



/VMLS

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2009 HCV 03869**

**BETWEEN     RUTH IRMA RODRIQUEZ MORALES PINO             CLAIMANT**

**AND             REINALDO PINO BESTARD                             DEFENDANT**

Ms. Marjorie Currie, Ms. Carleen McFarlane and Mrs. D. Edwards instructed by McNeil and McFarlane for the claimant.

Mrs. Rose Duncan Ellis and Mrs. Hyacinth Griffith instructed by Duncan Ellis and Company for the defendant.

**HEARD:     1<sup>st</sup>, 2<sup>nd</sup> February, 2011 and 1<sup>st</sup> July, 2011**

**FAMILY LAW; APPLICATION FOR DIVISION OF MATRIMONIAL  
PROPERTY; SEPARATION AGREEMENT; TIME WITHIN WHICH  
TO MAKE THE APPLICATION**

**CORAM:     E. BROWN, J (Ag.)**

1. By Fixed Date Claim Form filed 27<sup>th</sup> July 2009, the claimant Mrs. Ruth Irma Rodriguez Morales Pino, sought a number of orders against her estranged husband/defendant, Reinaldo Pino Bestard. The orders sought are:

- (i) That the claimant and the defendant own the matrimonial house located at 12 Hopeton Avenue, Kingston 8 in the parish of St. Andrew in equal shares of 50% each.
- (ii) That the applicant is the sole owner of Nissan motor car licenced # 3341 EJ.
- (iii) That the defendant transfer the said motor car to the claimant forthwith.
- (iv) That the defendant pays to the claimant by way of maintenance the sum of Ten Million Dollars (\$10,000,000.00) for the duration of her life.
- (v) That the defendant be restrained from cancelling Health Insurance Policy number 91300-05046, which he holds with Sagicor Limited as an employee or a member of the Correctional Service, and of which the claimant is a beneficiary or that he makes such arrangements for her Health Insurance as the Court deems just.
- (vi) That the claimant and the defendant are entitled to the sums in all the National Commercial Bank Account held at the Manor Park Bank Branch or such other branches in the name of the defendant or in both parties name, as the said funds have been transferred to.
- (vii) That the parties are equally entitled to a 50% interest in the one bedroom apartment at 9A Central Avenue, Kingston 8.
- (viii) That the defendant pays to the claimant such monthly sums as the Court deems just in the interim for her maintenance.
- (ix) That a valuator agreed upon by the claimant and the defendant be appointed to do a valuation on the premises situated at 12 Hopeton

Avenue, Kingston 8 in the parish of St. Andrew and that costs of same be paid equally by the parties.

- (x) That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all Orders of this Honourable Court if either party is unwilling or unable so to do.

## **BACKGROUND**

2. In her affidavit of even date, Mrs. Pino says she's a Store Manager but 'temporarily redundant'. Both are Cubans and met in 1982. After a courtship of seven (7) years they celebrated their marriage on the 23<sup>rd</sup> February, 1989 in that Spanish isle. The claimant is Dr. Pino's senior by three (3) years but nature's gifts of youth and youthfulness, together with the bliss of romance would have rendered that an invisible detail. Be that as it may, the medical doctor and working woman extended their union on 22<sup>nd</sup> January, 1990 with the birth of their first child.
3. Sometime thereafter, the allure of the English-speaking, democratic and perhaps more viable economy, of neighbouring Jamaica, caressed the couple to emigrate. Pursuant to their agreement, Dr. Pino preceded Mrs. Pino to Jamaica on 17<sup>th</sup> October 1994 to secure a job. Five months later Mrs. Pino and their child joined Dr. Pino.
4. While there is no dispute that the family first settled in Annotto Bay, St. Mary, where Dr. Pino had secured a job at the Annotto Bay Hospital, discord permeates the details of residence. In her affidavit of 27<sup>th</sup> July

2009, Mrs. Pino says they lived in a rented one bedroom near the Annotto Bay Hospital. Dr. Pino disputed that and counter-averred that it was a one room at the doctor's quarters, sharing common facilities. Mrs. Pino seems to agree in her affidavit of 29<sup>th</sup> January 2010. She therein says it was a one room apartment at the hospital. She added that that arrangement continued for one and a half (1½) months.

5. According to Mrs. Pino, thereafter the hospital found for them a three bedroom house. They resided in that house between 1995 and September 1997. At this time, Dr. Pino's grandmother, who lived with them in Cuba, resided with the family. Dr. Pino says within one month of Mrs. Pino's arrival he acquired a three bedroom house. That was through the hospital, as Mrs. Pino alleges, but specifically the administrator according to Dr. Pino. Although the house was then owned by Banana Estates, it was extended as a courtesy to the Resident Doctor. That translated into the nominal requirement of payment of maintenance only.
6. From this house the family moved to Kingston in September 1997. This was the family home, located at 12 Hopeton Avenue. That was notwithstanding needed repairs, in the evidence of Mrs. Pino. Dr. Pino in his affidavit of 2<sup>nd</sup> December 2009 refutes the latter assertion and says the house was in perfect living condition. Mrs. Pino maintained that while the house was in a livable condition, repairs and renovation were required.
7. Whatever the habitable condition of the family home, the question of real import is its means of acquisition. Mrs. Pino says most of the negotiation

was handled by Dr. Pino. That situation was precipitated by a coincidence of handicaps and tradition. First, whereas her grasp of the English language was inchoate, his had advanced to fluency. Secondly, in contradistinction to the temporal constraints imposed on her by work and care-giving thereafter, he enjoyed flexible work hours. Thirdly, Dr. Pino was the head of the household, with whatever authority was concomitant with that ceded, assumed or both. Mrs. Pino implies that the foregoing explains the title appearing in the sole name of Dr. Pino. That fact however excited no alarm as she harboured no anxiety concerning the protection of her interest.

8. Dr. Pino substantially contradicts the second handicap. He says Mrs. Pino was a stay at home mother so, presumably her participation in the negotiation wasn't thereby circumscribed. He is silent on the other matters. Dr. Pino boldly discloses that the property is in his sole name for what might be compendiously stated as the absence of any financial contribution from Mrs. Pino. A relative gave him \$4,750,000.00 and the National Housing Trust (NHT) the remaining \$1,098,930.00. The closing costs came from his personal savings.
9. This averment was frontally contradicted by Mrs. Pino in her reply, filed on 29<sup>th</sup> January 2010. The sum of \$4.75 million wasn't given by Dr. Pino's relative but rather by Mrs. Jennifer Greaves, a family friend. Mrs. Greaves was cast in the role of a bountiful, beneficent benefactor. Mrs. Greaves was their facilitator to settle on these shores and told them about the sale

of this house. Mrs. Greaves' beneficence was born of overwhelming love for Laima, the couple's daughter, Mrs. Pino asserted.

10. In consequence of that undying love, following a discussion with the Pinos, the money was gifted to the family as a deposit on the house for the benefit of Laima. Further, Mrs. Greaves arranged for her driver, Henry Adolph Durant, to transfer his NHT benefits [points perhaps] to facilitate a mortgage repayment of approximately \$10,000 per month. To this robust challenge Dr. Pino regurgitated an anaemic response, while admitting Mrs. Greaves to be a family friend, his relative morphed into a close friend with the identical characteristics of anonymity.
11. The parties appear to agree that the sale was completed in or about mid 1998. That having been done, Mrs. Pino says they made arrangements to both repair and extend the house. *Au Contraire*, Dr. Pino avers that no discussion preceded this. It was his decision to secure the property by the installation of grills and fences. Any discussion was with the workmen whom he personally supervised and remunerated. It was his evidence that Mrs. Pino was then pregnant, required the aid of a full-time helper and was bereft of any knowledge of construction.
12. Mrs. Pino partly refutes this in her reply. She does not explicitly challenge Dr. Pino's assertion of individuality of decision-making but contends an acceleration of that decision consequent upon their victimization by criminal gunmen. Further, for want of time and unfamiliarity with the construction sector, Mrs. Pino said Dr. Pino was as much a neophyte in

the area as herself. Her position was however mitigated somewhat by having worked in the hardware. So, that experience and being unemployed at the time equipped her as supervisor. That retort stood unanswered in Dr. Pino's reply, filed on 20<sup>th</sup> July, 2010.

13. By 2001, their second child was 2 years old, the house essentially restored and Mrs. Pino re-entered the labour force. Although the prefatory part of paragraph 16 of his affidavit of 2<sup>nd</sup> December, 2009 denies the foregoing assertion, the succeeding sentence makes it plain that the denial touches and concerns only the averment of the restoration of the house. Mrs. Pino's re-entry to the labour force was pursuant to a discussion which recognized that this would be in the best interests of their second child. It was also agreed that Mrs. Pino would assume responsibility for the expenses of employing a baby sitter, her sole contribution to the household expenses, swore Dr. Pino. Mrs. Pino countered that additionally; she paid the helper and on occasions the gardener as well. No further rejoinder came from Dr. Pino.
14. By this, the romantic bliss had evaporated like the morning mist in the face of the noon day sun, as the delicate petals of the marriage wilted before the concupiscent Fahrenheit 212° temperature of Dr. Pino's extramarital affair. Frequent trips to Cuba by Dr. Pino precipitated frequent quarrels between the two. Those trips evidenced an established paramour as Dr. Pino would remain in Cuba for several months. Dr. Pino implicitly accepts the charge of frequent trips to Cuba but counters that his sojourn never

lasted beyond ten days, a fact established by his exhibited passport. The quarrels, Dr. Pino avers, were instigated by Mrs. Pino as a sort of ruse to withhold conjugal rights. That withdrawal resulted in his 'humiliation, embarrassment and torture.' Mrs. Pino is silent on the suspension of conjugal rights. She however refutes the length of stay in Cuba, arguing the longevity of the illicit relationship with Mailin Betancourt from 1997 or 1998 as *ipso facto* proof.

15. Ms. Betancourt was soon to replace Mrs. Pino in the matrimonial home. In 2003 Mrs. Pino and their infant son were relocated to the apartment before the sun took its rest in the west. On the day of their removal, Ms. Betancourt supplanted Mrs. Pino in the matrimonial home. Ms. Betancourt was no longer the second brightest star in Dr. Pino's constellation. This supplantation was accompanied by threats of seizure of the motor car Mrs. Pino ordinarily had use of.
16. Dr. Pino denies that he ever threatened Mrs. Pino. Rather, Mrs. Pino voluntarily departed the home, having defiled it with an affair which showed equal disregard for rules of consanguinity, her lover being Dr. Pino's cousin. Mrs. Pino, he says, was carried out of the home on the low tide of shame from the discovery of her infidelity by their daughter. This defilement is admitted by Mrs. Pino. Mrs. Pino does not say whether she was discovered by her daughter but implies her daughter may have come to that knowledge from a video Dr. Pino showed to her. At this juncture,



their separation embraced the dichotomy of the physical and legal, evidenced by a Deed of Separation.

17. The Deed of Separation notwithstanding, Mrs. Pino returned to the matrimonial home after Ms. Betancourt's supposed return to Cuba. That re-entry she says was at the instance of Dr. Pino but driven by her love for him and a desire to make the marriage work. Dr. Pino admits inviting Mrs. Pino to return to the home but not to his bed. Mrs. Pino was to return as a 'friend' and to provide stability for their children. Her stay was not to extend beyond a year and there was no rescission of the Deed of Separation. They did not abide by this deadline. During the grace period Mrs. Pino was diagnosed with a terminal disease and, says Dr. Pino, for the claimant's best interests and their children's stability her residence was continued.
18. In her reply Mrs. Pino insisted she spent only a few months in the apartment. That Dr. Pino came back like the repentant sinner with much lamentation and beseeching. According to her, Dr. Pino advised that his mistress had been sent back to the Spanish isle. Further, he was going to terminate the affair and resume the marriage. He thereafter persuaded her to return to the family home and start anew, which she did, although reluctantly.
19. Subsequent to the resumption of shared accommodation Mrs. Pino says she decided to purchase her own home. That was a one bedroom apartment. This, Mrs. Pino says, was because of the instability attendant

upon her living arrangements. That purchase was facilitated by the magnanimity of Dr. Pino, together with the National Housing Trust and Victoria Mutual Building Society.

20. Dr. Pino says he purchased that apartment for Mrs. Pino entirely with his funds. He provided the deposit of \$320,000 in December 2003 and additional sums for closing costs, everything amounting to \$500,000. The apartment was bought in Mrs. Pino's sole name. He further magnanimously guaranteed a mortgage loan from the National Housing Trust and Victoria Mutual Building Society, without which neither was prepared to proceed. Dr. Pino went one step further and assumed the monthly mortgage payments of \$17,780. These assertions were fortified by documentary annexures to Dr. Pino's affidavit.
21. Mrs. Pino's rejoinder speaks to her personal \$20,000 contribution to the deposit of \$320,000 as well as her points accumulated at the National Housing Trust. While she denies that Dr. Pino spent as much as \$500,000, no attempt is made to account for the closing costs. Mrs. Pino attributes to Dr. Pino the ulterior motive of occupation of the apartment by his mistress. Dr. Pino refutes this and maintained that he was being faithful to the Deed of Separation. Even making Mrs. Pino the sole legal owner was adhering to the terms of the Deed of Separation.
22. Shortly after the purchase of this apartment, Dr. Pino demanded that it be given up for the occupation of Ms. Betancourt. Mrs. Pino agreed to this out of the apparent ubiquitous fear of losing the motor car and,

continuation of abuse. Ms. Betancourt took up residence, initially for two months but did so for three years. Dr. Pino of course does not admit these averments.

23. Whether these three years were a period of comity or conjugality, adversity struck as Mrs. Pino was diagnosed with a terminal disease. Dr. Pino himself discovered the malignancy. This involved extensive treatment, inclusive of two surgeries and a reconstructive procedure. During this time Mrs. Pino was “totally dependent” on Dr. Pino. While he assisted to a large extent with the medical expenses incurred by Mrs. Pino, Dr. Pino provided no money for her maintenance. That gap was filled by the generosity of Mrs. Pino’s employer and friends. To add insult to injury, Dr. Pino constantly threatened to revoke the health card which helped to underwrite some of the medical expenses.
24. Dr. Pino rejoined that he paid all the medical bills and expenses not covered by Blue Cross of Jamaica. The only medical expense he agrees Mrs. Pino paid for was the radiography treatment. That was so as Mrs. Pino had a taste for private facilities which Dr. Pino found unaffordable. In fact, he claims, he had made arrangements for the treatment to be done at the Kingston Public Hospital, which Mrs. Pino refused. There was no threat to revoke the health insurance. On the contrary, he used his position to facilitate services free of cost or hugely discounted. Mrs. Pino does not deny receiving Dr. Pino’s beneficence through his colleagues.

She adds, however, that her salary was collected by Dr. Pino and used to defray helper and other expenses.

25. Since much turns on the Deed of Separation, it is therefore convenient at this point to set them out in full:

**Deed of Separation, 2003**

This deed is made the 5<sup>th</sup> day of October, 2003 between Reinaldo Pino-Bestard of 12 Hopeton Avenue, Kingston 8, in the parish of St. Andrew (hereinafter called "Reinaldo") and Ruth Pino (Rodriquez-Morales) of 12 Hopeton Avenue, Kingston 8, (hereinafter called "Ruth").

**WHEREAS:**

- A) Reinaldo and Ruth were lawfully married on the 23 day of February, 1989, in Santiago de Cuba, Cuba. There are two children of the marriage, Laima Rosa born on the 22 day of January, 1990 in Santiago de Cuba, Cuba, and Reinaldo Jnr., born on the 8<sup>th</sup> day of July 1999 in Kingston, Jamaica. (Hereinafter called Laima and Reinaldo Jnr.)
- B) Irreconcilable differences have arisen between Reinaldo and Ruth whereby Reinaldo and Ruth are no longer interested in the marriage and such differences have resulted in their separation and a breakdown of the marriage;
- C) Reinaldo and Ruth have agreed to make arrangements for the custody, care and upbringing and maintenance of Laima and Reinaldo Jnr., the maintenance of Ruth and the treatment of the matrimonial assets.

- D) Reinaldo and Ruth have arrived at the Agreement made herein in the interest of Laima and Reinaldo Jnr. and of resolving amicably their differences.
- E) The Agreements made herein shall be in full and final settlement of all issues between Reinaldo and Ruth for the purposes of the Matrimonial Causes Act, The Married Woman's Property Act, Maintenance Act, and all applicable and governing Acts, Laws, Rules and Regulations and all other purposes.

**NOW THIS DEED WITNESSETH:**

In consideration of the payments herein stated and the mutual agreements and covenants herein after expressed, it is hereby agreed as follows:

- (i) Reinaldo shall have sole custody of actual care and control of Laima. Ruth shall have sole custody and actual care and control of Reinaldo Jnr. Ruth and Reinaldo will equally have an alternate weekend with each child. Reinaldo and Ruth shall be entitled to have the child who is not in their custody at least one day in a week and for alternate holidays, which will include two thirds (2/3) of Christmas, Easter and Summer vacations.
- (ii) Reinaldo shall pay to Ruth commencing on the 1<sup>st</sup> of December 2003 the sum of US\$333.00 (or its equivalent in Jamaican currency as per the Bank of Jamaica rate of exchange of the 1<sup>st</sup> day of every month) in respect of maintenance of Reinaldo Jnr. Additionally, he will pay for his medical and dental costs, **except in the event that she migrates**. Ruth

will pay for entertainment, traveling and daily living costs. This payment is due on the first day of each successive month until Reinaldo Jnr. arrives at the age of 21 years old.

- (iii) Reinaldo will pay Ruth the amount of US\$83 or its equivalent in Jamaican dollars as per the rate of exchange dictated by the Bank of Jamaica, on the first day of every month in respect of her maintenance.
- (iv) The Nissan Bluebird motor vehicle, which is presently owned by Reinaldo, shall be transferred to Ruth, by the 1<sup>st</sup> day of March 2004. Ruth shall maintain this vehicle, at her own expense.
- (v) Ruth will request a loan from NHT to enable her to purchase a small apartment.
- (vi) Reinaldo shall pay Ruth a lump sum of \$500,000.00 in full and final payment.
- (vii) Ruth will, in exchange, leave the matrimonial home by December 1<sup>st</sup>, 2003, with Reinaldo Jnr.
- (viii) Reinaldo and Ruth will both take reasonable steps for Ruth to take some of the objects acquired during their marriage to set up her new place of residence. This must include: a bed, a television set, a video cassette recorder, a refrigerator, a stove, and (sic) air conditioner unit, some furniture for the living room and some decorative figurines, which might have sentimental value for Ruth.

**THE PARTIES MUTUALLY AGREE THAT:**

- (i) Subject to all of the conditions mentioned above are provided (sic), Ruth will fully indemnify Reinaldo in respect of all her debts and liabilities, costs, proceedings, damages, expenses, claims or demands at all whatsoever incurred by her or Reinaldo Jnr.
- (ii) Reinaldo will fully indemnify Ruth of all debts and liabilities incurred in respect of him and Laima, any actions, proceedings, cost, damages, expenses, claims or demands whatsoever incurred by him or Laima.
- (iii) In the event of the death of either party during the currency of this Agreement the surviving party shall have sole custody of the other child who is not in his/her care and will be entitled to exercise all incidents of care and control in respect of that child;
- (iv) Each party fully understand (sic) their legal rights and each is signing this Agreement freely and voluntarily intending to be bound by it.
- (v) Each has made full disclosure to the other of their position respecting all issues concerning custody, maintenance and property division.
- (vi) Each understands that this Agreement is intended to be the full and entire contact between them.
- (vii) Reinaldo and Ruth agree that each has a right to be notified in advance of medical, educational and other major decisions respecting the care and upbringing of Laima and Reinaldo Jnr.
- (viii) Reinaldo and Ruth agree to give liberal access to the children at all times.

- (ix) In the event that Ruth wishes to migrate, she will give Reinaldo at least three months notice. The payment of the maintenance for Reinaldo Jnr. will remain as is, and so will Ruth's maintenance.
- (x) In the event that Reinaldo wishes to migrate, he will give three months notice to Ruth. Reinaldo will continue his payments as per this agreement.
- (xi) Reinaldo and Ruth accept the terms of this Deed as full and final settlement of their financial affairs; all claims by Ruth for the maintenance and financial support of the children and herself for the purposes of the Matrimonial Causes Act, The Married Woman's Property Act, The Maintenance Act and all Acts, Laws and Regulations; and all claims rights and entitlement of Ruth to any interest, financial or otherwise, in any property which Reinaldo owns or may have an interest in which shall include any shares or interest in any Company or Corporation.
- (xii) This Agreement supersedes any other Agreement, which Reinaldo and Ruth may have made in respect of the issues relating to and dealt with by the Agreement. This can only be amended or changed if both parties agree and sign to it.
- (xiii) Jamaican Law shall govern this deed of Separation and the Courts of Jamaica shall have exclusive jurisdiction over any matter, dispute, and difference or issue which arises from the agreement made herein and/or which may be directly or indirectly connected thereto.



## Deed of Separation, 2007

### ***Payor a Ruth Pino-Rodriguez Moralis***

*1<sup>st</sup> November 2007*

*Monthly (while Mrs. Pino is single and does not have a partner living in her apartment)*

*Mortgage: 18,000*

<i>Maintenance</i>	<i>20,000</i>	<i>(Reinaldo Junior)</i>
<i>Yearly</i>	<i>240,000</i>	
<i>School fees</i>	<i>45,000</i>	
	<i>43,000</i>	
	<u><i>43,000</i></u>	
	<i>132,000</i>	

<i>Inflation</i>	<u><i>3,000</i></u>	
	<i>135,000</i>	<i>School</i>

*Food 5000/month → 60,000 yearly*

<i>135,000</i>
<u><i>60,000</i></u>
<i>195,000</i>

*Extra 45,000 → 15,000 uniforms/books*

*Sobran 30,000*

*2,500/month → Savings*

## MAINTENANCE

26. Mrs. Pino alleges that Dr. Pino gives her \$20,000 per month for the maintenance of herself and their son. Upon Dr. Pino's insistence \$15,000 of this sum is allocated towards their son's \$48,000 per month school fees. Incongruously, Mrs. Pino says she's allowed to withdraw \$5000 per

month towards their child's food and other expenses. On the other side of the equation, Mrs. Pino earns a gross salary of \$80,000 per month. The net salary remains undisclosed. From this gross income several expenditure items are said to be defrayed but without being particularized. Mrs. Pino fears that in the event of a recurrence of her affliction she will be unable to care for and maintain herself. Mrs. Pino contends Dr. Pino has at least three jobs.

27. Dr. Pino countered that he has full responsibility for their son's school fees and supplies and other personal needs. In addition, save for alternate weekends, the child resides with him. According to Dr. Pino, he shoulders the burden of 80% of their child's expenses. The payments to the Stella Maris Prep School, evidenced by exhibited payment vouchers, are all in Dr. Pino's name, excepting one. That exception is in the name of Ms. Betancourt.
28. Further, says Dr. Pino, Mrs. Pino's fear of destitution is unfounded for three reasons. First, her official medical condition is described as in remission. Secondly, Mrs. Pino's current medication expenses is approximately J\$400 per month. Thirdly, Mrs. Pino continues to have access to increased benefits under his health plan.

## **SUBMISSION ON BEHALF OF THE CLAIMANT**

### **WHEN DID THE PARTIES SEPARATE?**

29. Despite the fact that Dr. Pino has filed three different Affidavits in his

divorce proceedings, one as late as December 2010, stating that the parties separated in 2006, after which time Mrs. Pino left the matrimonial home, he contends that the parties really separated in 2003. This, he contends, was evidenced by the Separation Agreement signed by them both, and after which time they lived separate lives with her having her Panamanian "boyfriend", who works at her office, (which we have heard about for the first time during cross-examination) and he having his "common law spouse". He agrees that she returned to the family home a few months after signing the said Agreement, whilst HIS GIRLFRIEND went into occupation of Mrs. Pino's apartment, allegedly purchased for her in furtherance of the separation agreement. Mrs. Pino denies the existence of this liberal arrangement, and contends that the parties resumed cohabitation in about June 2004. This remained the case until November 2007, when she was constructively evicted from the matrimonial home, after Dr. Pino prepared, in his own handwriting, a new separation Agreement which would remain in effect only if she remained single, and did not have a partner.

**WAS THE CONTRIBUTION BY MRS GREAVES FOR THE BENEFIT OF DR.  
PINO SOLELY?**

30. Mrs. Greaves, or Auntie Jenny, as Mrs. Pino calls her, has been a person of great influence in the lives of the Pinos. She has been kind to the family in general, even prior to their arrival in Jamaica. Mrs. Pino admits that she

met this benefactor whilst living in Cuba, and that this lady paid for the tickets for herself, her husband and her child so that they could migrate to Jamaica. Upon their arrival she made arrangements for them to be transported to St. Mary. She gave them many items of furniture, including Mrs. Pino's bed, and other gifts. Indeed, she contends that this benefactor had put aside monies for their child's education, which Dr. Pino confiscated, and she paid a substantial amount towards Mrs. Pino's medical expenses. She assisted them in locating the house in Kingston, so that they could relocate. It is therefore not farfetched that the substantial deposit of four fifths (4/5) of the sale price, was given as a gift to the family, especially in light of the arrangements involving her driver's NHT benefit. By involving her driver in these arrangements it is less likely that she would have been involved in such a clandestine arrangement with Dr. Pino, who makes mention of their romantic entanglement for the first time under cross-examination, when he had categorically stated that it was a relative that assisted him with the deposit for the house, and who proffered a lame excuse, that he called her his "relative" in order to be discreet. Despite the claimant admitting that she did not have dialogue with Mrs. Greaves during the acquisition of the property, it should be noted that it was the claimant who first acknowledged Mrs. Greaves' involvement in the acquisition of the premises. Additionally, the claimant's command of English, was likely to be more challenged then, than it obviously is now, and underscores the basis for bypassing her in dialogue relating to the

acquisition.

**IS THE PROPERTY RIGHTS OF SPOUSES ACT APPLICABLE?**

31. The parties have not yet had their marriage dissolved, and by virtue of Section 13 (1)(c) the claimant is entitled to institute proceedings under the Property (Rights of Spouses ) Act.

**IS 12 HOPETON AVENUE A FAMILY HOME?**

32. The claimant contends that 12 Hopeton Avenue meets all the requirement of being classified as the Family Home as set out under section 2, of the **Property (Rights of Spouses) Act**, in that it is wholly owned by either or both, has been the only principal family residence, and has been used mainly for the purposes of the household. It would be the defendant who is fixed with the obligation to prove that the donor, gave him this gift for his sole benefit, and intended that he alone should so benefit, and he has not done so. Further, even if it was established that the defendant acquired the home pursuant to a gift, he would be hard pressed, as a consequence of this legislation, to exclude the claimant from any proprietary interest accrued in respect of the family home.

**WHAT IS THE INTEREST OF THE PARTIES IN THE APARTMENT REGISTERED IN MRS. PINO'S NAME?**

33. The apartment was purchased in the name of Mrs. Pino, using her NHT benefits and a loan in her name from Victoria Mutual Building Society, with

funds provided by both parties. However, since its acquisition, Dr. Pino has demonstrated an interest in same, by placing his girlfriend in same for extended periods, renovating and remodeling same to meet his girlfriend's needs. He treats it as his own. Indeed, when questioned as to whether he received rent for the Apartment, he stated that he received same in "kind" from Mailin, his girlfriend. In his Affidavit in support of his divorce petition he stated that his two children resided with the claimant in the said apartment. He pays the mortgage on the apartment in which one or both of his children has/have resided with their mother, since 2007. Under cross-examination he was at pains to point out that he had no interest in the Central Avenue apartment, which was given to his wife, as part of the Separation Agreement and he specifically stated that he has no claim, WHATSOEVER, in that apartment now. From his admissions therefore, he has relinquished any proprietary interest he may have had in the apartment. It must therefore be accepted, as exclusively hers, it never having been the family home.

#### **IS THE SEPARATION AGREEMENT OF 2003 VALID?**

34. The Separation Agreement of 2003 is invalid. We contend this is so for the following reasons:-

- a. Same has been rendered **NULL AND VOID**, upon the resumption of cohabitation between the parties, within six (6) months of its execution. Based on the claimant's case, which is fully supported

by the three Affidavits of Dr. Pino, the parties separated after the execution of the separation agreement. She says 2007; he states that it was in 2006. In the said affidavits the defendant makes reference to the claimant leaving the matrimonial home after the breakdown of the marriage, in 2006. This clearly illustrates that the parties were residing in what they both considered to be the matrimonial home. It should be noted that this assertion is repeated as late as December 2010.

- b. The parties disregard for the Separation Agreement of 2003, upon the resumption of cohabitation is further bolstered by the fact that Dr. Pino saw the necessity to again prepare and have executed by the parties and their daughter another agreement in November 2007, setting out arrangements for the wife and child of the marriage. It required Mrs. Pino to remain single, and not have a partner.
- c. There is no evidence as to the nature of the legal advice given to or comprehended by Mrs. Pino, prior to the execution of the documents, which incidentally, was not signed in the presence of an Attorney-at-Law certifying that the requisite advice was imparted. The witnessing of the document in the presence of persons without any legal expertise or competence, is also remarkable, and the fact that it was witnessed by the helper would seem to suggest some level of informality in the execution of same.

35. Despite the protestations of the claimant, even if the court were to consider the Agreement itself on its merit, it is clear that the terms and condition of this agreement would have been breached by the defendant, in several material particular, including his failure to:

- a. pay to her monthly maintenance,
- b. transfer a vehicle to her, and;
- c. pay to her the lump sum.

So that, his "assisting her" to utilize her NHT benefit and acquire a loan in her name for an apartment in which he relocates his mistress would not by itself be sufficient to demonstrate that this Separation Agreement was in full effect. In short, the defendant cannot insist on the enforcement of certain aspects of the Agreement and ignore the other relevant purported considerations.

36. If the court were to examine any "Separation Agreement," it would therefore have to examine the Agreement of 2007, which would arise after the passing of the Property (Rights of Spouses) Act. None of the purported Agreements have met the requirements under the law, in that neither bears the requisite certification clause of the legal advisor, it was not properly witnessed, and in any event the court could rightfully examine same to determine whether same was fair and reasonable.

37. Even if the court should find that a valid Agreement existed, pursuant to Section 10 (8), this honourable court may deem it unenforceable if it would be unjust to give effect to the Agreement having regard to -



"10 (8)(c ) Whether, in light of the circumstances existing at the time the agreement was made, the agreement was unfair and unreasonable; " It is our submission that the home environment under which the claimant operated would have been hostile, oppressive and traumatic. (We refer to Paragraph 14 & 15 of the claimant's affidavit filed on January 28, 2010).

**IS MRS PINO ENTITLED TO CLAIM MAINTENANCE IN THESE CIRCUMSTANCES, AND IF SO HOW MUCH SHOULD SHE BE AWARDED?**

38. The parties have been married for in excess of twenty (20) years. The claimant is entitled to claim maintenance under the Matrimonial Causes Act in conjunction with the Maintenance Act as she has clearly demonstrated that she is a dependent of the defendant. So whilst the claimant has demonstrated that she is a woman of great industry, and has been supportive of her family throughout the marriage, the defendant has greater financial resources and strength. Dr. Pino contends that the claimant left her apartment in 2004 but returned selflessly to a 'loveless' home at 12 Hopeton Avenue, to care for the children of the marriage. She started working within months of traveling to Jamaica, even though she had language difficulties. She has no formal training, has been diagnosed with breast cancer, and is still being treated for same, and requires monitoring for a minimum of five years. It is not disputed that Mrs. Pino was a beneficiary under Dr. Pino's medical insurance for several years of the marriage and he has had her removed from same since last year,

even though there is no dispute that she is unlikely to qualify for any form of health insurance for the remainder of her life, based on her cancer diagnosis.

39. Dr. Pino does not deny that the claimant's earnings are considerably less than his, as are her qualifications. Notwithstanding this, she contributes to her son's maintenance, and is now responsible for her own car insurance, maintenance of the apartment, and at the end of the day, the loan for the said apartment is in her sole name, with him being a mere guarantor. It is highly likely with divorce proceedings underway, that the defendant will discontinue paying the mortgage for a forcibly displaced wife, suffering a terminal illness, even though the small apartment is shared intermittently by their child. Given the contemptuous, insensitive, selfish and cruel conduct of the defendant, the claimant is likely to confront great challenges if solely interim awards were made by the Court. This is a matter, we submit, truly deserving of a lump sum payment, an Order that this Court is empowered to make pursuant to Section 20, 23 of the Matrimonial Causes Act and Section 6 (b) of the Maintenance Act.

40. Under section 5(1)(b) and section 5(2) of the Maintenance Act, the Court can examine the many factors set out under the provisions which would clearly support a claim by Mrs. Pino for maintenance, in particular the length of time of the marriage, and the effect of the responsibility assumed by her during the marriage, and should make Orders which as far as possible determine the financial relationship between the parties, to avoid

further proceedings between them as is stated under section 6(2)(b) of the Act, especially in light of Dr. Pino's 2007 document, which requires her to remain single, without a partner in order for him to meet the terms set out in that document.

#### **WHAT IS/ARE THE DEFENDANT'S EARNINGS?**

41. The defendant has stated categorically that he earns **ONE HUNDRED AND TWENTY THOUSAND DOLLARS (\$120,000.00)** per month as a medical doctor of upwards of twenty (20) years. He is adamant that he works only with the Correctional Services. He denies Mrs. Pino's claims that he treats patients at home, and does private work. He has shown to this court documentary proof that he has an "attachment" at St. Joseph's Hospital, although he states that the patients that he sees there pay him in kind. He states that when he purchases drugs he has to give them an address, hence he uses St. Joseph's address, but, it is to be noted that the documents do not state in care of. Rather, they state Dr. Pino, St. Joseph's Hospital, and therefore it is unlikely that this explanation could be true.
42. Dr. Pino submits a document showing his monthly expenses at **TWO HUNDRED AND THIRTY-SIX THOUSAND ONE HUNDRED AND FIVE DOLLARS (\$236,105.00)** per month, which would lend credence to Mrs. Pino's claim that he has earnings outside of the **ONE HUNDRED AND TWENTY THOUSAND DOLLARS (\$120,000.00)**, which he claims to earn since he has not explained the shortfall.

## **SUBMISSION ON BEHALF OF THE DEFENDANT**

### **43. The Deed of Separation –**

The consideration of the issues of Validity, Part Performance, and Execution

#### **(A) VALIDITY**

A Separation Agreement is essentially a Contract/Agreement between the parties.

*"It is essential to the validity of a contract that the contracting parties should either have assented. Or be taken to have assented to the same thing in the same sense; or as it is sometimes put, that there should be consensus ad idem.*

*A contract, although assented to by all parties may be voidable by one of them on the ground that this consent was obtained by duress (or) undue influence..,"*

See **Halsbury's Law of England 4th edition Reissue Vol. 9(1) paragraph 701**

The wife sought and obtained independent legal advice and therefore it is reasonable for the Respondent to assume that she understood, agreed and "assented to the same thing in the same sense."

#### **(B) PART PERFORMANCE**

44. There has been part performance of the terms agreed, in that the wife has already taken the furniture and other items from the home as agreed upon between the parties. In addition the wife has had the benefit of the exclusive use and transfer of the vehicle pursuant thereto.

*"Where a wife has acted on a deed of separation and*

*accepted benefits under it, she will be estopped from denying that she has contracted."* **Halsbury's Law of England 4th edition reissue vol. 29 (30) paragraph 250**

**(C) INTENTION**

45. Provisions relating to the settlement of property will be construed as permanent unless a contrary intention plainly appears.

See **Halsbury's Law of England 4th edition Reissue vol. 29(3) paragraph 253**

***"A dissolution of the marriage or a decree of nullity does not of itself affect those provisions of a separation agreement which constitute a permanent settlement of property..."***

See **Halsbury's Law of England 4th edition Reissue vol. 29(3) paragraph 260**

It is submitted that:-

The intention of the parties at the time of the signing of the Separation Agreement was to resolve property settlement issue in a final way without contentious litigation. (See para.14 of the Petitioner's Affidavit).

The courts will not look into the bargain made between parties to see if it is a fair one, once it is satisfied that there has been valuable consideration and there has not been the exercise of undue influence by one party over the other. **Halsbury's Laws of England 4th edition Reissue Vol. 990 paragraph 736**

46. Since the execution of the Separation Agreement, the consideration offered and accepted by the claimant:-

1. The defendant provided the entire deposit on the purchase of the Apartment at Central Avenue apartment.
2. The defendant has since the purchase paid all the mortgage payments and outgoings on the property.
3. The claimant has since the separation enjoyed the exclusive use of the motor vehicle and same has been transferred into the sole name of the claimant pursuant to the said Agreement.
4. The defendant has paid the monthly maintenance as agreed in respect of the child of the family, Reinaldo.
5. The claimant has taken possession of furniture and other items from the matrimonial home.
6. The defendant effected renovations, repairs, and improvements to the Central Avenue apartment at the request and with the approval of the Claimant.

It is not in dispute that the claimant entered into the Separation Agreement at the time with the intention that same would be in full settlement of their respective claims for financial relief arising out of the breakdown of the marriage and intending that same would constitute a clean break between the parties.

47. In this area the leading case is still **Edgar v Edgar (1980) 3 All ER 887** in which the wife had entered into a Deed of Separation with her husband

which provided her with a settlement of financial provisions. It was a term of agreement that in any future divorce proceedings she would not make a claim for any further financial provision. The wife had the benefit of legal advice. Her legal advisers advised her that she had settled for terms that were less than the court would award her. In defiance of such legal advice she entered into the agreement. The terms of the financial settlement were implemented and almost three years later she issued divorce proceedings and made an application for a lump sum order. In the judgment of **Oliver, L.J.** at page 896 he stated:

**"Men and women of full age education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will depend in every case upon a subjective evolution of their motives for doing it. One may, of course, find that some unfair advantages has been taken of a judgment impaired by emotion, or that one party is motivated by fear induced by some conduct of the other or by some misapprehension of a factual or legal position, but in the absence of some such consideration that (and these are examples only) the mere strength of one party's desire for a particular result or the mere fact that one party has greater wealth than the other cannot affect the weight to be attributed to a freely negotiated bargain."**

48. In keeping with the principles laid down in **Edgar v Edgar (supra)** it is submitted that much weight should be given to the executed Agreement

since it appears from all standpoints that it was properly and fairly arrived at by the parties, with the benefit of independent and competent legal advice and therefore ought not to be displaced or set aside.

In ***Cam v Cam (1993) 4 FLR 577 CA Eveleigh L.J*** stated at 588:

**"One has to ask in relation to the wife, how far did she know what she was doing and what her choices were and in what circumstances did she make the agreement? Then one has to ask whether it is just to allow her to ignore the agreement to go behind it and one might say in a given case that the agreement was made in such circumstances that it should be binding unless a radical change of circumstances could be shown."**

It is submitted that there is no evidence of such change of circumstances. In addition to the clear evidence of intention, agreement and the absence of undue influence, the agreement must be executed in accordance with the requirements of **The Property (Rights of Spouses) Act 2004**.

#### **WERE THE PARTIES RECONCILED?**

49. The claimant submission that the parties were reconciled is based largely on the statement of the defendant in his petition for divorce. Whether or not the parties were separated is a question of fact for the court having regard to the evidence of the parties and all the circumstances of the case.

Paragraph 11 of the Petition;



**... The parties experienced irreconcilable differences throughout the marriage and the Respondent refused to obtain professional assistance to deal with their marital problems. The parties are incompatible with each other and eventually the Respondent removed from the Matrimonial Home and the marital relationship was discontinued since 2006.**

Both parties are agreed that there was never a separation in 2006 and therefore there was clearly an error in the date. The defendant was cross-examined on this and his response was that this statement of the date of the separation as 2006 was a mistake. In these circumstances where there is a Separation Agreement and a dispute as to whether same should not be relied upon by the court, it is submitted that the onus is upon the Applicant who alleges a reconciliation to satisfy the court of this. It is submitted that by their course of conduct it is reasonable to conclude that there was an arrangement or agreement between the claimant and defendant who continued to parent the two children of the family at the Hopeton Avenue premises but that by itself does not amount to a reconciliation or restoration of the marriage.

50. In the event that the court finds as a fact that the parties were reconciled and therefore the Separation Agreement cannot be relied upon to determine the entitlement of the parties on the breakdown of the marriage the application must be brought within the time?

## REASONING

51. Of the issues raised in the written submissions, it is both convenient and pragmatic to commence the analysis with a consideration of whether the application is properly framed under **The Property (Rights of Spouses) Act, 2004**, hereafter the Act. Section 13 of that Act entitles a spouse to apply to the Court for a division of property upon the occurrence of any of four events. That event then becomes the temporal calculus, that is, the time within which to make the application first accrues on the date of the relevant occurrence. Under section 13(2) “an application under subsection 1(c) shall be made within twelve months of the... separation or such longer period as the Court may allow after hearing the applicant.” The only event relevant to this case is that contained in Section 13(1)(c):

*Where a husband and wife have separated and there  
is no reasonable likelihood of reconciliation.*

52. So, two conditions precedent must be complied with for the Court to be seized with jurisdiction, viz., the relevant phenomenon and the application being made timeously. Insofar as the first condition is concerned, there is unanimity and convergence of the case for each side that the parties have hopelessly separated. In other words, it is a settled fact between the contenders that the parties have separated and there is no likelihood of reconciliation.
53. What then is the date of that separation? The principles to be relied on in this part of the enquiry were distilled by Sykes J, with his usual perspicuity,

in **Alva Melford Heron-Muir v. Maureen Veronica Heron Muir**  
**FD00144/2004 31<sup>st</sup> October, 2005**. At paragraph 16 of the judgment they  
are encapsulated as follows:

- a. the expression “separated and thereafter lived separately and apart” means a severing of the consortium vitae. The severance has two components, namely, a physical separation and an intention on the part of at least one of the parties to terminate the marriage relationship. Separation can only occur if one or both spouses intend to sever the marital bond and act upon that intention;
- b. there can be a cessation of cohabitation or severance of the marriage relationship even if the parties continue to live in the same premises and provide some household services to the other. Conversely, absence from being under the same roof is not sufficient. The absence of performing some household services is not necessarily conclusive that there is an intention to sever the marriage bond. Likewise the provision of household services is not necessarily conclusive that there was either no separation or that the separation has ended. The critical thing is to see if one or both parties have separated from a state of affairs (i.e. the marriage);
- c. there may be instances where the date of separation may be difficult to establish because the parties simply drift apart without any words passing between them but even in this situation the

requirements of section 5 (2) must be met;

- d. what amounts to a separation will vary from couple to couple because the Court is not concerned about generic marriages but the particular marriage before the Court. Despite this, the “checklist” of what is considered to be the indicia of marriage may provide some assistance when the specific marriage is being examined. However, the judge should not apply the “checklist” in a mechanical manner;
- e. in trying to determine whether there has been a severing of the consortium vitae, it is legitimate to look at the behaviour of the parties before and during the period of alleged separation to see if the physical and mental elements are satisfied.

54. The evidence is that the parties last parted ways physically, November, 2007. Whether Mrs. Pino was evicted or gave up possession of the Hopeton Avenue dwelling voluntarily is of little moment for present purposes. The fact of that departure and the subsequent filing for divorce by Dr. Pino demonstrates an unequivocal intention on his part to rupture for all time the consortium vitae. That Mrs. Pino was of a contrary view leaves Dr. Pino’s intention unshaken. Indeed, counsel for the claimant appears to accept November, 2007 the position of her opposite number, as the material date. However for reasons that will become clearer, the Court finds that the effective date of separation was August 2003.

55. Accepting for the sake of argument that November, 2007 was the date of

separation, the submission by counsel for the defendant that this application is out of time is unanswerable. In fact, the claimant's counsel merely glosses over the issue by a bald assertion of the claimant's entitlement to rely on section 13(1)(c) of the **Property (Rights of Spouses) Act, 2004**. However, it is patent that section 13(1)(c) must be read together with section 13(2).

56. That the application was made out of time is not necessarily conclusive of the issue as the legislature endowed the Court with the discretion to enlarge time. Under section 13(2) the application may be made within "such longer time as the Court may allow after hearing the applicant." The exercise of the judicial discretion is therefore predicated upon the Court first hearing the applicant.
57. It has been held that this application can be oral. **Dorothy Boswell v. Kenneth Delroy Boswell 2006/HCV02453 31<sup>st</sup> July, 2008**. That ruling appears to give effect to **Civil Procedure Rules, 2002** r. 11.6(2)(b). The general rule is that an application should be in writing: **Civil Procedure Rules** r. 11.6(1). In Australia, a jurisdiction which our draftsmen find paradigmatic, it is a full-blown application for an extension of time: **Harris v. Harris (1997) 22 Fam LR 263**.
58. The substantive legislation does not, with good reason, set out the methodology of the application. However, what the Court would be called upon to do is to make an order extending the time within which the application can be brought. The order extending time would of necessity

have to be made antecedent to the substantive application. That is so whether or not the application for extension of time takes place in separate proceedings or immediately before the property application. Consequently, this Court holds that the application to enlarge time is one contemplated by **Civil Procedure Rules, 2002** Part 11 and so should be governed thereby. In **Trevor Mesquita vs. Delkie Allen 2009 HCV 03221** 18<sup>th</sup> January, 2011, the application for an extension of time was treated as a preliminary issue, heard in Chambers before, and separately from the substantial hearing on the Fixed Date Claim Form.

59. Unlike the Australian law, the Jamaican legislation lays down no test that should be satisfied before the discretion is exercised one way or another. That, however, is no licence for the judge to surrender to whim or emotion in coming to a decision. The determinants of the decision must be things that are lawful for the judge to take into consideration. This Court therefore adopts as a just way to proceed the dictum of Warren J. in **McGibbon v. Marriott [1999] VSC 381 (13<sup>th</sup> September 1999)**:

**[Section 13(2)] does not raise specifically the issue of requiring an applicant to provide satisfactory explanation to the Court for the delay in instituting proceedings. However, in my view, when a Court exercise a discretion for an extension of time such as that contemplated by sub-section (2)... it behooves an applicant to provide at least a reasonable explanation to the Court as to why there has been a delay in instituting proceedings.**

60. The claimant in the instant case in fact made no application for an extension of time. Therefore, no material was placed before the Court upon which the Court could purport to exercise its discretion. *Ergo*, the submission of learned counsel for the defendant that the claimant is not entitled to rely on the provisions of the **Property (Rights of Spouses) Act, 2004**, is unimpeachable.
61. Before departing from this issue, the Court is constrained to make the following observation. At the time of hearing this claim no decree had yet been granted in the divorce proceedings. The import of that is, the time for making this claim under subsection 13(1)(a) of the **Property (Rights of Spouses) Act** has not yet accrued. This therefore makes the finding that the application is out of time the most bizarre of paradoxes. Whereas under subsection 13(1)(c) the claimant was dilatory, under subsection 13(1)(a) she is premature.
62. However that may be, what is the consequence of that finding? The **Property (Rights of Spouses) Act, 2004** sought to inaugurate a new era in this area of family law. To this end, section 4 declares:

***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 is made by this Act, between spouses and each of them, and third parties.***

63. So, since the claim does not fall to be considered under the **Property (Rights of Spouses) Act**, the rules and presumptions of the common law

and equity must be resorted to.

## **THE SEPARATION AGREEMENTS**

The parties executed two Separation Agreements, on the 5<sup>th</sup> October, 2003 and 1<sup>st</sup> November, 2007 in which they sought to address their respective property interests, *inter alia*. Their freedom to do so is enshrined in section 10(1)(b) of the Act. They may “make such agreement with respect to the ownership and division of that property as they think fit.”

There are certain statutory stipulations which must be present to make such an agreement enforceable. Every agreement must be in writing and signed by both parties: section 10(4). If the agreement is signed in Jamaica, the parties signatures shall be witnessed either by a Justice of the Peace or an Attorney-at-Law: section 10(4). Before they execute the agreement, each shall obtain independent legal advice: section 10(3). Further, the legal adviser is required to certify that the implications of the agreement have been explained to the recipient of the advice: section 10(3).

The Act gives two instances in which an agreement under section 10(1) may be declared unenforceable. First, where “there is non-compliance with subsection (3) or (4).” Secondly, where “the Court is satisfied that it would be unjust to give effect to the agreement.” In coming to a decision in the latter circumstance, the Court must have regard to a check list in section 10(8). Where the non-compliance with subsection (3) or (4) “has not materially prejudiced the interests of a party to the agreement, “the Court may” declare that the agreement



shall have effect in whole or in part or for any particular purpose”: section 10(7).

### **SEPARATION AGREEMENT, 2003**

64. The Separation Agreement of 2003 was executed before the Act came into effect. The Act came into effect on 1<sup>st</sup> April, 2006. The Act does not declare on its face that it has retrospective effect. Therefore, the validity of the 2003 agreement has to be gleaned from the law as it stood before the promulgation of the Act.

65. An agreement between spouses to live apart was held to be generally “valid and enforceable, provided that it was made in contemplation of, and is followed by, an immediate separation” (**Halsbury’s Laws of England 4<sup>th</sup> edition volume 29(3) paragraph 239**). On the question of formality and legality, the law was:

**No particular formality is necessary for the validity of a contract for separation. It may be made by deed, but a mere oral agreement is binding. A deed of separation may be varied by a subsequent written agreement not by deed. An agreement for separation is presumed to be legal until the contrary is proved, the burden of proving illegality lying on the person alleging it. (Halsbury’s Laws of England 4<sup>th</sup> edition volume 29(3) paragraph 244)**

66. The 2003 agreement is witnessed by three persons, two of them Justices of the Peace. This agreement was the product of joint instructions to an Attorney-at-Law and the style reflects the legal background of the

draftsman. Further, it was admitted that the agreement was executed by Mrs. Pino only after she sought and obtained legal advice. Although no particular formality was required, the parties went about entering the 2003 agreement in a manner which foreshadowed, to an appreciable degree, the statutory strictures of the Act. So, on the question of formality the document is indefeasible.

67. That notwithstanding, counsel for Mrs. Pino contends the agreement is null and void by virtue of the resumption of cohabitation within six (6) months of its execution. There is no divergence on the evidence that the parties in fact resumed living together within months of the execution of the 2003 agreement. What was hotly disputed was the quality of that cohabitation. Was it one of comity for the sake of the children as Dr. Pino asserts, or, was it a resumption of conjugality as Mrs. Pino claims? Did they just go on together, living separate lives?

68. According to **Halsbury's Laws of England**:

**The mere circumstance that the parties cease to be separated, in the sense that they reside together in a state of hostility, it is not sufficient to terminate the provisions of the separation agreement, nor is a reconciliation, as evidenced by friendly correspondence, without a resumption of cohabitation. Casual acts of sexual intercourse are not alone conclusive evidence that the parties ceased to live apart within the meaning of a separation deed. (Halsbury's Law of England 4<sup>th</sup> edition 29(3) paragraph 268)**

69. It appears then, that for the parties *ex post facto* conduct to negatively

impact the separation agreement, they must not only have resumed cohabitation but must also have been reconciled to each other. Whatever the several acts of reconciliation, collectively they must form the kind of matrix in which the re-birth of the marriage, as it is understood in western society, can take place; where the weeds of discord, deceit and everything destructive of the marriage bans will perish, giving the vows the photosynthetic environment for renewal so that they may ultimately flourish.

70. There was no evidence that following Mrs. Pino's return to the matrimonial home the couple did anything together. A suggestion that they travelled together to Florida in 2006 was denied. Beyond saying they slept in the same bed, no assertion was made of even casual sexual contact. No evidence of walks in the park with arms locked at the elbows while gazing into the eyes of each other with nostalgia and longing. No trips to the cinema or theatre. No family trips to the countryside or picnics.
71. This paucity of evidence of reconciliation begs the question, why did Mrs. Pino remain at the matrimonial home between 2004 and 2007? The answer that appears most plausible to the Court is that Mrs. Pino both returned and remained for the sake of her children, in the first place and later, for the benefit of her health. According to Mrs. Pino, the reason she left the matrimonial home in 2003, "was finally he had the woman in Jamaica and (sic) definitely was too much." In other words, Dr. Pino's infidelity was tolerable as long as his mistress remained in Cuba, in spite of

the quarrels his visits to her occasioned.

72. Since that was the proverbial straw that broke Mrs. Pino's back; the reasonable assumption would be nothing short of its removal could warrant her return to the matrimonial home. Indeed, that appears to be the impression Mrs. Pino wished to convey in asserting that Dr. Pino told her his mistress had been banished to Cuba. The uncontroverted evidence is, however, that Mrs. Pino and Ms. Betancourt merely exchanged residences. That was a fact Mrs. Pino was well aware of.
73. The fact of a Madame de Pompadour in modern society is not necessarily inconsistent with a desire to at least keep the embers of a marriage smoldering. However, the apartment didn't just become Ms. Betancourt's residence and Dr. Pino's love nest. Mrs. Pino's evidence was that Dr. Pino lived at the apartment. When these facts are juxtaposed with the dearth of evidence of attempts at reconciliation and Ms. Betancourt's presence in Jamaica being Mrs. Pino's *bête noire*, the reasonable and inescapable inference is that between 2004 and 2007 the parties remained unreconciled. In fact, Mrs. Pino said during these three years they quarreled constantly and she tried to distance herself emotionally from Dr. Pino. In other words, they resided together in a state of hostility. The parties resumption of cohabitation without the concomitant conjugal colouring, leaves the 2003 Separation Agreement unimpeached.

## **SEPARATION AGREEMENT, 2007**

74. This agreement is dated 1<sup>st</sup> November, 2007. The evidence is that the parties received legal advice before this agreement was executed. However, issue was joined as to whether the implications were explained to Mrs. Pino. That question arose because it is not manifest on the face of the document that the legal adviser went that far.
75. The Act requires the legal adviser to “certify” that that was done. What did the draftsman mean in his use of the word “certify”? The **Shorter Oxford English Dictionary 6<sup>th</sup> edition (2007)**, renders four meanings of the word. Of those, to “declare or attest by a formal or legal certificate”, and “testify to; vouch for” seem relevant. **Black’s Law Dictionary 8<sup>th</sup> edition** says, “to authenticate or verify in writing” and “to attest as being true or as meeting certain criteria.” According to **Stroud’s Judicial Dictionary of Words and Phrases 17<sup>th</sup> edition**, “the usual meaning of ‘certify’ does not require anything written; otherwise why should parties ever expressly stipulate as to certifying in writing?” per Byles J, in **Roberts v. Watkins, 32 L.J.C.P. 291.**”
76. Against this background, it appears the draftsman, in using “certify”, engaged in what Francis Bennion calls ‘weightless drafting’: **Understanding Common Law Legislation OUP 2001** page 63. The good drafter will not waste time defining words that carry no weight. Consequently, no attempt was made either to expand or circumscribe the ordinary meaning of the word.

77. The word 'certify' was used in the earlier **Maintenance Act, 2005** without any attempt at definition. Section 24(3) of the **Maintenance Act, 2005** is identical to section 10(3) of the **Property (Rights of Spouses) Act, 2004** save for the insertion of 'Maintenance' in the former. In both Acts, the drafter was deliberate in saying the respective agreements should be in writing. However, in neither case did he go on to require either that the legal advice should be in writing or that the legal adviser should certify in writing. Having left the matter to the usual meaning attached to the word, the mode of certification, that is, oral or written, falls to the election of the Attorney-at-Law.
78. How then shall a court be able to decide if an agreement falls afoul of either section 10(3) or 24(3) of the respective Acts? The short answer is, by the evidence placed before it. In the instant case there is no evidence that the implications of the agreement were not explained to Mrs. Pino.
79. The contrary is the reasonable and inescapable inference from her affidavit evidence. In Mrs. Pino's affidavit of 27<sup>th</sup> July, 2009, paragraph thirty, she said her Attorney-at-Law advised her not to sign the agreements Dr. Pino had prepared. Indeed, Mrs. Pino's lawyer seemed exasperated with her obstinacy. Mrs. Pino in her 29<sup>th</sup> January, 2010 affidavit said her Attorney-at-Law advised that she had closed Mrs. Pino's file on account of Mrs. Pino's refusal to take her advice. So, the facticity of the explanation of the implications of the agreement to Mrs. Pino is beyond doubt. And that is what the legislation seeks to ensure.

80. The Court is therefore satisfied that there was compliance with section 10(3) of the Act. The same, however, cannot be said in respect of section 10(4). The 2007 agreement was witnessed by the couple's daughter, Laima Pino, who is neither a Justice of the Peace nor an Attorney-at-Law. The consequence of that is non-compliance with section 10(4). That non-compliance must now be assessed to determine whether it precipitated any material prejudice to the interests of a party.
81. When both agreements are compared, the irresistible inference is that the latter was meant to provide a gloss for the former. The 2007 agreement speaks only to maintenance for Reinaldo Jr. and monthly mortgage payments. While maintenance for Reinaldo Jr. was dealt with in the 2003 agreement, the mortgage wasn't. Was there any material prejudice to the interests of Mrs. Pino?
82. It is worthy of note that the legislature contemplated that some prejudice to a party's interests is tolerable. What is not to be countenanced is material prejudice. How could Laima Pino's attestation occasion prejudice to Mrs. Pino, material or otherwise?
83. The requirement that the attestant be a public figure is not a legislative accident. This public figure is not only clothed with independence and objectivity of a disinterested bystander but the integrity and authority of office. Such an attestor is unlikely to wink at any impropriety in obtaining the signature of a party. The intention seems to be to put the authenticity of the parties' execution of the agreement beyond reproach.

84. Mrs. Pino's evidence is that when she signed the agreement in 2007 she was "demoralized, physically weak and stressed." Further, that she also harboured fears of Dr. Pino cutting off her medical benefit and taking away the car to which she had access. While a separation may be inherently stressful and Mrs. Pino's fears may have been inspired by Dr. Pino, there is no evidence that he compelled her to sign. Even if Dr. Pino had precipitated a state of fear, a signature voluntarily subscribed before a legislative attestant would have carried the same weight. Consequently, this Court holds no material prejudice to her interests was occasioned by the non-compliance with section 10(4).
85. That notwithstanding, the Court has an overarching power to declare an agreement unenforceable, if satisfied that it would be unjust to give effect to it: section 10(5)(b). Insofar as Dr. Pino's liability to pay the mortgage is made contingent on Mrs. Pino remaining without a companion, that provision is repugnant to the spirit of the Act.
86. Secondly, the maintenance provision for Reinaldo Jr. represents an approximate 30% reduction when compared to the similar provision under the 2003 agreement. That deficit will fall to Mrs. Pino to make good. Is this fair in all the circumstances? While the parties seem in the 2007 agreement to have been adjusting the provisions made in 2003, evidenced by the new item of responsibility for mortgage financing, their clear intention was to use the United States dollar as a base currency.
87. Consequently, the removal of United States dollar base exposes Mrs. Pino



to the vagaries of inflation coupled with any slippage of the Jamaican dollar vis-à-vis the United States dollar. When the parties respective earning capacities are compared this will represent a consequential burden on Mrs. Pino. The Court therefore finds this to be unfair. This along with the odious part of the mortgage clause make it unjust to give effect to the 2007 agreement in its entirety.

88. Since the 2007 agreement seeks to clarify the 2003 agreement, the Court's attention now reverts to the latter. The 2003 agreement is a contractual agreement from which *"the Court... will not lightly permit parties... to depart unless some good reasons is shown"*: per Sir Roger Ormrod in **Camm v. Camm (1983) 4 FLR 577, 579**. On the other hand, *"a wife is not bound by a separation agreement to which she is induced to consent by threats of violence or other undue pressure on the part of the husband"*: **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 29(3) paragraph 247**.
89. The law was compendiously enunciated by Oliver L.J. in **Edgar v. Edgar [1980] 3 All ER 887,896**:

**Men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will in fact depend in every case on a subjective evaluation of their motives for doing it. One may, of course, find that some unfair advantage has been taken of a judgment impaired by emotion, or that**

**one party is motivated by fear induced by some conduct of the other or by some misapprehension of a factual or legal position, but in the absence of some such consideration... the mere strength of one party's desire for a particular result or the mere fact that one party has greater wealth than the other cannot, I think, affect the weight to be attributed to a freely negotiated bargain.**

90. It is an admitted fact that the period leading to the giving of instructions for the preparation of the 2003 joint agreement was 'very volatile'. According to Mrs. Pino the discussions about leaving the matrimonial home spanned several months. During this time, she asserts she was in "a state of confusion and despair." This however, is notoriously no more than is to be expected in circumstances preceding a less than amicable separation. The question is, did that emotional state impair her judgment?
91. While the affirmative answer might be implicit in the asserted mental state, it is not expressly alleged. Indeed, at the time of the execution of the agreement in October 2003, the parties were no longer living together. So, having been removed from the hostile environment two months before, that may have facilitated the emotional space to be reflective.
92. However that may have been, critically, there is no allegation of anything oppressive in the conduct of Dr. Pino towards Mrs. Pino during these months of separation before the signing of the 2003 agreement. There is no evidence from which it can be inferred that Dr. Pino took an unfair advantage of Mrs. Pino. Neither is there any evidence that Dr. Pino's conduct excited fear in Mrs. Pino which motivated her to sign. In short,

this was an agreement into which Mrs. Pino voluntarily entered. The Court is therefore constrained to give effect to the 2003 agreement, along with the inoffensive parts of the 2007 agreement. The instant case is as distinguishable from **Camm v. Camm** as it is indistinguishable from **Edgar v. Edgar**.

93. So, the Court is giving effect to the intention of the parties as disclosed in those documents, so far as that seems just. In this vein, an interpretation of the 2003 agreement, together with the exhibit RRMP2, makes it plain that the lump sum of \$500,000 was to go towards the purchase of the house for Mrs. Pino. Therefore, that clause remains unfulfilled only to the extent of Mrs. Pino's admitted contribution to the purchase price of \$20,000.00. That notwithstanding, having regard to the duration of the marriage, the respective earning capacities of the parties and the uncertainties of Mrs. Pino's future medical care, it is just that she be awarded a lump sum of \$2.5M.

94. The Court therefore makes the following orders:

1. The defendant is the sole owner of the matrimonial home located at 12 Hopeton Avenue, Kingston 8.
2. The claimant is the sole owner of Nissan motor car registered 3341 EJ.
3. The defendant is ordered to transfer the said motor car to the claimant forthwith.
4. The defendant pays to the claimant a lump sum of \$2.5M within

three (3) months of the date hereof.

5. The claimant is the sole owner of the apartment located at 9A Central Avenue, Kingston 8.
6. The defendant shall make all mortgage payments until the mortgage is fully redeemed, in respect of the said apartment.
7. The defendant shall pay to the claimant US\$333 or its Jamaican dollar equivalent for the maintenance of Reinaldo Jr. on the 1<sup>st</sup> day of every month and full medical and dental costs, until Reinaldo Jr. attains age 21 years.
8. The defendant shall pay to the claimant US\$83 or its Jamaican dollar equivalent on the 1<sup>st</sup> day of each month and for a period of five (5) years from the date hereof unless the claimant sooner either marries someone else or is cohabiting with someone else.
9. For the avoidance of doubt, the section of the 2007 agreement which makes the continued payment of the mortgage conditional on the claimant remaining "single and does not have a partner" is hereby declared unenforceable.
10. The recalculation of the monthly maintenance for Reinaldo Jr. in Jamaican dollar is hereby declared unenforceable.
11. Each party is to bear its own costs.
12. Liberty to apply.