



[2019] JMSC Civ 145

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2014 HCV 02540

IN THE MATTER of all that parcel of land part of Salt Pond, Hut Pen, now called West Cumberland, Greater Portmore, in the parish of St. Catherine, being the Lot numbered Four Hundred and Thirty on the Plan of part of Salt Pond, Hut Pen, now called West Cumberland, Greater Portmore, aforesaid, deposited in the Office of Titles on the 26th day of April, 1999 of the shape and dimensions and butting as appears by the said Plan and being all of the land comprised in Certificate of Title registered at Volume 1318 Folio 483 of the Register Book of Titles

AND

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

BETWEEN **MITZIE NIOCIA MORRISON** **CLAIMANT**

AND PHILEMON JOSEPH JOHNSON DEFENDANT

IN CHAMBERS

Mr. Ruel Woolcock instructed by Ruel Woolcock & Company for the Claimant

Miss Catherine Minto instructed by Messrs. Nunes, Scholefield, DeLeon & Company for the Defendant

Heard: June 4 and 5 and July 17, 2019

Contract – Mental capacity to contract – Defendant’s mental disorder – Knowledge of the other contracting party – Averment of knowledge – Onus of proof – Whether the separation agreement is voidable by virtue of the defendant’s mental disorder – The bases on which matrimonial property is to be divided between the claimant and the defendant – Mental Health Act, section 2, The Property (Rights of Spouses) Act, sections 2, 4, 10, 13, 14 and 15

A. NEMBHARD, J

INTRODUCTION

[1] By way of a Fixed Date Claim Form, filed on 26 May, 2014, the Claimant, Mitzie Niocia Morrison, seeks the following Orders against the Defendant, Philemon Joseph Johnson: -

- (1) An Order that the Claimant is entitled to the full legal and beneficial interest in the property situated at SALT POND, HUT PEN, now called WEST CUMBERLAND, GREATER PORTMORE, in the parish of SAINT CATHERINE, being the Lot numbered FOUR HUNDRED AND THIRTY on the Plan of part of Salt Pond, Hut Pen, now called West Cumberland, Greater Portmore, aforesaid, deposited in the Office of Titles on the 26th day of April, 1999 of the shape and dimensions and butting as appears by the said Plan and being all of the land comprised in Certificate of Title registered at Volume 1318 Folio 483 of the Register Book of Titles;
- (2) An Order that the Defendant executes and transfers his entire share in the said property to the Claimant, within thirty (30) days of the date of the Order of this Court;

(3) An Order that, should the Defendant fail to execute a transfer of his entire interest in the subject property to the Claimant, that the Registrar of this Honourable Court be directed to execute such transfer;

(4) Costs;

(5) Liberty to apply.

BACKGROUND

- [2]** The Claimant, Mitzie Niocia Morrison, and the Defendant, Philemon Joseph Johnson, were married on 2 February, 1999. Prior to their marriage, the parties had one child together, a son, who was born on 3 October, 1997.
- [3]** On 20 October, 1999, the parties acquired property situate at Salt Pond, Hut Pen, now called West Cumberland, Greater Portmore, in the parish of St. Catherine, being the land comprised in Certificate of Title registered at Volume 1318 Folio 483 of the Register Book of Titles ("the subject property"). The subject property is registered in the names of the parties, as tenants-in-common.
- [4]** The parties separated on 5 May, 2004 and remained separated until their marriage was dissolved by the Superior Court of Justice of Toronto, Ontario, on 28 May, 2013.
- [5]** Prior to the dissolution of the marriage, the parties signed a Separation Agreement, dated 12 May, 2006 ("the Agreement"). The Agreement was drafted by Mr. Lincoln Allen, a paralegal representing Miss Morrison. Miss Morrison's signature to the Agreement was witnessed by one Mr. Allen, while that of Mr. Johnson was witnessed by one Miss Daisy Leach, a friend of Miss Morrison.
- [6]** Clauses 7 and 11 of the Agreement are of specific relevance. Clause 7 of the Agreement is entitled 'Matrimonial Home' and reads as follows: -

“The husband and wife hold joint title to the home and acknowledge that there is a matrimonial home to be disposed of. Account #100861368, address is Lot 430 West Cumberland, Greater Portmore, St. Catherine, Jamaica, W.I.

(a)The husband agrees to relinquish all interest in the home upon receiving a full sum of Nineteen Thousand Canadian Dollars (\$19,000.00), cash, payable by the wife on May 12, 2016.

(b)In consideration for this property, the husband agrees to relinquish any claims to an interest in the home and agrees to execute a transfer transferring title to the wife alone.

(c) The wife will assume sole responsibility for the matrimonial home.”

- [7]** Clause 11 of the Agreement is entitled ‘Independent Legal Advice’. It reads as follows: -

“Each party acknowledges that he or she has had independent legal advice, understands his or her respective rights and obligations under this agreement, and is signing this agreement voluntarily.”

- [8]** It is being contended on Mr. Johnson’s behalf that, at the time of the execution of the Agreement, he was suffering from a mental disorder.

THE ISSUES

- [9]** The following issues arise for the Court’s determination: -

- (1) Is the Separation Agreement voidable by reason of the Defendant’s mental disorder, at the time that it was executed?
- (2) How should the subject property be divided between the parties?

THE LAW

The Mental Health Act

[10] Section 2 of the Mental Health Act ("the Act") defines 'mental disorder' as follows:

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"mental disorder" means -

(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or

(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour,

and "mentally disordered" shall be construed accordingly'.

Mental capacity to contract

The old approach

[11] The Halsbury's Laws of England, 4th Edition, paragraph 1006, states as follows: -

"A fair contract with a person who was apparently of sound mind, but who in fact was suffering at the time of the contract from such mental disorder as rendered him incapable of entering into the contract, is voidable but not void. If the contract is not to be enforced against him, the person mentally disordered must prove that the other party either knew that he was of unsound mind or knew of such facts as would justify the court in inferring such knowledge. This rule is based on the principle of the common law that a person should not be allowed to stultify and disable himself; no one therefore could plead his own insanity, but his successors or the Crown might. The principle that a person may not stultify himself has been modified and it is now settled law, if the defendant can show that he did not have the capacity to form a contract and that the plaintiff knew it, there is a good defence to an action on the alleged contract.

Where a person mentally incapacitated from contracting could not have a contract entered into by him set aside, his successors are also unable to have that contract set aside.

Where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and made in good faith, and the parties cannot be put back into their former positions, the obligation will be enforceable.

Contracts entered into during lucid intervals or before insanity supervened are enforceable.”

- [12] The authority of **The Imperial Loan Company, Limited v Stone** [1892] 1 Q.B. 599 is a useful starting point. In that case the Court held that where a defendant in an action of contract sets up the defence that he was insane when the contract was made, he must, in order to succeed in this defence, show that, at the time of the contract, his insanity was known to the plaintiff. In this case the action was brought on a promissory note which the defendant, who had, since the making of the note been found by inquisition to be a lunatic, signed as surety. The statement of defence alleged that the defendant, when he signed the note, was so insane as to be incapable of understanding what he was doing, and that his insanity was known to the plaintiffs.

- [13] Lord Esher, M.R. opined that when a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. The burden of proof, in such a case, must lie on the defendant.

- [14] Lopes, L.J. stated that a contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of

sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact. Unless he proves these two things, he cannot succeed.

The new approach

[15] In **Leslie Augustus Watts (By Lloyd Barnett, his next friend and Guardian Ad Litem) v Lelieth Watts and Watts Investments Limited** [2013] JMCC COMM 15, at paragraph [38], Mangatal, J relied on the following passage in Snell's Equity, 31st edition, paragraph 8-44, entitled "Unconscionable Bargains": -

"5. - Unconscionable Bargains

1. Lack of capacity.

8-44 A gift will be set aside if it is shown that the donor lacked the requisite mental capacity. For these purposes mental capacity means 'in each case whether the person concerned is capable of understanding what he does by executing the deed in question when its general purport has been fully explained to him.' The doctrine applies to wills, contracts and gifts although the degree of understanding required depends on the nature of the transaction and varies from a low degree where the subject-matter of the gift is trivial to a high degree where the donor is disposing of his or her only asset of value. Once it is demonstrated that the donor lacked capacity in this sense the burden of proof shifts to the donee to demonstrate that the donor had the necessary understanding to validate the gift. If the donee fails to discharge the burden of proof, the transaction will be set aside. It has been suggested that a transaction entered into without the requisite mental capacity is void. But it is submitted that the better view is that such a transaction is voidable and the doctrine can only be invoked where the donee is guilty of unconscionable conduct and the transaction is only liable to be set aside where the donee has knowledge of the incapacity."

- [16] The Court adopted a different approach in the later decision of **In re Beaney, DECD**. [1978] 1 WLR 770, in which the issue raised was whether a mentally ill person was capable of understanding what the transaction was about.
- [17] In that case, the deceased, whose mental condition had begun to deteriorate from 1970, executed a transfer to the defendant, her eldest daughter, on 16 May, 1973, transferring a house which represented her only asset of value. The plaintiffs, her two younger children, sought a declaration that the transfer was void on the basis that the deceased was unable to understand that she was giving away her only asset of value and depriving her other two children of any real share in her estate.
- [18] The case establishes two important principles. Firstly, that the question in each case is whether the person concerned is capable of understanding what he does by executing the deed in question, when its general purport has been fully explained to him.
- [19] Secondly, that the degree of understanding required in respect of the execution of any instrument is relative to the particular transaction which it is to effect. For a Will, the degree of understanding required is always high but for a contract made for consideration or a gift inter vivos, the degree required varies, according to the circumstances, from a low degree, where the subject matter and the value of the gift are trivial, to as high a degree as is required for a Will, where the effect of the gift is to dispose of the donor's only asset of value, thus pre-empting its devolution as part of the donor's estate under his Will or on intestacy.
- [20] The Court found that, since the claims of the plaintiffs and the extent of the property to be disposed of were not explained to the deceased, the transfer was void, even if she did understand that she was making an absolute gift of the house to the defendant. (See also – **Thomas Bruce Hart v Joseph O'Connor and Others** [1985] 1 A.C. 1000 (PC), **In re K. (Enduring Powers of Attorney)** [1988] 1 Ch 310, **Simpson and Others v Simpson and Another** [1992] 1 FLR 601, **Irvani v Irvani** [2000] 1 Lloyds Law Reports 412, **In re W (Enduring**

Powers of Attorney) [2001] Ch 609 (CA), **Williams v Williams** [2003] EWHC 742 (Ch)).

The Property (Rights of Spouses) Act

- [21] The Property (Rights of Spouses) Act ("PROSA") utilizes what Morrison JA (as he then was) in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, at paragraph [34], termed a 'composite approach' to matrimonial property. In this approach, the 'family home' is treated differently from other property owned by either or both of the spouses. Unlike its treatment of other property owned by either or both of the spouses, PROSA creates a statutory rule of equal entitlement to the beneficial interest in the 'family home'.

- [22] The 'composite approach' is in contrast with the equivalent English legislation, the Matrimonial Causes Act, 1973, where there is no statutory equal share rule in respect of matrimonial property. The Courts are given a wide discretion, largely unrestricted by statutory provisions.

- [23] Although the 'composite approach' is not unique to Jamaica, the position taken by PROSA is not as detailed as the equivalent legislations in some other jurisdictions that have adopted that approach. The equivalent legislation in New Zealand, the Matrimonial Property Act, 1976 (which was amended and renamed The Property (Relationships) Act, 1976), also utilizes the 'composite approach'. This legislation specifically addresses the matter of contribution in respect of the matrimonial home in certain circumstances and applies the equal share rule not only to the matrimonial home but also to certain other family assets.

When can an application be made under the Property (Rights of Spouses) Act?

- [24] Section 13 of PROSA provides that a spouse shall be entitled to apply to the Court for a division of property on the grant of a decree of dissolution of a marriage or termination of cohabitation or on the grant of a decree of nullity of marriage or where a husband and wife have separated and there is no

reasonable likelihood of reconciliation or where one spouse is endangering the property or is seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property earnings.

- [25] Any application made under section 13(1)(a), (b) or (c) of PROSA, shall be made within twelve (12) months of the dissolution of a marriage, termination of cohabitation, annulment of marriage or separation or such longer period as the Court may allow after hearing the Applicant.

The definition of 'property' under the Property (Rights of Spouses) Act

- [26] Section 2(1) of PROSA provides that 'property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled.

Who can apply?

- [27] Section 2(1) of PROSA defines a 'spouse' as including: -

(i) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;

(ii) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years.

- [28] For the purposes of sections 13(1)(a) and (b) and 14 of PROSA, the definition of 'spouse' shall include a former spouse.

- [29] Section 10 of PROSA allows spouses to make such agreement with respect to the ownership and division of their property as they think fit, subject to certain conditions stated in the section.

Division of properties 'other than the family home'

Contribution

- [30] Section 14 of PROSA reads as follows: -

(1) Where under section 13 a spouse applies to the Court for a division of property the Court may –

- (a) Make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
- (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),*

Or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

(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 circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

(3) In subsection (2) (a), a ‘contribution’ means –

- (a) The acquisition or creation of property including the payment of money for that purpose;*
- (b) The care of any relevant child or any aged or infirm relative or dependant of a spouse;*
- (c) The giving up of a higher standard of living than would otherwise have been available;*

- (d) *The giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –*
 - (i) *Enables the other spouse to acquire qualifications; or*
 - (ii) *Aids the other spouse in the carrying on of that spouse's occupation or business;*
- (e) *The management of the household and the performance of household duties;*
- (f) *The payment of money to maintain or increase the value of the property or any part thereof;*
- (g) *The performance of work or services in respect of the property or part thereof;*
- (h) *The provision of money, including the earning of income for the purposes of the marriage or cohabitation;*
- (i) *The effect of any proposed order upon the earning capacity of either spouse.*
- (4) *For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.*

The power of the Court

[31] Section 15 of PROSA provides as follows: -

- (1) *In any proceedings in respect of the property of the spouses or of either spouse (other than the family home), the Court may make such order as it thinks fit altering the interest of either spouse in the property including –*
 - (a) *An Order for a settlement of the property in substitution for any interest in the property;*
 - (b) *An Order requiring either or both spouses to make, for the benefit of either or both spouses, such settlement or transfer of property as the Court determines; or*

(c) ...

(2) *The Court shall not make an Order under subsection (1) unless it is satisfied that it is just and equitable to do so.*

(3) ...

The law before the Property (Rights of Spouses) Act

[32] In discussing the Law prior to PROSA, which he later termed the ‘old regime’, Morrison, JA in **Brown v Brown** (supra), at paragraph [21], summarized it based on the decision of **Gissing v Gissing** [1970] 2 All ER 780. He stated as follows: -

“...this case decided that the mechanism for the resolution of disputes between husband and wife as to the beneficial ownership of property vested in the name of one or the other of them was to be found in the law of trust, in particular in the principles governing resulting, implied or constructive trusts...”

[33] Section 4 of PROSA makes the position subsequent to its coming into effect quite clear and provides as follows: -

“The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of 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.”

[34] Section 4 of PROSA therefore directs that there is to be an entirely new and different approach in deciding issues of property rights between spouses. This section directs the Courts as to what that approach should be.

[35] Since the passing and implementation of PROSA, the ‘presumptions of common law and equity’ are no longer applicable when deciding issues of property rights between spouses and between spouses and third parties. All claims to an entitlement to a share in property other than the ‘family home’, must satisfy the factors set out in section 14 of PROSA.

- [36] The Privy Council, in **Miller and another v Miller and another** [2017] UKPC 21, commented that PROSA is a robust enactment which stood on its own two feet and that there would rarely be occasion to resort to English authorities under the Married Woman's Property Act. However, the Board cautioned that the issue of the intention of the parties should not be disregarded, as it was an issue that could be considered as a question of fact as a starting point, without regard to the rules or presumptions of common law and equity.

The approach of the Court

Fairness

- [37] In **Carlene Miller v Ocean Breeze Suites and Inn Limited, Harold Miller and Ocean Breeze Hotel Limited** [2015] JMCA Civ 42, Brooks, JA, at paragraph [36], discusses the overriding objective of PROSA.

- [38] Brooks, JA stated as follows: -

*"In his comprehensive judgment in **Brown v Brown** [2010] JMCA Civ 12, Morrison JA traced the process by which the PROSA was devised and promulgated. It may be gleaned from each of the judgments cited in that important case that the object of the PROSA is to achieve fairness between the parties upon the breakdown of their marriage."*

- [39] Brooks, JA continued at paragraph [45] as follows: -

*"The respective interests of spouses at the time of separation or termination of the marriage was considered by Lord Nicholls of Birkenhead in **Miller v Miller; McFarlane v McFarlane** [2006] UKHL 24; [2006] 2 AC 618. In addressing certain elements or strands that comprise the principle of fairness in the division of matrimonial property, Lord Nicholls said at paragraph 16 of his judgment, that unless there is good reason to depart from it, fairness requires that when the partnership ends each is entitled to an equal share of the property. He said that the principle was applicable to both short and long marriages: A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': **R v R** [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership,*

unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

ANALYSIS

The legal burden of proof

- [40] The legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) by a preponderance of the evidence. What is the degree of the legal burden borne by Miss Morrison in a civil proceeding such as this?
- [41] In **Miller v Minister of Pensions** [1947] 2 All ER 372 at 373-374, Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -

"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not."

The issue of credibility

- [42] This is a case in which the central issue is that of the credibility and reliability of the witnesses from whom the Court has heard.
- [43] In **Sonia Stanginer-Reid v Robert Lloyd Lee and others** [2016] JMSC Civ 185, Laing, J noted at paragraph [19], that, in assessing the evidence, he would be guided by the observations of Lord Pearce (dissenting) in the House of Lords decision of **Onassis v Vergottis** [1968] 2 Lloyd's Rep 403 at page 431.
- [44] Lord Pearce is quoted as follows: -

"Credibility involves wider problems than mere demeanour, which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following...Firstly, is the witness a truthful

or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly, and if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over discussion of it with others? ...Lastly, although the honest witness believes that he heard or saw this or that, is it so improbable that it is on a balance of probabilities that he was mistaken?

On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness.

All these...compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process..."

- [45] In assessing the credibility and reliability of the witnesses in the instant case, as well as that of the evidence that it has heard, this Court will also be guided by the observations of Lord Pearce.

Is the Separation Agreement voidable by reason of the Defendant's mental disorder, at the time that it was executed?

- [46] In the instant case, the parties executed the Agreement on 12 May, 2006. By virtue of the Agreement, for the consideration of Nineteen Thousand Canadian Dollars (CA\$19,000.00), Mr. Johnson agreed to relinquish all his interest in the subject property upon receiving the said sum, in cash, from his wife, Miss Morrison.
- [47] It is being contended on Mr. Johnson's behalf, that, the Agreement is void by virtue of his mental disorder and that, at the time of the execution of the Agreement, he was unable to understand the effect of the terms of the Agreement by virtue of his mental disorder, which was known to Miss Morrison.
- [48] The first issue for the Court's determination therefore, is, whether Mr. Johnson was suffering from a mental disorder.

- [49]** Terms such as ‘insane’ and ‘lunacy’ have rightfully been removed from the Law and have been replaced with the less offensive term of ‘mental disorder’, as defined in section 2 of the Act. The Mental Health Act of Canada, the jurisdiction in which Mr. Johnson has been deemed certifiable, has an even simpler definition. Section 2 of that Act defines the term ‘mental disorder’ as ‘any disease or disability of the mind (“trouble mental”)’.

The evidence of Mr. Johnson’s mental capacity and Miss Morrison’s knowledge of his affliction

- [50]** There is an abundance of evidence in relation to Mr. Johnson’s mental condition. On 4 June, 2005, he was taken to the North York General Hospital in Canada, by Miss Morrison herself, at which time he was ‘deemed certifiable under the Mental Health Act of Canada. There is evidence that in December 2004, Mr. Johnson had quit his job of ten (10) years and had returned to Jamaica to live with his father. While Mr. Johnson was in Jamaica, a friend telephoned Miss Morrison and informed her that he [Mr. Johnson] was “unkempt” and “not talking right”.
- [51]** In April 2005, Mr. Johnson’s mother, Miss Dahl, took him to see one Dr. Gelber at Scarborough General Hospital in Canada, where he [Mr. Johnson] was assessed and put on medication, Zyprexa, which he [Mr. Johnson] took for a few days but did not continue.
- [52]** Mr. Johnson left his mother’s home, where he was living since being discharged from the hospital in 2005, and went to stay with Miss Morrison. While there, he began to complain about pains all over his body, smelling “chemicals like a gas”, that he thought was coming from the roof into the apartment and which he contended was causing his hands to become numb. While staying with Miss Morrison, Mr. Johnson became suspicious of the television and began to speak of jumping off the balcony or stabbing himself. Mr. Johnson also stated that he had not been sleeping well.

- [53]** On the visit to the hospital on 4 June, 2005, Mr. Johnson was referred to the psychiatric department for an assessment. Dr. Peter Grant's observation then was that he [Mr. Johnson] had recent paranoid ideation as well as olfactory hallucinations. Mr. Johnson was diagnosed with schizophrenia from psychosis.
- [54]** Mr. Johnson was also assessed by Dr. Zohar Waisman, who assessed him to be actively paranoid and experiencing somatic and olfactory delusions and hallucinations.
- [55]** On July 25, 2005, Mr. Johnson was again taken to the hospital, at which time he appeared to be depressed and indifferent, to the crisis worker. At that time, he was assessed as being depressed, eating poorly, losing weight, sleeping poorly and appeared to have been non-compliant with treatment.
- [56]** On 5 April, 2006, Mr. Johnson was again seen at the Scarborough hospital. He was then assessed by Dr. Gelber as being a long term schizophrenic who is getting paranoid in the community and withdrawing. On discharge, Mr. Johnson was found to be progressing very nicely and it was recommended that short term case management should follow.
- [57]** On 4 May, 2006, Miss Dahl contacted the Scarborough hospital and informed them that Mr. Johnson had lost the prescription they had given him and requested that he be given another.
- [58]** On 3 October, 2006, Mr. Johnson was admitted to the Scarborough hospital, at which time he was diagnosed as schizophrenic and treated with Zyprexa. Over the course of his stay at the hospital Mr. Johnson gradually improved. He became a voluntary patient on 18 October, 2006 and displayed no management problems. He denied any psychotic symptoms, suicidal or homicidal thoughts, and was discharged into the care of his mother.
- [59]** On 15 August, 2007, Mr. Johnson was again admitted to the Scarborough hospital and was reported to have been non-compliant with his medication since 2006. By the year 2007, Mr. Johnson was wandering the streets, stealing food

and hoarding garbage. His medical records for the years 2012 to 2014, reveal that his mental condition has never improved.

- [60] The Court accepts the evidence adduced in relation to Mr. Johnson's mental disorder and finds that it establishes his 'mental disorder', as defined in the Mental Health Act, both of Canada and of Jamaica.
- [61] The Supreme Court of Canada, in **Starson v Swayze** 2003 SCC 32 (CanLII) stated as follows: -

"Capacity involves two criteria. First, a person must be able to understand the information that is relevant to making a treatment decision. This requires the cognitive ability to process, retain and understand the relevant information...Second, a person must be able to appreciate the reasonably foreseeable consequences of the decision or the lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof."

- [62] The Court accepts the submission of Learned Counsel Miss Minto, advanced on Mr. Johnson's behalf, that, the same disease of the mind that would render him incapable of consenting to his own treatment (the basis on which his mother was appointed his substitute decision maker), would also affect his ability to consent generally.
- [63] It is instructive to note that the purpose of a Community Treatment Order, pursuant to section 33.1(4) of the Mental Health Act of Canada, is to provide a person who suffers from a serious mental disorder with a comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.
- [64] The Court also finds that Miss Morrison knew of Mr. Johnson's mental disorder, prior to 12 May, 2006. In making that finding the Court has had regard to the evidence referred to, at paragraphs [50] and [52] above. There is also evidence

which demonstrates that, to Miss Morrison's certain knowledge, Mr. Johnson has been living with his mother since 2005, and that he suddenly quit his job, after ten (10) years, and has not worked since. The evidence demonstrates that Mr. Johnson has not played a role in his son's life and does not maintain him financially, although his medical records indicate that he has asked to be allowed to see his son. The evidence also is that Miss Morrison has not attempted to bring an action against Mr. Johnson, for child maintenance.

The evidence in relation to the Agreement

- [65]** Miss Minto has submitted that there is no evidence before the Court that the Agreement was ever read over to Mr. Johnson, or that he was allowed to read the document himself, prior to the execution of same. It was further submitted that there is no evidence before the Court that it was asked of Mr. Johnson whether he understood the terms of the Agreement and the effect of same, nor is there any evidence that he indicated that he understood same.
- [66]** The Court accepts those submissions. The evidence of Miss Morrison, in relation to the process that led to the execution of the Agreement, is confined to paragraph 16 of her Affidavit filed on 26 May, 2014. The Affidavit of Lincoln Allen is also silent in this regard.
- [67]** The Court finds that there is no evidence as to whether or not Mr. Johnson was allowed to see the Agreement prior to the date of signing. There is no evidence demonstrating that the content of the Agreement was ever read to Mr. Johnson, or, that its effect was ever explained to him. Nor is there any evidence that he indicated that he understood the terms and effect of the Agreement.
- [68]** The Court also finds that Clause 11 of the Agreement does not assist Miss Morrison. There is no evidence that Mr. Johnson benefitted from independent legal advice. There is no indication that he was afforded an opportunity to peruse the Agreement, prior to the date of signing, or to seek independent legal advice. Nor is there any evidence that, at the time of the execution of the Agreement, Mr.

Johnson benefitted from independent legal advice. It is instructive to note that Mr. Allen, who was present, was not himself an Attorney-at-Law. Furthermore, the person who was present and who witnessed Mr. Johnson's signature, was a friend of Miss Morrison.

[69] Miss Morrison's evidence in this regard, does not advance her case any further. She testified that she believed that Mr. Johnson had a meeting with Mr. Allen, prior to 12 May, 2006 and was given the Agreement at that time. She was unable to say when and where this meeting took place.

[70] The Court therefore finds, on a preponderance of the evidence, that Mr. Johnson suffers from a mental disorder and that, at the time of the execution of the Agreement, he did not have the mental capacity to understand the nature and/or effect of the terms of the Agreement. The Court also finds that at the time of the execution of the Agreement, Miss Morrison was aware of Mr. Johnson's mental disorder. The Agreement is therefore void.

How should the subject property be divided between the parties?

[71] Having found that the Agreement is void, the Court must now determine how the subject property is to be apportioned between the parties. In that regard, there can be no doubt that Miss Morrison is allowed by Law to make this application for the division of matrimonial property. PROSA provides that, for these purposes, 'spouse' includes a former spouse. Miss Morrison would fall under the definition of 'spouse' and can therefore make this application pursuant to section 13 of PROSA. Additionally, the application has been made within twelve (12) months of the dissolution of the parties' marriage.

[72] The parties agree that the subject property does not fall within the definition of 'family home' under PROSA, and that it should be shared equally between them. In all the circumstances of this case, the Court will not depart from that.

DISPOSITION

[73] It is hereby ordered that: -

- (1) The Separation Agreement entered into by the Claimant, Mitzie Niocia Morrison, and the Defendant, Philemon Joseph Johnson, on 12 May, 2006, is void;
- (2) The Claimant, Mitzie Niocia Morrison and the Defendant, Philemon Joseph Johnson, are each entitled to a fifty percentage (50%) share of the legal and beneficial interest in the property situate at Salt Pond, Hut Pen, now called West Cumberland, Greater Portmore, in the parish of St. Catherine, being the land comprised in Certificate of Title registered at Volume 1318 Folio 483 of the Register Book of Titles;
- (3) Each party is to bear his/her own costs;
- (4) Liberty to apply;
- (5) The Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.