

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2006HCV03158

BETWEEN DONNA MARIE GRAHAM CLAIMANT
AND HUGH ANTHONY GRAHAM DEFENDANT

IN CHAMBERS

Mr. Gordon Steer and Ms. Deborah Dowding instructed by Chambers, Bunny & Steer for the claimant

Mr. Pierre Rogers instructed by Rogers, Burgher & Company for the defendant

February 29 & April 8, 2008

Matrimonial Property - Husband and wife- Entitlement to the family home - The equal share rule – Extended family- Family home for benefit of third party dependants of one spouse - Third party contribution to family home on behalf of one spouse - Whether proper application made for variation of the equal share rule - Whether application of equal share rule unreasonable or unjust – Burden of proof - Departure from equality - Property (Rights of Spouses) Act, 2004, ss. 6, ,7 13, & 14(1)(a)- Judicature (Supreme Court) Act, s.48(b)&(g)

McDONALD-BISHOP, J (Ag)

1. This is a claim under the **Property (Rights of Spouses) Act, 2004** (the Act) by Mrs. Graham (the claimant) against her husband, Mr. Graham (the defendant) for a declaration that she is entitled to a 50% share in properties situated at 17 Murray Drive, Kingston 6 and 9 Durie Drive, Kingston 8 in the parish of Saint Andrew and registered at Volume 1280, Folio 179 and Volume 1266, Folio 155, respectively, of the Register Book of Titles. She also claims for compensation for a motor car that she alleges the defendant took from her.

2. The claimant is a teacher and the defendant is a businessman. They were married in July, 1993 and separated in October, 2003. A decree nisi was granted in July, 2006 but the nisi is yet to be made absolute. At the time of the marriage, the claimant was an

assistant bank manager and the defendant, by then, was already an established businessman. There are two young children of the union who presently reside with the claimant. The defendant has another child from a previous relationship.

3. In February 1996, 17 Murray Drive was acquired and transferred in the names of both parties as the registered proprietors. The acquisition was made through joint effort of the parties in that the defendant financed the deposit and the claimant utilized her concessionary mortgage benefit at the bank to which she was employed to obtain a mortgage. It is the claimant's contention that the defendant told her that he had purchased this property as a gift for her but it was on the instruction of the bank that his name was added to the transaction and later on the title. The defendant, however, said that this property was bought specifically for use as a matrimonial home for the claimant and himself.

4. At the time of the acquisition of Murray Drive, the parties were living along with the defendant's mother in rented premises at Courtney Drive. The defendant's mother had lived with the defendant prior to the marriage and was living with him at the time of the marriage. The claimant accepted that the defendant's mother would have been a part of their living arrangement. They continued to live together with the defendant's mother in the same rented premises after the acquisition of Murray Drive. The parties never lived at Murray Drive at any time prior to their separation. Murray Drive was rented and the rental was used to meet the mortgage repayments and to pay the rent for Courtney Drive. It was after the parties separated that the claimant, some time later, moved into Murray Drive where she now resides with the two children of the union.

5. In October 1996, within months of the acquisition of Murray Drive, the Durie Drive property was transferred to the defendant solely. The claimant made no contribution to the purchase of this property. The claimant's assertion is that the defendant had always said that the Durie Drive property was theirs. The defendant has denied this. He stated that this property was bought by him specifically to provide a home for his mother and in also in contemplation of his son of the previous union coming to

reside there with his grandmother. According to him, it was not intended that Durie Drive would be the matrimonial home. Whatever the parties' intentions and beliefs, however, the critical fact is that the parties moved into the Durie Drive house with the defendant's mother and it became, at least, their principal place of residence.

6. Following the purchase of Durie Drive, the property had to be renovated. The renovation had started before the parties moved into the house. It is evident that extensive improvements were made to the property including addition of rooms to accommodate the defendant's mother and his son. This renovation of the property was undertaken by the defendant with assistance from his uncle, Mr. Leonard Graham, who is a contractor. The claimant admitted that she made no monetary contribution to the renovation but that she participated in the process by dealing with some matters relating to construction expenses and meeting with the architect.

7. After moving into Durie Drive, the claimant left her employment at the bank and started working with the defendant's companies. The capacity in which she was employed is a subject of dispute between the parties. The claimant said she was employed as a general manager in charge of operations for two companies but the defendant said she was an accounting manager. I find that the designation of the claimant is of no materiality because whatever capacity she held, she had entered the business as a paid employee and not as an equal business partner with the defendant although she contended that she was paid a salary below market rate. She stayed at the company until 1999 when she left thus making her employment with the defendant for a period of about two years. She claims that it was during the course of her employment with the defendant that she was deprived of her Suzuki Swift motor car for which she now claims compensation.

8. It is undisputed that the defendant carried the financial weight of the family. It is the claimant's contention that because she was not paid a competitive salary while working with the defendant, she was curtailed in contributing to the expenses of the

family. She has admitted that the defendant met all the family expenses but that she attended to the children and met the household expenses. She agreed that the defendant's mother assisted her from time to time and a helper assisted in housekeeping duties but not with the care of the children.

THE ISSUE

9. It has been conceded by the defendant that the claimant is entitled to 50% of Murray Drive as claimed. Therefore, no issue was joined between the parties in respect of this property.

10. The defendant, in his affidavit in response to the claimant's claim, has denied that the claimant is entitled to 50% of Durie Drive. He deponed that Durie Drive was not the family home and that Murray Drive should be regarded as the family home. However, at the commencement of the hearing, he conceded that Durie Drive was the family home. This concession is inevitable in light of the evidence that Durie Drive was, at least, the principal place of residence and that the parties never resided at Murray Drive. The defendant's contention, however, is that while he will accept that the claimant is beneficially entitled to a share in the property, he will not accept that she is entitled to half share. The thrust of his argument is that it would be unjust and unreasonable in the circumstances for the claimant to share equally in Durie Drive.

11. Essentially, the question to be determined in relation to Durie Drive is whether the claimant should share equally in accordance with the Act or should the equal share rule be departed from on the grounds that to apply it would be unreasonable or unjust in the circumstances as contended by the defendant.

THE RELEVANT LAW

12. The claimant's claim is properly made pursuant to section 13 of the Act. It is also now an undisputed fact that Durie Drive was the family home as defined by section 2 of the Act. In relation to the parties' entitlement to the family home in the particular circumstances of this case, section 6 of the Act provides that '*subject to sub-section 6(2)*

and sections 7 and 10, each spouse shall be entitled to one-half share of the family home.' The claimant is thus brought within the ambit of the equal share rule without need for further evidence as to her entitlement.

13. Section 6, however, is made subject to section 7 which provides, in part:

"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..."

Some of the factors that are identified in the Act as being relevant considerations under section 7 (1) are that the house was inherited by one spouse; that the house was already owned by one spouse at the time of the marriage or the beginning of cohabitation or that the marriage is of short duration. A spouse is recognized as an interested party who may apply for a variation of the rule under the section.

14. Section 14 (1) then provides that in relation to application under section 13 for the division of the family home, the Court may make an order for the division of the family home in accordance with sections 6 or 7, as the case may require.

The scope of the equal share rule

15. By virtue of the statutory rule, the claimant would, without more, be entitled to her 50% share in the family home as claimed and this is regardless of the fact that the defendant is sole legal and beneficial owner. 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 (See **R v. R** [1992] 1 A.C. 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 A.C. 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. It is this notion of fairness that underpins the provisions of sections 6 and 7 of the Act that are under scrutiny in the instant proceedings. Lord Nicholls of Birkenhead in the conjoined appeal, **White, White v White** [2000] 2 F.L.R. 981, 989, stated it aptly when he said:

“Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue supporting the other.... Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then, fairness, like beauty, lies in the eye of the beholder.

So what is the best method of seeking to achieve a generally accepted standard of fairness. Different countries have adopted different solutions. Each solution has its own advantages and disadvantages. One approach is for the legislature to prescribe in detail how property should be divided, with scope for the exercise of judicial discretion added on. A system along these lines has been preferred by the New Zealand legislature in the Matrimonial Property Act 1976. Another approach is for the legislature to leave it all to the judges. The courts are given a wide discretion, largely unrestricted by statutory provisions. That is the route followed in this country.”

17. Jamaica has adopted the line similar to New Zealand and Scotland, that is, a mixture of legislative prescription with the scope for the exercise of judicial discretion added on. Our statute is clear that in respect of the family home, the equal share rule must be taken as the general rule and should only be departed from if the parties by written agreement seek to oust its operation pursuant to section 10 or where, in the opinion of the court, it would be unreasonable or unjust to apply it. The principle of equality has thus been enshrined within our jurisprudence not as a mere aid to analysis but as the rule by which all considerations in respect of the entitlements to the family home must be governed. The legislature has sought to limit the broad exercise of judicial discretion in respect of adjustment of the family home. Unlike in the U.K. and Australia, our courts are obliged to start with and heed the rule that the family home is to be shared equally. The legislature, however, has not ousted altogether the input of judicial wisdom in dealing

with issues concerning the entitlement to the family home and so the rule is made subject to the discretion of the court when it is such that to apply it in the circumstances of a particular case would be unreasonable or unjust.

18. In the U.K., the courts, although not constrained in the exercise of their discretion by a statutory 50/50 rule, have, nevertheless, use the principle of equality as an aid in the determination of questions concerning the division of matrimonial property. Lord Nicholls in **White** (supra) pointed out that although the principle is not a presumption of law or to be taken as the starting point in the U.K., “a judge would always be well advised to check his tentative views against the yardstick of equality of division and as a general guide equality should be departed from only if, and to the extent, that there is good reason for doing so.” In endorsing this dictum, Lord Cooke of Thorndon in the same case at page 999 said:

“The most important point, in my, opinion, in the speech of my noble and learned friend Lord Nicholls is his proposition that, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions.”

19. I have observed that no matter the differences in legislative provisions and in the resultant judicial approach in the U.K. and some Commonwealth jurisdictions, one thing that seems common to all is the recognition that the overriding consideration in matrimonial property adjustment is fairness, that is, the need to achieve an equitable and just result. So while courts may consider different factors and give different weight to different considerations in considering matrimonial property disputes, or whether the equal share principle is a rule, a presumption of law or merely an aid to analysis, the objective of the court is, invariably, the same and that is the attainment of a fair outcome.

Is there an application under section 7 for variation of the rule?

20. Mr. Steer has submitted that section 7 should not be invoked to vary the rule as there is no application from any interested party as provided for in the section. In looking at this objection, I have noted that the claimant has claimed 50% in both Durie Drive and

Murray Drive and this was duly served on the defendant. The defendant in his Acknowledgement of Service of Claim Form, filed in the matter, indicated that he intended to defend the claim and that he admitted no part of the claim. He later filed an affidavit in response in which he sets out, among other things, that Durie Drive was not acquired to be the matrimonial home. He then states:

“34. [T]hat *in all the circumstances we humbly pray that this Honourable Court will declare Murray Drive to be the matrimonial home for the purpose of the operations of the Property (Rights of Spouses) Act and make such orders as it deems fit and just.*”

There is thus an express application by the defendant that the half share rule be applied to Murray Drive. I find that implicit in this is an application that the rule not be applied to Durie Drive and that in respect of the claim and the matters stated by the defendant in response to it, an order should be made in all the circumstances that would be fit and just.

21. At the beginning of the trial, the defendant conceded to Durie Drive being the family home but he expressly continued to deny a 50/50 apportionment in keeping with his statement of case. There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of Durie Drive. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of Durie Drive and for the court to make an order in the circumstances that is 'fit and just'. This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7.

22. The defendant is a party to the action brought at the instance of the claimant. He is also an interested party in respect of the disputed property. I find that the defendant has properly put forward on his statement of case that the equal share rule should not be applied to Durie Drive. The claimant would have had ample notice as to the defendant's response to her claim and so could not be taken by surprise or, in any way, be prejudiced by the defendant's continued assertion that the equal share rule not be applied to Durie Drive. There is, in substance, before me an application by the defendant for a variation of

the equal share rule no matter the form his application might have taken. It is a fundamental rule of equity that equity looks to the substance and not the form.

23. It should be noted that while the Act has outlawed the operation of the former rules and presumptions of equity and common law, this is only to the extent of the parties' transaction in respect of matrimonial property. It has not taken away the general right and duty of the court to conduct proceedings in accordance with the rules of equity. Within this context, **The Judicature (Supreme Court) Act**, s. 48 becomes instructive. This section makes provision for the concurrent administration of law and equity by the court in civil matters. Section 48(b) states:

"If a defendant claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed, instrument or contract or against any right, title or claim asserted by a plaintiff or petitioner in such cause or matter or alleges any ground of equitable defence to any claim of a plaintiff or petitioner, the Court and every judge thereof shall give to every estate, right or ground of relief so claimed and to every equitable defence so alleged, the same effect, by way of defence against the claim of the plaintiff or petitioner., as ought to have been given by the Court of Chancery before the passing of this Act."

Section 48 (g) then stipulates:

"The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined and multiplicity of proceedings avoided."

24. I am prepared to hold that the defendant has properly brought forward an application on his statement of case for the provisions of section 7 to be invoked in these circumstances where the claimant is praying in aid the statutory rule that she is entitled to 50% of the family home. I find that there is, in substance, an application by the defendant for variation of the rule.

Who bears the burden of proof?

25. The equal share rule stands in aid of the claimant. The law allows for an exception to its application where, in the court's opinion, the circumstances are such that it would be unjust or unreasonable to apply it. The rule can be displaced. This has formal implications for the burden of proof. The defendant has asserted that the circumstances in this case are such that would warrant an exception to the rule. He asserts it, he must prove it. He must bring himself within the exception. The burden of proof is, therefore, on the defendant to place himself outside the application of the rule that stands in aid of the claimant.

ANALYSIS OF THE LAW AND THE EVIDENCE

26. The sole question now is: do the circumstances of this case justify a departure from the 50/50 rule in respect of the family home? Both parties relied on affidavits filed on their behalf in the matter and were both cross-examined. I was given an opportunity to observe their demeanour. The defendant also relied on the affidavit of his uncle, Mr. Leonard Graham. Mr. Leonard Graham was not present for cross-examination and so this is borne in mind in determining the weight to be accorded to his affidavit. I have given due consideration only to those matters contained in his affidavit that would be within his personal knowledge and which could not be materially challenged by the claimant. I must say that some aspects of his evidence, like those of the parties, have been ignored on the grounds of irrelevance and or/ inadmissibility. Those aspects that are deemed germane to the issue to be determined have been considered although I do not propose to repeat everything in my analysis. I must say too that the helpful submissions of counsel and the authorities brought to my attention by them have been duly considered in my determination of the issue.

27. It is noted that the Act, in indicating some relevant considerations for the court in deciding whether the rule should be departed under section 7, has not sought to present a closed category of the considerations that would be relevant. It expressly identifies three relevant factors that may be considered by the court. The defendant cannot and did not seek to argue that any of those considerations applies to his situation. The fact that the

category of factors is not closed by the statute is taken to 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 in respect of the family home when there is an application under section 7 to vary the rule. It stands to reason, therefore, that in considering an application 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.

28. It is against this background that I have considered Mr. Steer's submission that the defendant has put nothing before the court to justify moving away from 50/50 apart from contribution which is not relevant. I do not agree that contribution can automatically, and without more, be declared as irrelevant. It must be for the court to determine in the circumstances what considerations are relevant and then to decide on the weight that should be accorded to each in light of the intent and purpose of the statute to ensure fairness. The contribution of the parties, and indeed third parties, to the marital union and to the family assets might be a relevant consideration once there is a challenge to the application of the 50/50 rule. It must be that on a totality of the circumstances, when all things are considered and evaluated, including but not limited to contribution, that the court would be able to say whether or not sufficiently good reason exists for a departure from the rule within the ambit of section 7.

29. In considering the evidence, it cannot be disputed that Durie Drive is wholly owned by the defendant having been purchased solely by him without the assistance of the claimant. This, however, does not preclude the operation of the equal share rule as the Act specifically brings within the operation of the rule property wholly owned by either

spouse once it fits the definition of the family home. Sole ownership of the family home by the defendant is, therefore, not a ground to disentitle the claimant from half- share.

30. Similarly, there is no question that the defendant was the breadwinner for the family and the dominant partner in providing financially for the union. The claimant has admitted that the defendant met the family expenses as her salary was not at the level for her to make any better financial contribution. Monetary contribution was, therefore, unequal. The claimant, however, had her role to play in the union as well. The law is clear that the claimant's role as mother to the children of the union and as homemaker must be seen as a substantial and not merely as a token contribution to the property of the family regardless of who legally owns it.

31. Under the new statutory regime, there can be no discrimination against the claimant merely on the basis of financial inequality. Monetary contribution cannot be presumed to be of higher value than non- monetary contribution. This, is said, to be a rule of almost universal application. In **Miller v Miller** (supra) Lord Nicholls reiterated the approach of the House of Lords as demonstrated in **White** (supra) when he stated at page 630:

"The House emphasised that in seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties' contribution to the family, there is no bias in favour of the money earner and against the homemaker and child-carer. This is a principle of universal application. It is applicable to all marriages."

32. In **G v G (Financial Provision: Equal Division)** [2002] 2 F.L.R. 1143, the wife stayed home and cared for the children while the husband worked in a successful business. The husband was, undisputedly, the breadwinner. He argued that he should have a greater share in the matrimonial assets because of the exceptional wealth creation he had contributed to the marriage. Coleridge, J declared that there was no reason to depart from the principle of equal division. The wife's contribution as homemaker was of equal importance as the husband's role as the breadwinner and there was nothing striking about the husband's role that warranted special treatment. The observations of Coleridge,

J was echoed by Lord Nicholls in **Miller** (supra) who reasserted the view expressed in **G v G** (supra) that “*parties should not seek to promote a case of ‘special contribution’ unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life.*”

33. The unequal monetary contribution in this case cannot be a basis for departure from the rule. There can be no discrimination against the claimant on this basis. Mr. Rogers, on behalf of the defendant, has submitted that there are circumstances in the case that warrant special treatment and which would justify a departure from equal division in respect of Durie Drive. I must say that counsel, to his credit, has not sought to glorify the defendant’s monetary contribution towards the family home or the union, in general, or to denigrate the role of the claimant in any way. He has asked the court to consider, as a special factor worthy of consideration, the presence of third party interests that had influenced the acquisition and preservation of the property and the conduct of the parties towards it as a family home. He has also asked that all this be viewed against the background that the defendant had made provision for the claimant through the acquisition of Murray Drive.

34. It is, indeed, a feature of this case that the defendant’s mother was a part of the family. It is also a feature of the case, that there is a child of the defendant who, although not the claimant’s child, was accepted as a child of the family. This was an extended family unit rather than a nuclear one. Murray Drive having been acquired jointly by the parties, the defendant then, within months, bought Durie Drive in his own name and without the input of the claimant. This he said he did with an intention to make provision for his mother and son who were not the responsibility of the claimant. The undisputed fact that living quarters were added to the house to accommodate these persons lends credence to the defendant’s stated intention to provide a home for them. These are persons to whom, it may be said, the defendant owes a duty to maintain. These obligations existed prior to the union, continued to subsist during the currency of the union and are likely to continue after the dissolution of the union. These persons are,

legitimately, his dependants. The family home was purchased and improved by him with them in mind.

35. Mr. Steer submitted that no weight should be accorded to this as a consideration to tip the scale in favour of the defendant. He argued that neither the son nor the mother has brought an application in respect of the property as interested parties. Furthermore, the defendant had not given any of them a proprietary interest in the property by adding their names to the title. He basically contended that the mere fact that the defendant's mother lives with him and provision is made at the house for his son would not be sufficient to displace the rule.

36. This question as to the position of an extended family unit in the determination of spousal entitlement to matrimonial property and financial provision on divorce was considered in the English case of **G. v G (Matrimonial Property: Rights of Extended Family)** [2006] 1 F.L.R. 62. In that case, the wife applied for ancillary relief from her husband upon the break down of the marriage. Both parties were Hindus who had an arranged marriage. They had a ten year old son. The wife had lived in the matrimonial home with her husband and extended family. The issue for determination was the extent of the husband's assets. He was the legal owner of two properties. He, however, argued that the matrimonial home was owned by ten beneficial owners, namely all adults living within it as well as his wife. The wife argued that the husband was the true beneficial owner. The wife claimed a half share in his assets. The husband had built up the wealth by working in the family clothing business with his brothers. The business was started by his father.

37. On the point taken by the husband about the extended family, it was held that there could be no resulting trust or constructive trust in respect of the matrimonial home. The court concluded that on the evidence, the husband's family had agreed merely to live in the house. They had not agreed to the acquisition of proprietary interests under any form of constructive trust. Furthermore, the court opined that the husband's family could not sustain the argument that proprietary estoppels arose. They had not relied on any

representation made by the husband to their detriment. The family members had made no such claim as to estoppels or an irrevocable licence and it was not for the husband to claim it on their behalf. It was clear that the husband was the legal as well as beneficial owner of the matrimonial home. The court did not see this assertion of the interest of third party adults in the home as a factor that should be used in favour of the husband.

38. The court, however, found that while it was clear that both parties had made a contribution during the marriage, the husband had made extra contribution through his family in that his father had started the business which had produced much family wealth and provided the means to provide the matrimonial home. The husband's brother was also a shrewd business man and it was clear that his skill had helped the husband to make the monies comprising his assets. The wife was granted a 41% share in the assets. Clearly, the input and contribution of third parties to the matrimonial assets was a factor that was accorded some weight in favour of the spouse on whose behalf such contribution was made thereby justifying a departure from equal division.

39. I am mindful that the statutory provisions applicable to the English cases are not the same as under our legislation but the principles may, nevertheless, prove instructive given that the attainment of fairness is the bedrock of the law in both jurisdictions. In the case at bar, like in **G v G (Matrimonial Property: Extended Family)** (supra), it is clear that the defendant is the legal and beneficial owner of the property. Similarly, he has not sought to vest any beneficial interest in anyone and it has not been argued that any of his dependants does have a proprietary interest.

40. The evidence has disclosed, however, that the defendant has sought to make provision for a mother with whom he lived prior to the marriage (indeed for all his life) and for whom he had undertaken the responsibility to, at least, provide a home. He also sought to make provision for his child. This is another person to whom he would have owed a legal duty to maintain. These are not merely relatives whom he is granting a favour; these are persons who are his dependants and who have been accepted as such by the claimant. With these additional dependants in mind, the defendant purchased the

house and then added value to it also for their use and benefit. This marks a point of departure from the circumstances as reported in **G v G**. The situations are not identical and so I find it necessary to distinguish the cases and to hold that the provision made by the defendant for his additional dependants outside the marriage partnership is a relevant consideration that arises in the circumstances of this case that justice demands should not be ignored.

41. To take it even further, the defendant, in seeking to make this provision for his extended family, obtained the assistance of his uncle as a contractor. The defendant said that he was hard pressed for cash to carry out the renovations on the house. The claimant, in her affidavit evidence, stated that because she witnessed the defendant purchased expensive fixtures and appliances in Florida for the house, he did not appear to be hard pressed for cash. She, however, admitted that he did not discuss his financial affairs with her. It follows then that she cannot materially challenge his assertions concerning his financial status at the time the house was being renovated. She also deponed in her affidavit that to the best of her recollection, the uncle was paid for his services but then she later admitted in her *viva voce* evidence that she does not know if the uncle was paid for his services as contractor. The claimant has no knowledge of the arrangements between the defendant and his uncle concerning the renovation of the property. In all the circumstances, I find that the claimant cannot materially challenge the assertions of the defendant and his uncle, for that matter, when they say that the renovation was carried out by both of them with the uncle bearing the ‘lion’s share’ of the expenses for the benefit of the mother. This bit of evidence remains unchallenged and I accept it.

42. I consider the ‘extended family factor’ and the contribution made by the uncle, a third party, on behalf of the defendant for the benefit of this extended family as of marked relevance in determining what is reasonable and just. The uncle’s role in the improvement and preservation of the property for the benefit of a person other than the parties to the union is another special feature of this case which I find difficult to ignore because justice demands that it also be considered. The structural renovations done were

quite extensive. The contribution of the defendant's uncle to the family home, in my view, stands as a gift to the defendant and not to the claimant or to them jointly. This gift to the defendant for the benefit of his mother has served to substantially enhance the value of the property. This added value must be credited to the spouse on whose behalf it was contributed; fairness demands it.

43. While credit is given to the claimant for her role as homemaker and child bearer and carer, it cannot be ignored that she was assisted in some way by the defendant's mother who formed part of the household and by a helper who, she admitted, attended to the housekeeping duties. The claimant was not a housewife who spent all her time at home managing the home. There is nothing in her role as homemaker that would place it above the norm for it to be viewed as striking over and above the role of the defendant as provider. I must say though, that I have taken into account that the claimant's role as child carer of the union still continues as she still has to supervise and provide for the two young children of the union who are left in her immediate care. The defendant will also have a responsibility to provide for these young children of the union who continue to be his dependants. All these are relevant considerations that justice demands should be taken into account in determining whether the equal rule should be displaced.

44. In **S v. S (Financial Provisions: Departing from Equality)** the U.K. court concluded that the lump sum sought by the wife on the basis of equal division would be disadvantageous to the husband given that he had a young family to support. It stated that equality should not be applied where it would prove harder on one party than on the other. While I do note the differences in statutory provisions, I nevertheless believe that this is a useful principle that could assist in determining what is just or reasonable when the application of the equal share rule is challenged in respect of the family home. I find in this case that both parties' obligation to the maintenance and care of the young children of the union hangs in the balance and so there would be no greater hardship on the defendant, over and above the claimant, in respect of making provision for the minor children that would be a basis to tip the scale in favour of the defendant away from equal division.

45. I find, though, that while the role of the defendant as earner and financial provider does not, of itself, make him entitled to a greater share, it would be inequitable to ignore the extra contribution he has made for the benefit of third parties and the contribution made by a third party on his behalf in respect of the family home. In **G v G (Financial Provision: Equal Division)** (supra), the contributions of the members of the husband's family to the matrimonial assets were taken into account in moving away from equal share. In **White** (supra), the contribution of the husband's father to the early phases of his business was also taken into account in tipping the scale away from equality in favour of the husband. While these English cases have not emanated from legislative provisions identical to our statute, I nevertheless accept the approach to third party contribution as being of highly persuasive value given that these decisions would have been influenced by the universally recognized objective to ensure fairness between the spouses and the concomitant principle, enunciated by the House of Lords, that equality should not be departed from unless for good reason. In our situation, as a matter of law, the rule should only be departed from where it would be unreasonable or unjust to apply it. The issue as to what is a good reason (in the U.K.) or what is unreasonable or unjust (in Jamaica) is totally a question of fact and, therefore, for the judicial conscience in the particular circumstances of each case. There are no hard and fast rules or fixed principles laid down for the resolution of this question. In this case, the facts have revealed that the defendant, with the assistance of a third party, has made an extra contribution to the union and to the family assets for the benefit of persons who are his dependants and who are likely to be so on termination of the partnership. It would be inequitable to disregard his extra and special contribution to the family home done for and on behalf of these persons who form part of the extended family.

46. When all the relevant circumstances of the case are examined and assessed as justice demands, it is my opinion that an application of the equal share rule would be unreasonable and unjust. I am persuaded to the view that fairness demands a departure from the equal share rule. The claimant's claim to 50% is denied. The entitlements to Durie Drive are, therefore, apportioned as follows 40% to the claimant, 60% to the defendant.

COMPENSATION FOR THE CAR

47. The claimant has requested an order for the defendant to compensate her with a motor car in lieu of her Suzuki Swift motor car that was taken away by the defendant. The evidence adduced on this aspect is that the car was bought by the claimant with the assistance of a loan from the bank at which she worked. When she left the bank to work with the defendant, the defendant promised that the company would take over the loan. This did not materialize. The defendant took the car and assigned it to one of his employees who crashed the car making it a total loss. The proceeds from the insurance were used to satisfy the bank loan. The claimant was never given a motor car in compensation for her loss.

48. The defendant has adduced no evidence in response to this aspect of the claimant's claim. The claimant's assertion remains unchallenged for all intents and purposes. I conclude that fairness dictates that the claimant should be compensated with a car of comparable value as at the time of the accident on such terms to be agreed between the parties in writing. If suitable arrangement cannot be made between the parties for compensation as ordered, the claimant is at liberty to make an application for damages to be assessed in respect of her loss.

ORDERS

49. I now make the following declarations and orders:

- 1) As agreed between the parties, the claimant is entitled to fifty percent (50%) interest and the defendant fifty percent (50%) interest in the property located at 17 Murray Drive, Kingston 6 in the parish of Saint Andrew and registered at Volume 1280, Folio 179 of the Register Book of Titles.
- 2) The claimant is entitled to forty (40%) interest and the defendant to sixty (60%) interest in the property located at 9 Durie Drive, Kingston 8 in the parish of Saint Andrew and registered at Volume 1266, Folio 155 of the Register Book of Titles.

- 3) That a valuation of both properties to be done by a valuator to be agreed between the parties with the cost of valuation to be shared by the parties proportionately with their share in the respective properties. If the parties cannot agree to a valuator, the Registrar of the Supreme Court is empowered to appoint one.
- 4) The defendant is given the first option to purchase 9 Durie Drive, Kingston 8 and the claimant is given first option to purchase 17 Murray Drive, Kingston 6, such option to be exercisable within thirty (30) days of receipt by both parties of the valuation report in respect of each property.
- 5) Should either or both parties fail to exercise their option to purchase the property or properties aforesaid, then such property or properties, as the case may be, shall be placed on the open market for sale by private treaty and failing that, by public auction.
- 6) The Registrar of the Supreme Court is empowered to sign any or all documents to give effect to any or all orders made herein if any of the parties is unable or unwilling to do so.
- 7) The defendant to compensate the claimant with a motor car of comparable value to the claimant's Suzuki Swift as at the time of the accident on terms to be agreed in writing between the parties. If the parties cannot agree the terms of compensation within thirty (30) days of the date hereof, then the claimant is at liberty to proceed to have damages assessed in respect of her motor car.
- 8) The parties to bear their own costs.
- 9) Liberty to apply.