

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 3069

BETWEEN	DONNA DIEDRICK	CLAIMANT
AND	AUDLEY DIEDRICK	DEFENDANT

Gordon Steer and Mrs. D. Donna Dowding instructed by Chambers Bunny & Steer for the Claimant.

Mrs. G. Gibson-Henlin and Miss Tavia Dunn instructed by Nunes, Scholefield, Deleon & Co. for the Defendant.

Heard 3<sup>rd</sup> and 18<sup>th</sup> December, 2007.

**M. MCINTOSH, J.**

The Claimant by Fixed Date Claim Form is seeking a determination by the Court of questions under the Property (Rights of Spouses) Act 2004 concerning the ownership of property located at 2 Close Haven Walk, Belgrade Heights, Kingston 19, St. Andrew against the Defendant who is her husband.

The following orders are being sought by the Claimant against the Defendant:

- (a) That the Claimant is entitled to the fifty percent (50%) interest and the Defendant entitled to fifty percent (50%) in the property located at 2 Close Haven Walk, Belgrade Heights, Kingston 19, in the parish of St. Andrew, registered at volume 1057, Folio 480 of the Register Book of Titles.
- (b) That a valuation agreed upon by the Claimant and the Respondent be taken and that costs of same be shared proportionally by the parties.
- (c) That if no valuator can be agreed upon then one shall be appointed by the Registrar of the Supreme Court.

- (d) That the Defendant be given the first option to buy the said property, within 30 days of the receipt of the valuation.
- (e) That should the Defendant be unable or unwilling to exercise his first option to purchase then the said property be put on sale on the open market by public auction or by private treaty.
- (f) 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 unable or unwilling so to do.

The couple was married on 12<sup>th</sup> June 1986 (the claimant says 12<sup>th</sup> July, 1986) subsequently according to the Defendant they separated five (5) times throughout the course of their marriage and finally for the sixth time in June 2006 when he moved out of the bedroom that they shared and went to live in the guest bedroom. There is no evidence as to the length of these separations. There are discrepancies in relation to the date of the marriage of the parties and the date of the last separation but these differences do not seem to be of great significance.

The Claimant moved out of the house, the Defendant says, on his request on the 31<sup>st</sup> August 2006. Whether the couple separated in June 2006 when the Defendant moved into the guest room or on the 31<sup>st</sup> August 2006 when the Claimant left the home was a source of dispute which was relevant to the Claimants entitlement to bring the current action as she did on the 30<sup>th</sup> July 2007. This was resolved by the application for extension of time to bring the claim made by the Claimant's attorney-at-law which was not opposed by the Defendant's Attorney-at-law and was granted by the Court.

The Claimant's attorney at law also applied for an order in relation to the non-compliance with Part 8.2 of the Civil Procedure Rules 2002 as the Claimant had failed to file the affidavit and Particulars of Claim with the Claim Form. The application for this order was also unopposed and granted by the Court.

The property which is the subject matter of this suit is 2 Close Haven Walk, Belgrade Heights, Kingston 19.

The couple had purchased a house in Portmore but lived at 2 Close Haven because it was a more convenient location. They rented the property in Portmore and the proceeds of the rental were used to pay the mortgage, the Defendant says he added to this amount received for rental to meet the mortgage payments.

It appears that there were discussions with the landlord for sale of the property to them.

In 2004 the house at 2 Close Haven which the parties and their children had been residing was offered to them for sale and it was purchased.

Paragraph 14 of the Claimant's affidavit in support of the Fixed Date Claim Form states:

"14. That to the best of my knowledge the Respondent used the combined funds from the sale of the Portmore house which had been invested and had accumulated interest along with the saved rental from the Portmore house to purchase the house at Belgrade."

The Claimant further states that she believed that the home was jointly owned.

The Defendant paid the mortgage and the Claimant took on the domestic expenses e.g. groceries, children expenses, domestic assistance, gardener, utility bills and so on.

A year after the Belgrade house (2 Close Haven) was brought in the name of the Defendant only, a cheque for \$1,419,846 was received and it is the Claimant's evidence that the Defendant indicated he was giving the Claimant "some money" from the Portmore house, she did not, she deposes demand her share to invest elsewhere.

The Defendant claims that the house at Portmore was purchased solely by him and the Claimant's name was added merely as a matter of convenience. He also states that at all material times the parties kept their financial assets separate although there were instances when they would have both their names on bank accounts for convenience.

The house at 2 Close Haven was purchased at a time when the parties had separated and was purchased in the Defendant's name only although, at his request, the Claimant's subsequently returned to the house and lived there for nearly two years before the "final" separation.

The affidavit contained information as the details of the financial, emotional and physical relationship which the parties shared and each affidavit gives that affiant's version. Needless to say, there are many differences and contradictions between them.

This claim is brought under the Property (Rights of Spouses) Act 2004 and in Section 2 of the Act, "family home" is defined as follows:

"'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."

Section 6 of the Act provides:

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

The Claimant is relying on Sections 4 and 6 of the Property (Rights of Spouses) Act and contends that 2 Close Haven Walk is the family home as defined in

the Act there is no defence to it and the Court should find for her in the circumstances.

On the other hand, the Defendant contends that Section 6 is a rebuttable presumption. It is a presumption of equal ownership of the family home. In addition on examination of Section 6, 7 and 14 of the Act provides the starting point for varying the 50-50 entitlement and Section 6 is to be read in the context of Section 7, 14 and 15 of the Act.

Further, the Defendant contends that it is not enough to assert that a home is a "family home" it must be demonstrated that it comes within the definition of Section 2 of the Act as interpreted in *STEWART V STEWART C.L. 2007 HCV 2327* delivered in 6<sup>th</sup> November 2007, a judgment of Sykes, J.

The Defendant submits that even if there is sufficient evidence from which to draw an inference that the home is a family home, the Defendant had discharged the burden of demonstrating that the existing property rights should not be distributed 50-50 as it would be unjust and unreasonable to do so.

The Claimant has not brought herself within Section 15 of the Act in any event to alter the rights of the Defendant even though it is her argument that her case is based on that section.

The Defendant referred to Section 78 and 79 of the Family Law Act of Australia and compares the provisions of Section 78 of that Act to Sections 6 and 7 of the Property (Rights of Spouses) Act and states that these taken with Section 79 are similar to Section 14 and 15 of our act.

Section 78 of the Australian Family Law Act referred to in "Family Law in Australia" 6<sup>th</sup> Edition by Monahan and Young at page 491 11.28 states:

"Section 78 of the FLA gives the Court power to declare existing rights in property, and to make consequential orders giving effect to such declaration.

Section 78 is quite different from Section 79, as the latter gives the Court wide discretionary power to alter property rights to effect a just distribution between the parties in accordance with considerations specified in the statement. This aspect required judicial comment in the 2003 case of *HICKEY V HICKEY*

AND THE ATTORNEY GENERAL FOR THE COMMONWEALTH OF AUSTRALIA (INTERVENER) (2003) 30 FAM. L.R. 355 FLC 93-141 where the Full Court of the Family Court stated:

The Section does not allow the Court to alter existing rights such as a power contained in Section 79. This is a declaration under Section 78 (1) and is an order which determines the existing titles or rights of parties to a marriage in respect of property.... By contrast Section 79 confers power upon the court to make orders altering the interest of parties in property, having regard to the matters referred to in Section 79.

In practice, Section 78 is rarely used, most parties invoking the wider powers of Section 69 on marriage breakdown.”

The Australian Act speaks to property in general including the matrimonial home so the Court in Australia is empowered to look at everything and at the end of the day, make such order as they deem just taking into consideration such matters as the length of the marriage etc. a spouse can make an application in respect of the family home as well as other property.

Section 6 of the Property (Rights of Spouses) Act gives 50% - 50% and it is for an interested party to reduce the 50%. The property (Rights of Spouses) Act repealed Sections 16 and 17 of the Married Women's Property Act (see page 21 of the Act).

It is argued by the Defendant that the property 2 Close Haven was not owned by either of them before 2004 but regard must be had to the history of the case, the fact that they jointly owned a home in Portmore but because of convenience chose to live at 2 Close Haven.

The Court having considered all the evidence and the authorities placed before it finds that the property 2 Close Haven Walk is the “family home” and no evidence has been adduced to persuade the Court to find that the property should not be divided 50% - 50% between the parties.

The court, in the circumstances grants Order in terms of paragraphs (a), (b), (c), (d), (e) and (f) of the Fixed Date Claim Form dated 3<sup>rd</sup> July 2007.

Each party to bear their own costs.