> 'exploitation of a dominant position to secure an Unreasonable advantage.'

The evidence before the Court is that the Defendant was aware that Mr. Facey had 2 properties, whilst she only had one. There is no evidence that Mr. Facey used this fact to unduly influence or pressure the Defendant to enter into the agreement.

[26] I find that the Defendant has failed to provide the Court with any evidence that would indicate that she had been prejudiced in entering the prenuptial agreement. I find that the agreement protected the properties that had been acquired by both parties prior to the marriage.

[27] In addition, I note that the marriage was childless. This is important as in the event the parties had produced a child, this could have affected the terms of the agreement. The needs of the child would then have had to be considered.

Conclusion

[28] This was a fairly short, childless marriage, where the parties infrequently visited each other. The documentary evidence points to fact that Mr. Facey's intention was to keep his properties separate from his wife's. He signed the prenuptial agreement indicating this, then he signed a will devising the properties he owned to his children. I find that the Defendant's property had been protected in the agreement and as such she was not placed at a disadvantage. I find that the Defendant had not produced and evidence that she had been prejudiced in signing this agreement. I find that the prenuptial agreement is valid, and that full weight should be given to it.

Orders

[29] A declaration, pursuant to section 10 of the Property (Rights of Spouses Act), that the prenuptial Agreement dated October 16th, 2014, entered into between the Claimant and the deceased, Dehon George Facey, shall have effect in whole, is granted.

[30] Cost to the Claimant in the Counterclaim to be agreed or taxed.

[31] The Claimant Joyce Facey, having not received permission to discontinue the Claim prior to the unless order taking effect, the Statement of Case of Joyce Facey stands Struck out.

[32] Judgment for the Defendant Comala Diane Remogene a.k.a Comala Vassel (Executrix of the Estate of Dehon George Facey, deceased) with cost to be agreed or taxed.