

FAMILY

THE PROPERTY (RIGHTS OF SPOUSES) ACT, 2004 (Act 4 of 2004)

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FAMILY

No. 4 - 2004

I assent,

[L.S.]

(Sgd.) H.F. Cooke
 Governor-General
 March 10, 2004

AN ACT to Make provision for the division of Property Belonging to Spouses and to provide for matters incidental thereto or connected therewith.

[The date notified by the Minister
 Bringing the Act into operation]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Jamaica, and by the authority of the same, as follows:—

PART I. Preliminary

- 1. This Act may be cited as the Property (Rights of Spouses) Act, 2004, and shall come into operation on a day to be appointed by the Minister by notice published in the *Gazette*. Short title and commencement.

2. (1) In this Act—

“cohabit” means to live together in a conjugal relationship outside of marriage and “cohabitation” shall be construed accordingly;

“family home” means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;

“marriage” includes a void marriage referred to in paragraphs (a), (b) and (c) of section 4 (1) of the Matrimonial Causes Act;

“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;

“relevant child” means a child who is—

- (a) a child of both spouses; or
- (b) a child of one spouse who is accepted as one of the family by the other spouse, and in paragraphs (a) and (b) of this definition “child” includes an adopted child and a child of a void marriage;

“spouse” includes—

- (a) 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;

- (b) 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,

immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.

(2) The terms “single woman” and “single man” used with reference to the definition of “spouse” include widow or widower, as the case may be, or a divorcee.

3.—(1) Except as otherwise provided in this Act and subject to subsections (2) and (3) of this section and section 6, the provisions of this Act shall not apply after the death of either spouse and every enactment and rule of law or of equity shall continue to operate and apply in such case as if this Act had not been enacted.

Application of Act.

(2) The death of either spouse shall not affect the validity or effect of anything done or suffered in pursuance of the provisions of this Act.

(3) If, while any proceedings under this Act are pending one of the spouses dies, the proceedings may be continued and be completed; and any appeal may be heard and determined and the Court may make such order as it thinks fit in the circumstances of the case as if the spouse had not died.

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

Act to have effect in place of rules of common law and equity.

5.—(1) Subject to section 11, in any proceedings relating to property instituted under this Act, the parties to the proceedings may apply—

Courts having jurisdiction.

- (a) where the value of the property in dispute is within the monetary limits prescribed by or under the Judicature (Resident Magistrates) Act, to the Resident Magistrate of the parish in which the property is located or in which any of the parties reside, or as the case may be, to a Judge of the Family Court; or
- (b) in any other case, to a Judge of the Supreme Court in Chambers.

(2) A Judge of the Family Court or Resident Magistrate may, upon the request of either party to proceedings upon an application referred to in subsection (1), hear such application in Chambers.

PART II. Family Home

6.—(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home—

- (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
- (b) on the grant of a decree of nullity of marriage;
- (c) where a husband and wife have separated and there is no likelihood of reconciliation.

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

7.—(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into

consideration such factors as the Court thinks relevant including the following—

- (a) that the family home was inherited by one spouse;
- (b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
- (c) that the marriage is of short duration.

(2) In subsection (1) “interested party” means—

- (a) a spouse;
- (b) a relevant child; or
- (c) any other person within whom the Court is satisfied has sufficient interest in the matter.

8.—(1) Where the title to a family home is in the name of one spouse only then, subject to the provisions of this Act—

- (a) the other spouse may take such steps as may be necessary to protect his or her interest including the lodging of a caveat pursuant to section 139 of the Registration of Titles Act; and
- (b) any transaction concerning the family home shall require the consent of both spouses.

(2) The Court may dispense with the consent of a spouse required by subsection (1) (b) if it is satisfied that consent cannot be obtained because the spouse is mentally incapacitated or the whereabouts of the spouse are unknown or consent is unreasonably withheld or for any other reason consent should be dispensed with.

(3) Where one spouse enters into a transaction concerning the family home without the consent of the other spouse then—

- (a) subject to paragraph (b), that transaction may be set aside by the Court on an application by the

Transactions to defeat interest in family home.

other spouse if such consent had not been previously dispensed with by the Court;

- (b) paragraph (a) shall not apply in any case where an interest in the family home is acquired by a person as *bona fide* purchaser for value without notice of the other spouse's interest in the family home.

(4) Where by virtue of subsection (3) (b) a transaction cannot be set aside by the Court, the spouse whose interest is defeated shall be entitled to claim, out of the proceeds of the transaction, the value of that spouse's share in the family home.

Transfer of interest in family home exempt from transfer tax.

9. An interest in the family home which is transferred from one spouse to another spouse or from one spouse to both spouses or from both spouses to one spouse, pursuant to the provisions of this Act, shall be exempt from transfer tax under the Transfer Tax Act.

PART III. Property

Agreements

Agreements in respect of property.

10.—(1) Subject to section 19—

- (a) spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect to the ownership and division of their property (including future property) as they think fit;
- (b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

(1), an agreement may—

- (2) Without prejudice to the generality of subsection (1), an agreement may—
- (a) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation;
- (b) provide for the calculation of such share and the method by which property or part thereof may be divided.

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

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

- (a) if signed in Jamaica, be witnessed by a Justice of the Peace or an Attorney-at-Law;
- (b) if signed in a country or state other than Jamaica, be witnessed by—

- (i) a person having authority by the law of such country or state to administer an oath in that country or state; or
- (ii) a Jamaican or British High Commissioner or Ambassador, as the case may be, or a Jamaican or British Envoy, Minister, Charge d'Affaires, Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consul Agent exercising his functions in that country or state.

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

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

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

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

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

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

- (a) the provisions of the agreement;
- (b) the time that has elapsed since the agreement was made;
- (c) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;
- (d) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;
- (e) any other matter which it considers relevant to any proceedings.

(9) Nothing in this section shall limit or affect the capacity of spouses to agree to acquire or hold any property

jointly or in common (whether or not with any other person), and whether legally or beneficially.

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

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

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

Orders regarding Property Rights

11.—(1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides.

Court may make orders regarding property.

(2) The Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.

(3) A spouse may make an application to the Court in respect of any title, interest or rights to property which had been in the possession or under the control of the other spouse but has ceased to be in the possession or under the control of that other spouse.

(4) The Court may, on an application under subsection (3), make such order as it thinks just for the payment of a sum in respect of—

- (a) money to which the application relates or the spouse's share thereof, as the case may be;
- (b) the value of property to which the application relates or the spouse's interest therein, as the case may be,

if the Court is satisfied that the property was in the possession of or under the control of the other spouse who has not made to the applicant, such payment or disposition in relation to the property as would have been appropriate in the circumstances.

(5) Where a Court makes an order under subsection (2) or (4), it may make an order as to costs and may make such consequential orders including orders as to sale or partition and interim or permanent orders as to possession.

(6) An order made under subsection (2) or (4)—

- (a) by a Judge of the Supreme Court shall be subject to appeal in the same manner as would be applicable to an order made by that Judge in any proceedings in that Court; or
- (b) by a Judge of the Family Court or by a Resident Magistrate shall be subject to appeal in the same manner as would be applicable to any other order made by that Judge or Resident Magistrate.

(7) In respect of an application under subsection (1), any bank, corporation, company, public body or society shall, for the purposes of that application (including costs referred to in subsection (5)) be treated as a stakeholder only.

Determination of Value and Share

12.—(1) Subject to sections 10 and 17 (2), the value of property to which an application under this Act relates shall be its value at the date the Order is made, unless the Court otherwise decides.

Determination of value and share of property.

(2) A spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the Court.

(3) In determining the value of property the spouses shall agree as to the valuator who shall value the property, or if there is no agreement, the Court shall appoint a valuator who shall determine the value of the property for the purposes of this subsection.

Division of Property

13.—(1) A spouse shall be entitled to apply to the Court for a division of property—

- (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
- (b) on the grant of a decree of nullity of marriage; or
- (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

Time when application may be made to Court for division of property.

(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve 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.

(3) For the purposes of subsection (1) (a) and (b) of this section and section 14 the definition of "spouse" shall include a former spouse.

Division of
property.

14.—(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), "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.

Alteration of Property Interests

15.—(1) In any proceedings in respect of the property of the spouses or of either spouse (other than the family home),

Alteration
of property
interest.

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 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) an order requiring either or both spouses to make, for the benefit of a relevant child, such settlement or transfer of property as the Court determines.

(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) Where the Court makes an order under subsection (1), the Court shall have regard to—

- (a) the effect of the proposed order upon the earning capacity of either spouse;
- (b) the matters referred to in section 14 (2) in so far as they are relevant; and
- (c) any other order that has been made under this Act in respect of a spouse.

Court may set aside order made under section 15.

16.—(1) Where the Court is satisfied on an application made by a person affected by an order made under section 15 that the order was obtained by fraud, duress, the giving of false evidence or the suppression of material facts, the Court may set aside the order and make another order under subsection (1) of that section in substitution therefor.

(2) The Court shall, in exercising its power under subsection (1), have regard to the protection of the interest of a *bona fide* purchaser for value without notice.

Property and Creditors

17.—(1) Subject to the provisions of this Act—

Provisions relating to creditors.

- (a) secured or unsecured creditors of a spouse shall have the same rights against that spouse and any property owned by that spouse as if this Act had not been enacted; and
- (b) property which, if this Act were not enacted would have been administered under the Bankruptcy Act by the Trustee in Bankruptcy on the bankruptcy of a spouse, shall be so administered.

(2) The value of property that may be divided between the spouses shall be ascertained by deducting from the value of property owned by each spouse—

- (a) any secured or unsecured debts (other than personal debts or debts secured wholly by property) owed by one spouse; and
- (b) the unsecured personal debts owed by one spouse to the extent that such debts exceed the value of any property of that spouse.

(3) Where any secured or unsecured personal debt of one spouse is paid out of property owned by both spouses the Court may, on a division of that property, order that—

- (a) the share of the other spouse in that property be increased proportionately; or
- (b) the first mentioned spouse pay compensation to the other spouse.

(4) In subsections (2) and (3) “personal debt” means a debt incurred by either spouse other than a debt incurred—

- (a) by both spouses jointly; or
- (b) in the course of a joint venture carried on by both spouses whether or not with any other person; or

- (c) for the purpose of effecting improvements to the family home or acquiring, repairing or effecting improvements to the family chattels; or
- (d) for the benefit of both spouses or any relevant child in the course of managing the affairs of the household or for caring for the relevant child, as the case may be.

Protection
of mortgage.

18.—(1) Subject to the provisions of sections 21 and 22, the rights conferred on any spouse by an order made under this Act shall be subject to the rights of any person entitled to the benefit of any mortgage, security, charge or encumbrance affecting any property in respect of which the order is made if such mortgage, security, charge or encumbrance was registered before the order was made or if the rights of that person arose under an instrument executed before the date of the making of the order.

(2) Notwithstanding anything contained in any enactment, no money payable under any mortgage, security, charge or encumbrance referred to in subsection (1) shall be called in or become due by reason of the making of an order under this Act, not being an order directing the sale of any property.

Agreement
to defeat
creditors
void.

19. Any agreement, disposition or other transaction between spouses with respect to their family home or other property which is intended to defeat any creditor of either spouse shall be void.

Disposal of Property

Disposal of
property.

20.—(1) No person shall, where proceedings are instituted pursuant to this Act, sell, charge or otherwise dispose of any property to which the proceedings relate without the leave of the Court or the consent in writing of the spouse by whom the proceedings are brought.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction before a Resident Magistrate to a fine not exceeding one million dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

21.—(1) Where the Court is satisfied that a disposition of property referred to in subsection (4) is about to be made in order to defeat the claim or rights of any other person under this Act, then, on the application of that other person and on such notice being given as the Court may direct, the Court may act in accordance with subsection (2).

Court may
restrain
disposition
of property.

(2) The Court may—

- (a) by order restrain the making of the disposition; or
- (b) order that any proceeds, which, at the time of the hearing of the application may have been paid in respect of the disposition, be paid into Court to be dealt with as the Court directs.

(3) Any disposition of property to which subsection (1) refers which is made after an order has been made under subsection (2) shall be void, so, however, that the Court may consider the claim of any person interested and make such order as it thinks fit.

(4) The disposition mentioned in subsection (1) is a disposition of property made whether for value or not, by or on behalf of or by direction of or in the interest of any person.

22.—(1) Where the Court is satisfied that any disposition of property referred to in section 21 (4) has been made in order to defeat the claim or rights of any other person; the Court may, on the application of that other person order that—

Court may
set aside
disposition
of property.

- (a) the person to whom the disposition was made otherwise than as a *bona fide* purchaser for value without notice (hereinafter in this section referred to as the recipient) or his personal representative—
 - (i) shall transfer the property or any part thereof to such person as the Court directs; or
 - (ii) shall pay into Court, or to such person as the Court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or
- (b) any person who, not being a *bona fide* purchaser for value without notice received any interest in the property from the recipient shall—
 - (i) transfer that interest to such person as the Court directs; or
 - (ii) pay into Court or to such person as the Court directs, a sum not exceeding the value of the interest.

(2) The Court may, for giving effect to any order under subsection (1), make such further order as it thinks fit.

PART IV. Power of Court to Make other Orders

Court may make other orders.

- 23.—(1) Without prejudice to any other provisions of this Act, the Court may make any of the following orders—
- (a) for the sale of property or part thereof and for the division, vesting or settlement of the proceeds thereof;
 - (b) for the vesting of property owned by both spouses as tenants in common in such share as the Court considers just;

- (c) for the vesting of property or part thereof in either spouse;
- (d) for postponing the vesting of any share or part thereof in the property until such future date contingent on such future happening as may be specified in the order;
- (e) for the partition or vesting of any property;
- (f) for vesting property owned by one spouse in both spouses jointly or as tenants in common in such share as the Court considers just;
- (g) for vesting property owned by both spouses (whether jointly or as tenants in common) in one spouse;
- (h) for the cancellation of any settlement of a family home held in joint tenancy;
- (i) for the payment of a sum of money by one spouse to the other spouse;
- (j) for the transfer of land;
- (k) for the transfer of shares, stocks, mortgages, charges, debentures or other securities or of the title to any other property;
- (l) for the transfer of rights or obligations under any instrument or contract notwithstanding any term or condition contained in such instrument or contract;
- (m) for varying the terms of any trust or settlement, not being a trust under a will or other testamentary disposition;
- (n) for the vesting of property or part thereof in a relevant child.

Sett

(2) Where the Court makes an order directing one spouse to pay to the other spouse a sum of money, the Court may direct that payment be by a lump-sum payment

or by instalments and either with or without security and otherwise in such manner and subject to such conditions as the Court thinks fit.

(3) The Court may make an order granting to either spouse for such period and on such terms and conditions as it thinks fit, the right to personally occupy the family home or any other premises forming part of the property belonging to either or both spouses.

(4) The person in whose favour an order is made under subsection (3) shall be entitled, to the exclusion of the other spouse, to personally occupy the family home or other premises to which the order relates.

(5) Notwithstanding section 3, an order made under subsection (3) shall be enforceable against the legal personal representative of the spouse against whom it is made unless the Court otherwise directs.

PART V. General

Savings.

24. The commencement of this Act shall not affect—

- (a) any legal proceeding in respect of property which has been instituted under any enactment before such commencement; or
- (b) any remedy in respect of any such legal proceeding to enforce or establish a right, privilege, obligation or liability acquired, accrued or incurred before such commencement,

and any such legal proceeding or remedy may be continued or enforced as if this Act had not been brought into operation.

Miscellaneous amendments of certain enactments. Appendix.

25. The enactments mentioned in the first column of the Appendix are amended in the manner respectively specified in the second column thereof.

APPENDIX (Section 25)

Act	Amendments
The Judicature (Family Court) Act.	Insert in the Schedule thereto next after the words "The Education Act" the words "The Property (Rights of Spouses) Act".
The Married Women's Property Act.	<ol style="list-style-type: none"> 1. Repeal section 16. 2. Repeal section 17. 3. In section 24 delete the words "sections 16, 17 and" and substitute therefor the word "section".
The Matrimonial Causes Act.	Repeal section 10(1)(d).

Passed in the Senate this 6th day of February, 2004 with 24 amendments.

SYRINGA MARSHALL-BURNETT, C.D.,
President.

Passed in the House of Representatives this 17th day of February, 2004.

MICHAEL PEART,
Speaker.

This printed impression has been carefully compared by me with the authenticated impression of the foregoing Act, and has been found by me to be a true and correct printed copy of the said Act.

Clerk to the Houses of Parliament.