



[2018] JMSC Civ 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

CLAIM NO. 2014 M1450

BETWEEN COURTNEY ONEIL COLLEY PETITIONER/APPLICANT

AND KAREN JANICE SILVERA COLLEY RESPONDENT/APPLICANT

IN CHAMBERS

Mrs. Khadine Colman for the Petitioner/Applicant

Ms. Vivienne Washington for the Respondent/Applicant

Heard: 6<sup>th</sup> February, & 2<sup>nd</sup> March, 2018

***Maintenance – Maintenance of child who is not a minor – Division of matrimonial property – Family home constructed on land belonging to other family members – Maintenance Act, sections 2, 8 (1) –Property (Rights of Spouses) Act, Sections 2, 6, 13.***

**CALYS WILTSHIRE, J (Ag.)**

### **Background**

- [1] The parties were married on 29<sup>th</sup> June, 1996. The Applicant filed a Petition for divorce on 10<sup>th</sup> June, 2014 in which he pleaded that they separated in 2010. The union produced one child, Deanna Janice Colley born on 17<sup>th</sup> August, 1997.
- [2] On the 11<sup>th</sup> July, 2014 the Applicant filed a Notice of Application for Court Orders where he sought the following orders regarding premises situated at Faiths Avenue, Duanvale, in the parish of Trelawny:

- (i) A declaration that the Petitioner and the Respondent are the joint owners of a dwelling house situated on the premises in equal shares.
- (ii) An order for the division of the dwelling house on the premises in accordance with the respective shares of the parties declared at (i) above.
- (iii) An order that a valuation of the dwelling house be undertaken by a Valuator to be agreed between the parties within sixty (60) days of the date of this order, failing which the Registrar of the Supreme Court to be empowered to appoint a competent Valuator.
- (iv) The cost of the valuation report be borne by the parties in equal shares.
- (v) The attorneys-at-law for the Petitioner/Applicant shall have carriage of sale.
- (vi) That the Respondent shall have the first option to purchase, such option to be exercised within ninety (90) days of the order.
- (vii) That the house be sold on the open market and the net proceeds of sale divided in accordance with the respective shares of the parties declared at (i) above.
- (viii) That if the Respondent refuses to sign any document of transfer upon sale within a period of twenty-one (21) days of their receipt, the Registrar of the Supreme Court shall be empowered to sign.
- (ix) All other costs attendant on the transfer on the sale of the dwelling house be borne by the parties equally.

**[3]** The Petitioner/Applicant relied on Affidavits filed on 10<sup>th</sup> June, 2014, 11<sup>th</sup> July, 2014, 10<sup>th</sup> March, 2015 and 7<sup>th</sup> August, 2015 in support of his application and in response to the Respondent's application for maintenance for Deanna Colley, who I will hereafter refer to as Deanna.

- [4] On 14<sup>th</sup> March, 2016 a Notice of Discontinuance of the Petition for Divorce was filed by Mr. Colley. He was subsequently permitted to withdraw his Notice of Discontinuance, by order of D. Palmer J. on the 29<sup>th</sup> June, 2016.
- [5] The Respondent/Applicant filed an answer and cross petition on the 9<sup>th</sup> February 2015 seeking, among other things, orders that,
- (i) The Respondent is legally entitled to remain undisturbed in the building which was constructed on the land given to the parties by the parents of the Respondent.
  - (ii) The Petitioner is not entitled to be paid any money for any portion of the dwelling
  - (iii) The current Maintenance Order be varied for the Petitioner to pay an increased amount for maintenance of the relevant child of the marriage.
- [6] Mrs. Colley filed further affidavits on the 27<sup>th</sup> July, 2015, 27<sup>th</sup> November, 2015, 16<sup>th</sup> May, 2016, 16<sup>th</sup> August, 2016, and 25<sup>th</sup> November 2016, in support of her application and in response to Mr. Colley's application for division of matrimonial property.
- [7] Pursuant to Mrs. Colley's Notice of Application for Court Orders filed on 27<sup>th</sup> November, 2015, D. Palmer J. on the 18<sup>th</sup> April, 2016 made interim orders that
- (1) *The period of maintenance for Deanna Colley was extended effective 1<sup>st</sup> September, 2015 until the determination of the application for maintenance and*
  - (b) *The weekly sum be increased from One Thousand Five Hundred Dollars (\$1,500.00) to Three Thousand Dollars (\$3000.00)*

**[8]** On the 29<sup>th</sup> June, 2016, Mr. Justice D. Palmer made further orders as follows:

*(1) The Petitioner is ordered to pay the sum of Five Hundred Dollars (\$500) per week from, the date of the filing of the cross petition up to the 18<sup>th</sup> birthday of the subject child Deanna Colley.*

*(2) The Petitioner to pay the sum of Three Thousand Dollars (\$3000.00) per week from the first day of the following month after the child turned eighteen (18) up to August 2016.*

*(3) The Applicant must apply thereafter for any extension and show proof that the child Deanna is enrolled in full time school.*

#### **Evidence of Petitioner /Applicant**

**[9]** Mr. Colley testified that during the course of his marriage to the Respondent, they acquired property at Faiths Avenue, Duanvale, in the Parish of Trelawny by way of a Deed of Gift from the Respondent's parents.

**[10]** He stated that he alone contributed financially to the construction of the house by way of his securing of several loans from various financial institutions. Further that he has been solely responsible for repaying those loans.

**[11]** Mr. Colley described the house as the principal residence during the marriage, and indicated that he was seeking a seventy (70%) interest in the matrimonial home since he contributed all the funds for its construction.

#### **Evidence of Respondent/Applicant**

**[12]** Mrs. Colley's evidence is that the land on which the house was built was not owed by the persons who purportedly gave the land to her and Mr. Colley. She stated further that although the parties lived there as man and wife, they had no legal rights to the land.

- [13] Mrs Colley denied that the loans taken by Mr. Colley were used in the construction of the house. She stated that she engaged her brother to build the house and paid him on a monthly basis from her partner draws and money received from her older brother in Canada. She also said that she put in physical labour in the construction of the house.
- [14] She testified further that she had made an application to the Falmouth Resident Magistrate's Court in May 2014, to increase the sums being paid for maintenance for Deanna. She also made an application for an extension of time for maintenance of Deanna beyond her 18<sup>th</sup> birthday, in April 2015.

### **Petitioner's Submissions**

- [15] Miss Colman submitted that the application for division of matrimonial property was made pursuant to section 13 of the Property Right of Spouses Act 9 (PROSA), where subsection (1) (a) allows spouses to apply to the court for a division of property "on the grant of decree of dissolution of marriage or termination of cohabitation". Further that the land on which the house stands was gifted to both parties and the house is their matrimonial home. Miss Colman argued that although there is no registered title, the parties have been in open, continuous and undisturbed occupation for over 12 years. They have shown not only the act of possession but an intention to possess the land to the exclusion of all others, which has placed them in a strong position to establish title by adverse possession.
- [16] Miss. Colman contended that based on the definition of family home in section 2(1) of PROSA the house in question so qualifies and because it was built on family land did not take away from its standing as the family home. Counsel conceded that, despite Mr. Colley's claim that he is entitled to seventy percent (70%), because of his financial contribution, the facts of the case do not merit an order for an unequal division.

[17] Counsel maintained however that the house was wholly owned by both parties and was also their principal place of residence and hence Mr. Colley would be entitled to a fifty percent (50%) interest in the property.

[18] On the application for extension of maintenance for Deanna until she turned 23 years old, Counsel argued that it was made after she turned 18 years old and further that no evidence was been presented confirming Deanna's enrolment at University of Technology.

[19] Miss Colman relied on the following cases:

- (2) **Smith v. Pinnock** [2016] JMCA Civ 37
- (3) **Re Atkinson and Horsell's Contract** [1912] 2 Ch1
- (4) **Cunningham v Cunningham** 2009 HCV 02358
- (5) **RVR** [1992] 1A.C.599
- (6) **Bowes v. Taylor** 2006 HCV 05107
- (7) **Hendricks v. Hendricks** [2014] JMSC Civ 149
- (8) **Midland Bank PLC v. Cooke** [1995] 4 All ER

#### **Submissions – Respondent/Applicant**

[20] Mrs. Washington cited the following cases in support of her submissions.

- (1) **A v. B** [2017] JMSC Civ 103
- (2) **Gibbs v. Stewart** [2016] JMCA Civ14

[21] Counsel contended that a maintenance order was in effect for Deanna when the application for extension was filed on 27<sup>th</sup> November, 2015. Reference was made to the undetermined application for extension of maintenance from 18 to 19 years which was before the Parish Court and then transferred to Supreme Court. Miss

Washington submitted that in light of that transfer the Supreme Court has the jurisdiction to make the order sought.

[22] On the application for division of matrimonial property Mrs. Washington argued that Mr. Colley did not tell the Court that the property in question was the family home or petition the court to make that determination. Further that Mr. Colley had not furnished any proof of ownership of the property, or shown that the person who allegedly gave the gift was legally entitled so to do. Counsel contended that the exhibited deed of gift should be rejected as it was neither stamped nor registered.

[23] Mrs. Washington also submitted that the court could not make an order for division of the property as other interested parties would be affected, and those persons had not been joined. She stated finally that even if the court considered Mr. Colley's application under PROSA, it would be out of time, as he had not sought and obtained leave of the court.

### **Issues**

[24] In resolving this matter I must determine the following:

- (i) Whether the Application to extend maintenance for the child of the family was made before her 18<sup>th</sup> birthday
- (ii) Whether the property in question is the family home.
- (iii) Whether the Petitioner/Applicant is entitled to a one half share in the property in question
- (iv) Whether the Petitioner's application has been barred by his failure to make an application for an extension of time to make a claim for division of matrimonial property
- (v) Whether the Petitioner should be ordered to pay maintenance for Deanna Colley.

## LAW

[25] The Maintenance Act 2005 provides the guidelines to be considered by the court regarding maintenance of a child. Section 8 (1) states that

*“Subject to subsection (2) every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parents unmarried child who*

*(1) Is a minor or*

*(2) Is in need of such maintenance, by reason of physical or mental infirmity or disability.*

Section 2 of the said Act defines a “minor” as a person under the age of 18 years and section 16 (1) states as follows:

*“Subject to the provision of this section and section 18, a maintenance order shall remain in force:*

*(a) In the case of a child until the child attains the age of 18 years.*

*(b) In the case of any other person for such period as may be specified in the order*

*And in subsection (3) where the Court is satisfied that:*

*(3) A child in respect of whom a maintenance order had been made is or will be engaged in a course of education or training after attaining the age of 18 years; and*

*(4) For the purpose of such education or training it is expedient for payments under the order to continue after the child has attained that age;*

*the Court may direct that the order remain in force for such period as may be specified in the order, being a period not extending beyond the date on which the child attains the age of twenty-three years.*

[26] Based on the language of this Act, an application for a maintenance order to remain in force pursuant to section 16 (3), must be made before the child attains the age of 18 years per Mangatal JA (Ag.) at paragraph 14 of **Roosevelt Rowe v. Beverley Brown** [2014] JMCA Civ 30. Morrison J.A. in **Daniels v. Daniels** [2016] JMCA App 29 reinforced this at paragraph 10 of his judgment, making the

point that the application must be made “in the sense of having at least been filed, before the child reaches the age of 18, otherwise the order will expire and the court has no power to revive it”

- [27]** Deanna was born on 17<sup>th</sup> August, 1997. She would have turned 18 years on 17<sup>th</sup> August 2015. There is undisputed evidence that an order was made in the Falmouth Resident Magistrate Court on the 13<sup>th</sup> March, 2012, for Mr. Colley to pay the sum of \$1,500.00 per week plus ½ educational expenses and 80% of medical expenses covered by his health insurance. This order was to remain in effect until the child’s 18<sup>th</sup> birthday.
- [28]** Mrs. Colley made an application for an extension of the maintenance order beyond Deanna’s 18<sup>th</sup> birthday to her 19<sup>th</sup> birthday as she was then still completing her high school studies at William Knibb High School. This application was served on Mr. Colley on the 17<sup>th</sup> April, 2015, for the hearing of the application on the 7<sup>th</sup> May, 2015, at the Clarke’s Town Resident Magistrates Court. It was never determined in that court. By that time the Petitioner had filed his petition for divorce accompanied by an affidavit in which he had stated that the arrangements for the child’s maintenance were satisfactory.
- [29]** It is also undisputed that in 2014 Mrs. Colley had made an application in the Falmouth Resident Magistrates Court for an increase in the maintenance for Deanna. Consistent with that application, Mrs. Colley responded to Mr. Colley’s petition for divorce with a cross petition which included an application to vary the maintenance order upward. Miss Colman has submitted that the existence of these two matters of the same nature before two different courts amounted to an abuse of process.
- [30]** I must respectfully disagree with Counsel. The matters before the Parish Court for increase of the maintenance and extension of the maintenance order were not litigated. They remained unresolved. I do not find that there is an abuse of

process as this is not a case where, as per A. L. Smith LJ at page 681 of **Stephenson v. Garnett** [1898] 1Q.B. 677,

*“..... it has been shown that the identical question sought to be raised has been already decided by a competent court”.*

- [31] As Mrs. Colley had made her application for extension of the maintenance order before Deanna turned 18 years old, the existing order of the Falmouth R.M. Court would have remained in place until the court's determination of the matter. The order sought was for an extension until her 19<sup>th</sup> birthday in August 2016. The fact that the court did not make a determination was not her fault. She had made the application before the child's 18<sup>th</sup> birthday.
- [32] The matter being unresolved before the Resident Magistrate's court, Mrs. Colley then made her application as part of the divorce proceedings, for a further extension, on the 27<sup>th</sup> November, 2015, before Deanna reached her 19<sup>th</sup> birthday. The unresolved application having been made before the maintenance order expired, the court, by virtue of the Matrimonial Causes Act and its obligations where there are matrimonial proceedings involving children, had the jurisdiction to hear and consider Mrs. Colley's application for an extension until Deanna's 23<sup>rd</sup> birthday.
- [33] Unfortunately based on her evidence in chief, Deanna is enrolled in and pursuing studies at the University College of the Caribbean. Under cross examination she indicated that Deanna was no longer enrolled there but was now at University of Technology. No documentation in proof of said enrolment has been furnished to this court.
- [34] While I do not disbelieve Mrs. Colley that Deanna is in fact enrolled at University of Technology, the standard required to enable me to make the order being sought, has not been met. The documents in proof of her enrolment at said institution did not form part of her evidence before the court. The court in the best interest of the child would have been prepared to accommodate an application to amplify, but same was not requested. Certainly at the point of cross examination

when it was revealed to the court it would have been too late for any consideration to be given to such an application.

[35] Consequently the court is constrained and the order being sought by Mrs. Colley cannot be granted.

[36] On the division of matrimonial property section 13 of PROSA provides that:

(1) A spouse shall be entitled to apply to the court for a division of property:

*(1) On the grant of a decree of dissolution of a marriage or termination of cohabitation, or*

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

*(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of a cohabitation ..... or separation or such longer period as the court may allow after hearing the applicant.*

[37] In light of Mr. Colley's declaration that there is no likelihood of reconciliation and the application is made pursuant to a petition for divorce, the court has no doubt that the application would fall under section 13. Therefore the time limit of 12 months for a spouse to bring an application for division of property, being separated with no reasonable likelihood of reconciliation would be applicable. The court must therefore determine based on Mrs. Washington's submission, whether Mr. Colley's claim has been barred or ought not to be considered since he did not seek an extension of time to proceed under 3.13(1).

[38] Phillips JA at paragraph 86 in **Hoilette v. Hoilette and Davis** SCCA No.137/2011 had concluded the following among other things:

*"There are no express words used in PROSA requiring that leave be obtained.*

*Section 13 was not promulgated to create a limitation bar.*

*If the claim is filed outside the 12 month time period, set out in the statute extension of time must be obtained from the court for the matter to proceed, but no leave is required and so no application for leave and extension is required”.*

**[39] Cunningham v. Cunningham** [2009] HCV 02358 also provides valuable guidance and I will adopt the reasoning of McDonald – Bishop J at paragraph 23, that,

*“What makes the time limit imposed on separated spouses under s.13 even more incomprehensible is the fact that upon dissolution of the marriage a spouse may still bring the claim for division of property under s.13 and even has the right to do so up to 12 months after the dissolution of the marriage. What we have then is that a person, who is a divorcee, who brings the action within 12 months after the dissolution of the marriage can enjoy the benefits of the Act conferred by s.13 and related sections, but a separated spouse without reasonable likelihood of reconciliation, who has been separated for over 12 months, cannot”*

**[40]** I find therefore that Mr. Colley’s application can properly proceed.

**[41]** Mr. Colley is not required to state that the property in question is the family home or ask the court to determine same. He has asked the court to determine that he and Mrs. Colley are joint owners in equal shares and for the division to be made of the “dwelling house “accordingly.

**[42]** PROSA facilitates applications being brought for the determination of spousal interest in property that is among other things,

*“any real or personal property, any estate or interest in real or personal property..... or any other right or interest whether in possession or not to which the spouses or either of them is entitled”*

- [43] The question is whether it is spousal property within the meaning of PROSA. Thereafter, on analysis of the evidence, the court would determine where it is the family home. Mr. Colley has specifically stated that his claim is in respect of the dwelling house. He has not claimed an interest in the land.
- [44] Both parties have asserted that based on their respective financial contributions the court should assess their entitlement. Mr. Colley claimed fifty percent (50%), then increased it to seventy percent (70%), on the basis that he solely financed the construction. Mrs. Colley said he should get no more than thirty percent (30%) as she alone financed the construction but he contributed some labour.
- [45] This court's consideration of financial contribution will depend on whether the dwelling house is the family home. Under s.2 of PROSA, the family home is defined as:

*“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 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.”*

- [46] Based on the definition the dwelling house qualifies as the family home. PROSA creates a rule of equal entitlement to the beneficial interest in the family home. Section 6(1) sets out entitlement to ½ beneficial interest in the family home in spite of how the legal interest is held on

*(1) Grant of decree dissolving a marriage or termination of cohabitation*

*(2) Grant of decree of nullity*

*(3) Where parties have separated and there is no likelihood of reconciliation.*

[47] This however may be displaced by circumstances outlined in s.7 as follows:

*(1)Where it would be unreasonable or unjust taking such factors including,*

*(a)Family house inherited by one spouse*

*(b)Or owned by one spouse at time of marriage or beginning of cohabitation*

*(c)Short duration marriage.*

[48] That means equality is the norm. Brooks J.A. in **Stewart v Stewart** [2013] JMCA Civ 47 at paragraph 34 stated that *“each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjudicate the equal share rule.”* And further at paragraph 40, that *“the legislature did not wish the family home to be embroiled in arguments”* over the issues of contribution and other general facts and circumstances which would be relevant in considering *“other property.”*

[49] Based on Mrs. Washington’s submissions I must further determine whether the fact that neither party holds the legal title for the land affects the position of the dwelling house as the family home. Although Mrs. Washington has questioned the validity of the deed of gift given to both parties by Mrs. Colley’s parents, it has not been disputed that the parties were given permission by her parents to build a house there as man and wife.

[50] The house was constructed without interference and there is no evidence of any objection to their occupation of the land. There is no evidence of any attempt by anyone to claim possession of the land. The parties and their child lived there in open, continuous and undisputed occupation of the land for the 14 years that the marriage lasted. Mrs Colley continues to reside there with their daughter.

[51] Even though there is no registered title, Miss Colman is correct that the parties occupied the land for over 12 years with no interference from anyone which showed the act of possession and an intention to possess the land to the exclusion of all others. That does place them in a strong position to establish title by adverse possession. The definition of property in PROSA is wide enough to cover an equitable interest in land and per McDonald- Bishop J in **Cunningham** (supra),

*“The Act does not at all preclude an entitlement to land if there is no registered interest or legal title.”*

[52] I therefore find that the land on which the dwelling house was constructed was used wholly for the purposes of the household. Consequently the land along with the dwelling house is the family house. Mrs. Colley has however only sought an interest in the dwelling house. By virtue of S.6 (1) of PROSA he is entitled to 50% in the dwelling house situated on the land.

I therefore make the following orders:

- (1) It is declared that the Petitioner/Applicant is entitled to a 50% share and the Respondent to 50% share in the dwelling house located at Faiths Avenue, Duanvale, Faiths Ave, in the parish of Trelawny.
- (2) The parties are joint owners of a dwelling house at Faiths Avenue, Duanvale, in the parish of Trelawny.
- (3) The said dwelling house is to be valued by a valuator to be agreed between the parties and the cost of said valuation is to be borne by the parties equally. If the parties cannot agree to the valuator, the Registrar of the Supreme Court is empowered to appoint a competent valuator, within 60 days of the date of his order.
- (4) The Respondent shall have the first option to purchase the Petitioner's share in the said house, such option to be exercised within 60 days of

Deanna Colley completing her course of studies or her 23<sup>rd</sup> birthday whichever comes first.

- (5) If the option is not exercised the house shall be sold on the open market and the net proceeds divided equally between the parties in accordance with their respective share.
- (6) If the property cannot be sold as a result of issues regarding the land and /or title, the Respondent is to pay to the Petitioner the monetary equivalent of his half interest in the said house. This half interest will be recoverable by the Petitioner as a debt incurred by Respondent.
- (7) If the Respondent refuses to sign any document of transfer upon sale within a period of 30 days of their receipt the Registrar of the Supreme Court shall be empowered to sign.
- (8) All other costs attendant on the transfer on the sale of the dwelling house shall be borne by the parties equally.
- (9) The Attorney-at-law for the Petitioner/Applicant shall have carriage of sale.
- (10) Liberty to Apply
- (11) Each party shall bear their own costs.
- (12) Leave to Appeal granted to the Respondent –in respect of the issue of maintenance for Deanna Colley.