



[2016] JMSC Civ.23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2014 HCV 01868

BETWEEN	PANSY IONIE DOWNER-SPENCE (also known as PANZIE IONIE SPENCE)	CLAIMANT
AND	DONALD HUBERT SPENCE	DEFENDANT

Mr Gordon Steer and Mrs K. Parke instructed by Chambers Bunny and Steer for
Claimant

Miss Tamiko Smith and Mr Obiko Gordon instructed by Frater Ennis and Gordon
for the Defendant.

*Matrimonial Property - Claim for 50% share in dwelling house - Parties
separated –whether property in question is the family home - The Property
(Rights of Spouses) Act, Sections 2, 6, 7, 13 and 14(1)*

Heard: November 3, 2015 and February 23, 2016

LINDO J.

[1] This is an application by way of Fixed Date Claim Form under the Property (Rights of Spouses) Act, filed on April 16, 2014, in which the claimant is seeking orders *inter alia* that property located at Lot 107 Ridgewood Avenue, Nightingale Grove, Bushy Park in the parish of Saint Catherine is owned by herself and the defendant in equal shares, that the property be sold and that the defendant accounts for all rental collected on the property since the separation.

[2] There is no dispute that the parties were married on August 27, 1966 and that during the course of the marriage, the property, subject of the claim was purchased. It is also not in dispute that the certificate of title to the property shows that the parties hold the legal interest as joint tenants.

[3] The claimant's case is set out in her affidavit filed with the Fixed Date Claim Form and the affidavit in response to the defendant's affidavit filed on August 27, 2014 while the defendant's case is stated in that affidavit. At the hearing, the two parties were subject to extensive cross examination.

[4] Counsel for both parties have provided the court with detailed written submissions supported by authorities which I will not attempt to repeat, and neither will I attempt to repeat all the evidence of the parties. The parties and their Counsel however, can rest assured that I have carefully reviewed and considered the evidence and submissions as well as the authorities cited.

[5] The issues which fall to be determined are:

1. Whether the property in question is the family home;
2. Whether the presumption of equal share has been displaced

[6] Section 14 (1) of the Property (Right of Spouses) Act, (The Act) provides that on an application under section 13, the Court shall divide the family home in accordance with section 6 or 7 of the Act.

[7] In relation to the division of the family home, section 6 of the Act, states:

"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 the marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

[8] The “*family home*” is defined under section 2 of the Act as:

“[t]he 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.”

[9] I have no doubt that the home in question is the family home. I find that it falls squarely within the definition set out in Section 2 of the Act. An examination of the undisputed evidence reveals that the parties enjoyed a relationship which spanned over forty years. Both parties have given evidence that they lived together at the premises as man and wife and that the claimant went to the United States of America (USA) to seek employment in or about 1986 while the defendant remained at the home and that in or around 1996 the defendant went to the USA with the claimant while their daughter continued to live at the home, a part of which was rented.

[10] As at 1976 when the property was purchased, the home was wholly owned by both parties. I find on the evidence that between the date of purchase and when the claimant went to live and work in the USA it was used habitually as the only family residence and even after the defendant went to live overseas, it was used from time to time by them both, as the principal family residence. The parties retained ownership of the property even while they continued to live together as husband and wife in the USA.

There is no evidence to show that they relinquished this property and the defendant himself has quite properly described it as the family home.

[11] Section 7 of the Act authorizes the Court to vary the equal share rule upon the application of an interested party where, in the circumstances of the case, the Court is of the opinion that applying the rule would be unjust and unreasonable. The defendant has by way of his affidavit in response to the claimant's claim applied for a variation of the rule and is asking the court for a declaration that he is entitled to 100% interest in the property.

[12] The defendant is resisting the claim on the basis that the claimant is ordinarily resident in the USA, that the marriage broke down in 2002 and that, with regard to the purchase of the property, he paid the whole purchase price and the claimant did not contribute to the acquisition in any way and also that he alone repaid the mortgage loan.

[13] The defendant did not impress me overall as a witness of truth. He indicated that the claimant had made no contribution at all but later admitted that when he left the house furniture was in it and when pressed, having said "we had furniture in it" indicated that "we" meant himself and his wife. He also stated that when the claimant migrated to the USA "she took all of her personal belongings and left nothing behind" but in cross examination he agreed that from the house was purchased up until 2013 she had things in the house.

[14] Additionally, the defendant is contending that the parties separated in December 2002 but states that he remained in the same household with the claimant until 2009 when he returned to Jamaica and during this period he shared the rent and that each year subsequently, he has returned to the USA to the same residence with the claimant, and has admitted to staying for as long as a month.

[15] Mr Spence's assertion as to when cohabitation ceased is difficult to accept. He has provided no evidence to indicate why the relationship would have ceased in 2002. It

therefore appears quite odd that cohabitation could have ceased in 2002 as he would have the court believe, but he remained in the one bedroom that he shared with the claimant in the USA. I therefore reject his evidence in that regard.

[16] Mrs Spence has stated that she did dressmaking while in Jamaica and before she migrated to the USA and I accept on a balance of probabilities that it provided a source of income, and although it is not clear how much she earned, I find that it would have enabled her to contribute directly to the expenses of the household. I believe her evidence that when she went to the USA she sent items for sale in the 'Arcade' and she sent items for the children and that she gave money to Mr Spence when he came to the USA.

[17] Despite the absence of specific figures in relation to her earnings, I find her to be a truthful witness and find her to be more credible than Mr Spence. Additionally, I do not find her inability to speak to the cost of the property fatal to her claim as even the defendant was unable to give a credible account of how the purchase was undertaken. I therefore agree with Counsel for the defendant that "there would be reasonable erosion of memory of a transaction that occurred approximately 40 years ago."

[18] The defendant has not demonstrated any cogent and exceptional circumstances that could cause the court to displace the presumption of the equal share rule. He has sought to establish his direct financial contribution towards the purchase and renovation of the house as a basis for full entitlement. Although the claimant has not given specific information as to her contribution toward the family home that by itself is not sufficient to prove that equal entitlement is unreasonable or unjust.

[19] I am of the view that the house in question fits within the definition of what would be a family home for the purposes of the Act. It cannot be denied that it was the parties' principal place of residence during the period 1976 to when the claimant migrated in 1986, while the defendant and the children remained at the property, up to 1996 when the defendant went with the claimant to the USA, when a portion was rented and even

when they both resided overseas and would return to Jamaica separately. I find that both parties continued to have a substantive connection to the property.

[20] I prefer and accept the evidence of the claimant that in 2012 when she came to Jamaica she stayed at the home and shared the same bed with the defendant. I therefore find it more likely that the parties separated in 2013 as stated by the claimant and not 2002. It therefore follows that the last place where they cohabited as man and wife would be the home which is the subject of this claim and as such would be the family home for the purposes of the Act.

[21] Having found that the property in question is the family home within the meaning of the Act, owned by both of them, this in my view would entitle each of them to a half share in it unless there are circumstances in law, for a departure from the equal share rule. The defendant has not shown any circumstances for the court to be of the opinion that it would be unreasonable or unjust for each of them to be entitled to one-half of the family home under the provisions of Section 7 of the Act.

[22] Even if I am wrong in my finding that the property in question is the family home, I have also examined the claim within the context of section 14 (1) (b) of the Act which makes provision for the division of property that is not the family home. Having taken into consideration the relevant factors specified in subsection 2, I would still have concluded that the claimant would be entitled to a 50% share in the house,

ORDER

(1) It is hereby declared that the claimant and the defendant own the property located at Lot 107 Ridgewood Avenue, Nightingale Grove, Bushy Park in the parish of Saint Catherine in equal shares.

(2) That the parties are to agree on a valuator to determine the current market price of the property and that the costs of such valuation be borne equally by the parties

(3) That if no valuator can be agreed upon that the Registrar of the Supreme court is hereby empowered to appoint one

- (4) That the Defendant shall have the first option to purchase the Claimant's half share of the said property within 90 days of the date of receipt of the valuation report failing which the Claimant shall have the option to purchase the Defendant's half share within 60 days after the date of the Defendant's failure to exercise his option.
- (5) That in the event the parties are unable or unwilling to purchase the property within the time specified, the property is to be put on the open market for sale by private treaty (or public auction)
- (6) That the Registrar of the Supreme Court shall undertake an accounting to determine the rental collected by the defendant from June 2013.
- (7) That the proceeds of the sale are to be divided equally between the parties with the sum found to be due to the claimant after the accounting is undertaken being deducted from the defendant's half share and paid over to the claimant
- (8) That the firm of Frater Ennis & Gordon shall have carriage of sale
- (9) That if either party fails, neglects or refuses to sign any documents necessary to effect a registrable transfer of the property within 14 days of being requested so to do, the Registrar of the Supreme Court is empowered to sign the documents on behalf of that party.
- (10) That each party is to bear his/her own costs of these proceedings.
- (11) There shall be liberty to apply.