[2018] **JMSC Civ.164**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV06177

BETWEEN	**KAREN CAMERON**	**CLAIMANT**
AND	**ANDREW RAY THOMAS**	**DEFENDANT**

Ms. Fara Brown instructed by the Norman Manley Law School Legal Aid Clinic for Claimant.

Ms. L. Smikle and Ms. C. Steele instructed by Nigel Jones and Co; for Defendant.

Heard: 26th October, 2017 and December 20, 2018

Whether matrimonial home to be regarded as family home – Section 2 of The Property (Rights of Spouses) Act – Can Section 14 of Act be used to confer share of property to a spouse if property is not family home - Evidence

CORAM: MORRISON, J

[1] In this Judgment I shall proceed unconventionally by stating the conclusions of the Claimant's written submissions that she would bid this court to come to, namely that:-

i. The property at Marine Drive became the family home when it was inherited by the Respondent during their occupation.

ii. Although the property was inherited by one of the parties, the role of the Claimant's contribution to the bequest in all the circumstances it would not be unreasonable or unjust for each spouse to be entitled to over half of the family home;

iii. If the court finds that there are grounds for departing from the one-half rule, then the nature of the Claimant's efforts over the course of the marriage is sufficient that she should be granted a substantial share in the property;

iv. If the property is found not to be the family home, the following factors namely, the Claimants having made equal or substantial contributions, the duration of the marriage, the fact that there is no family home, and the general circumstances of the case which requires be taken into account, indicates that the Claimant should get a significant share in the property."

[2] In service to her submissions the Claimant relied on The Property (Rights of Spouses) Act and on the case law authority of **Carol Stewart v Lauriston Stewart**, Court of Appeal No. 15/2011.

[3] As to the Defendant his arguments in counterpoint was nourished, firstly, by the self-same authority of PROSA and, second, the first instance case law authorities of **Mitchelle Brown-West v Beresford West,** Claim No. 2013, HCV00215 and **Elonia Shim v Michael Shim**, Claim No. 2010HCV06072.

The Issues

[4] I adopt the issues as stated in the Claimants pre-trial memorandum filed on September 26, 2017:-

a) Whether the property is the family home and should be divided pursuant to section 6 of the Property (Rights of Spouses) Act, 2004 (PROSA); alternatively,

b) Whether the property is to be defined as 'property other than the family home,' and therefore to be divided according to the factors set out in section 14(2) of PROSA.

c) Whether, in light of section 7 and section 14(2), there should be-

i. a departure from the 50/50 rule, and if so

ii. what the parties' respective share in the property should be

The Evidence

[5] The primary facts are that the Defendant, Mr. Andrew Thomas, lived from 1993 to 1998 with his benefactor, Ms. Sylvia Gretelle Earle at her property at 90 Marine Drive, Bridgeport, Portmore, St. Catherine. He subsequently left Ms Earle's residence after he got married to the Claimant in 1998. The marriage produced two children: Celina Thomas Gavin on the 25th day of August 1999 and Nathanael Thomas born on the 3rd July, 2002.

[6] Subsequently, in 2003 Ms. Earle allowed the Defendant and his family, at his request, to reside at the subject property. While living there the Claimant tended to Ms Earle until her death in 2004. The Defendant left the questioned property sometime in 2011 or 2012 because of, as he says, "conflicts and the hostile environment at the house between the Claimant and myself." He however returned to the property in 2014. Ms. Earle, from her Last Will and Testament dated 16th September, 2003, devised, "all her interest in premises situated at Lot 90 Marine Park, Bridgeport Post Office in the parish of Saint Catherine to Andrew Ray Thomas on condition that he takes care of me for the rest of my life." She also devised and bequeathed all the rest and residue of her Real and Personal estate wheresoever or whatsoever to Andrew Ray Thomas.

[7] At a later date, the Supreme Court of Jamaica granted Probate of the estate of Ms. Sylvia Gretelle Earle to Mr. Andrew Ray Thomas. From the evidence, the Defendant has a pending application at the Office of Titles to be registered on transmission.

[8] On the 24th December, 2014 the Defendant was granted his Decree Absolute.

[9] It is a paramount fact that both parties have been living on the subject property since 2003 and the Claimant has admitted that the Defendant acquired the

property on the 6th May, 2008 by way of inheritance from the said Ms. Sylvia Gretelle Earle.

[10] The Fixed Date Claim Form was filed on 17th December, 2014 and this predates the Decree Absolute by seven days it being 24th December, 2014.

The Findings of Facts

[11] As far as the Defendant is concerned, the Claimant was a ne'er-do-well whose only duty was to her children in respect of providing them with emotional and psychological support – not material support. He would have this court believe, that he has been maintaining the property from 1993 while Ms Earle was alive; while he was married and not residing at the property and also after Ms Earle's death; he has done several renovations to the property when the need arose. He tiled the bathroom floor and wall, changed the fixtures in the bathroom and changed the flooring in his son's room, among other things, from his own funds; that the rent collected from the sister of the Claimant to whom he had rented the master bedroom, was used to cover minor expenses of the household; that if the rent did not cover his portion of the utility costs, an additional amount was given to the Claimant's sister to cover the balance; he covered every school expense incurred by his children from graduation to school fees, food and other supplies.

[12] As for the Claimant, the Defendant left the property in 2011 when he separated from her and that he only returned in 2014 he having commenced divorce proceedings which culminated by the grant of the Decree Absolute in December 2013.

[13] The Claimant has denied that the Defendant did renovations to the property and refutes all other assertions made by him. She forcefully asserts that she painted the entire house except for the master bedroom. She paid to lay the board in her son's room and also to lay the linoleum in the master bedroom. She had to provide food for the household, prepare lunch for the children to take to school. Importantly, and as is conceded by the Defendant, if only grudgingly, the

arrangement to have the Claimant care for Ms Earle was based, he depones, on a discussion between himself and the Claimant to which the latter agreed for a very short time. It is particularly to be noted that Ms Earle died on March 27, 2004.

[14] I state here and now that I have had the benefit of seeing and hearing both parties to the action. This case, I observe, is marked by a dearth of documentary material that would assist in pointing to what and by whom things were done to the house.

[15] Where the evidence is equivocal or, where there are factual conflicts on the evidence, I accepted the evidence of the Claimant in preference to that of the Defendant. The Claimant gave her evidence with the refreshing simplicity and condor of a truth teller. The Defendant's evidence, on the other hand, did not present itself without the taint of being artificially formal, pompous and lofty.

[16] In any event, I would regard the Claimant's domesticated status, as seen through the eyes of the Defendant, as proof of a quality devoutly to be wished for so as to enable her to take care of the needs of her children and that of Ms. Earle, a dependent of the Defendant.

The Law

[17] According to Section 6(1) of PROSA, "Subject to subsection (2) of this section and sections of and 10, each spouse shall be outlined to one-half share of the family home.

a) on the grant of decree of dissolution of a marriage or the termination;

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.

[18] On the present state of the evidence the current claim falls squarely in condition (a) of Section 6 (1).

[19] Nevertheless, I now go on to determine whether in fact 90 Marine Drive satisfies the concept of the family home as is defined in Section 2 of PROSA.
It reads: "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, building 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 gift to one spouse by a donor who intended that spouse alone to benefit."

[20] From the evidence the parties began living together along with their children at 90 Marine Drive in 2003 certainly up to 2017 according to the Claimant. According to the Defendant he left 90 Marine Drive either in 2011 or 2012 only to return there in 2014. Against these primary facts is to be noted the fact of the bequest of 90 Marine Drive by Ms Sylvia Grettelle Earle to Andrew Ray Thomas by her Will of 16th September, 2003. In this, her Will, already adverted to,st of 90 Marine Drive was solely to Andrew Ray Thomas in circumstances where both parties and their children were living together at 90 Marine Drive before and after the bequest of the property to the Defendant. On that fact, the question of whether 90 Marine Drive was the family home turns on whether it was wholly owned by either or both of them and used habitually or from time to time as the only or principal family residence. The criteria of "wholly owned," plus, "used habitually or "as only or principal family residence are conjunctive and would serve to indicate that both elements must cohere. However, the property was not owned by either party, certainly before the bequest. The property was bequeathed to the Defendant by way of a deed of gift by Ms Earle at a time when both parties were married and where they "lived and moved and had their being." That fact alone would distinctly suggest, but for the exception created by the words, "but shall not include" which follow the qualifying elements of family home,

that the Claimant would be entitled to a share in it. However, the "but shall not include" exception puts it beyond a doubt that the Claimant is not entitled to share in the property as it was a gift to the Defendant by Ms Earle who by her bequest intended that the Defendant was alone to benefit by her omitting to name the Claimant as a beneficiary of her bequest of 90 Marine Drive. That this has to be so, I suggest, is as a result of the words "who intended that spouse alone to benefit where the "intended" has to be looked at in the context of the words and deeds of Ms Earle at the time of her bequest.

[21] On that qualification, if I am right, 90 Marine Drive, cannot be regarded as the family home.

[22] However, Section 17(2) of PROSA read in tandem with Section 14(1)(b) seems to present an alternative resolution where the property is not regarded as the family home. Section 14(a)(b) reads: "subject to section 17(2), where a spouse applies to the Court for a division of property", the Court may, according to section 14(1), ... "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)." (emphasis mine).

[23] Note, however, that Section 14(c) deals with the division of property where a spouse applies to the Court pursuant to section 13.

[24] The factors referred to above 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.

[25] PROSA, it is to be remarked, attempts to bring some measure of fair-mindedness For the division of Property Belonging to Spouses and to provide for matters incidental thereto or connected therewith," according to its revealed purpose to be found at the head of the Act.

[26] The Act through the conscious policy making of the Legislature has sought to protect vulnerable partners, whether in a full-fledged union or not, from being proprietarily exploited by the other and thereby being left empty-handed with the daunting prospect of having to re start his/her life with the severe handicap of nothing, having contributed to the acquisition of property by the other by whatever means measured in degree or kind.

[27] This is why the Act in its wisdom did not give a restricted sense to the concept of property which it defines as "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 right or interest whether in possession or not to which the spouses or either of them is entitled."

[28] Again, the Act by its liberality says that 'contribution as used in Section 14 (1) (a) 14 (2) (a) means –

a) the acquisition or creation of property including the payment of money for that purpose

b) the care of any relevant child or...

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 spouses's occupation or business;

c) 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

[29] The above numeration shows how wide a net is cast to catch any referable contribution by the disadvantaged spouse towards the "acquisition, conservation or improvement of any property" by the other which must be inputted in determining what share of the property such a one is entitled to. For emphasis, Section 14(4) says that no presumption that a monetary contribution is to be regarded as of greater value than a non-monetary one. Property sharing is to be the just reward of a partnership of equals upon its termination.

[30] It will suffice here to outline what section 7(1) of PROSA mandates: "Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust to 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 house was inherited by one spouse;
b) that the family home was already owned by one spouse or the time of the marriage or the beginning of cohabitation;
c) that the marriage is of short duration

[31] It seems, then, that section 7(1) is to be read alongside section 6(1) so that if the Court considers that the family home was inherited by one spouse but it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, then the Court is empowered to vary the equal share rule.

[32] The Claimant threw her reliance upon the Court of Appeal of **Carol Stewart v Lauriston Stewart**, supra Brooks JA with whom his brethren agreed identified the factors that a court should consider in assessing the question of the respective interest, of the parties in the family home.

[33] It is, of course, important to note the background facts and the legal arguments which occupied that Court's attention.

[34] The Stewarts had purchased property in 1981 of which Mr. Stewart was the major financial contributor. Mr. Stewart input also included the repayment and the discharge of the mortgage loan.

[35] Mrs. Stewart eventually moved out of the premises where she said Mr. Stewart and their two children had lived together. Both Stewarts provided support and maintenance for their children. However, Mr. Stewart not only bore the major financial costs during their conjugal time but he also the costs associated with maintaining the premises and supporting the family.

[36] Subsequent to their separation Mr. Stewart and the two children occupied the premises. He also bore all of the financial costs pertaining to the premises. In respect of the support and maintenance of the children Mr. Stewarts contribution exceeded that of Mrs. Stewart.

[37] Against that background counsel for Mr. Stewart argued, among other things that Mr. Stewart's re-payment of the mortgage loan and his maintenance of the children ought not to have enhanced his interest in the property as, was found by the judge at first instance. Further, he submitted that section 7, of PROSA had implicitly, and section 14 had expressly, removed financial contribution as being a dominant factor in determining whether the statutory rule of equal entitlement to the family home should be displaced.

[38] Counsel for Mr. Stewart, on the other hand, argued that Mr. Stewart's superior financial contribution was a relevant factor and that taken in tandem with the fact that the children were left in his care, were significant to displace the equal share rule pursuant to section 6 of PROSA.

[39] After a review of comparative legislation from other relevant jurisdictions as well as case law authorities, Brooks JA said, "Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is, beyond the ordinary imponderables of the trial process."

[40] The court should not, continues Brooks JA, "embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists." Should however, a section 7 factor is credibly shown to exist a court in considering whether the equal rule should be displaced, should be reluctant to depart from it. The principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure.

[41] A court, before it makes any orders that displace the equal entitlement rule, enjoins Brooks JA, "should be careful to be satisfied that an application of that rule would be unjust and unreasonable." His Lordship at paragraph 63 of

judgment said, “In considering this appeal it may firstly be said, based on the comparison of sections 7 and 14 there was no basis for the learned trial judge to have embarked on the exercise to consider a departure from the equal share rule. Since contribution, by itself, does not qualify as a section 7 factor, there was no section 7 factor proved and, therefore, there was no basis to consider a departure from the statutory rule of an equal division”. I do not find the Stewart Case apposite to the case at hand; see also Claim No. 2007HCV02805, Camille **Greenland** v **Glenford Greenland**, **Naomi Greeland** and **Audre Greenland** Judgment delivered on 9/2/2011 and Claim No. 2006HCV03198**, Donna Graham** vs **Hugh Graham**, Judgment delivered on 8/4/2008.

[42] In the first instant judgment of **Mistelle Brown-West v Beresford West**, supra, Straw, J had to deal with a declaration, sought by the claimant under section 6 of PROSA, that the house in which she lived with her former husband, the defendant, is the family home, pursuant to section 2 of the said Act and that she was entitled to a 50% share in it. The issue with which Straw, J grappled was whether the expression “family home” fell within its definition in section 2 of PROSA.

[43] On the facts it was shown that the house was owned solely by the Defendant on land owned by him and his two siblings. Her Ladyship remarked, at paragraph 25 of her judgment, that even if she came to the conclusion that the claimant had any beneficial interest in the dwelling house, she could not make such a determination pursuant to section 6 because the land appurtenant to the dwelling house is legally owned by the defendant and two others as tenants-in-common.

[44] Straw, J had to determine whether section 14 could be relied on by the claimant. Her Ladyship was of the view that, “section 14(1) allows the court the option to make a decision by virtue of sections 6 and 7 or by virtue of section 14 or take action under both categories.”

Her Ladyship awarded the Claimant a lump sum payment which was 20% of the beneficial interest in the dwelling house.

[45] The reference to section 13 by section 14(1) is a reference to, as noted in the side vote, the time when an application may be made to the Court for division of property, that is –

a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

b) ...

c) Where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

d) ...

[46] There is more to be done, according to section 13(2), where subsections (1)(a), (b) or (c) are regarded as the relevant or triggering point: Such an application shall be made within twelve months of dissolution of marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant .

[47] As applied to the instant matter based on the evidence the Defendant's contention that the Claimant is not entitled to a 50% share of the property or any at all, is based on the totality of his efforts in keeping and maintaining the property and also caring for and maintaining the children in the care of their mother, the Claimant, by his paying of the utility bills. He rather blithely snubs and balks at the suggestion that the Claimant is entitled to any benefit at all. However, I am of the view that Section 17 of PROSA can be invoked as coming to the aid of the Claimant.

The evidence of the Claimants contribution which this court accepts is set out at paragraphs, 24 and 27 of this judgment and are to be looked at in the light of the

Section 14 factors. It is luminously clear that the Claimant is entitled to share in the property for the reasons as have been advanced.

I would accordingly, on the basis of the Mistelle Brown-West case, supra, award the Claimant a 20% interest in 90 Marine Drive to be valued as at the day of this judgment in consequence of her entitlement. The Claimant is to prepare and draft all consequential orders.