[2018] JMSC Civ 111

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 M 01712

BETWEEN	**NATALEE KEMORINE HEW**	**APPLICANT**
AND	**RAYMOND ANTHONY HEW**	**RESPONDENT**

IN CHAMBERS

Applicant unrepresented

Mr. Gordon Steer and Mrs. Kay Ann Parke instructed by Chambers Bunny and Steer for the Respondent

Heard: February 22, 2017 and August 2, 2018

FAMILY LAW – DIVISION OF MATRIMONIAL PROPERTY – SHARES – JOINT SHARES ACCOUNT – PROPERTY (RIGHTS OF SPOUSES) ACT, 2006 – SECTION 14

THOMPSON-JAMES J

INTRODUCTION

[1] The sole issue before the Court is the division of property in respect of shares contained in an account at Stocks & Securities Limited (SSL) held in the names of both parties, as well as in the names of the respondent's two (2) children.

[2] The applicant, Natalee Kemorine Hew, and the respondent, Raymond Anthony Hew, were married July 3, 2003 and divorced April 24, 2014 when a decree absolute was granted.

[3] Shortly after the filing of the petition for Dissolution of Marriage July 15, 2012, the applicant filed a Notice of Application for Court Orders July 25, 2012, seeking

several orders in respect of maintenance and division of property. This Application was subsequently amended by an Amended Notice of Application for Court Orders filed August 8, 2014.

[4] By way of a consent order dated February 19, 2014 and filed February 24, 2014, the parties came to an agreement in respect of the property material to orders 2, 3(a), 3(b), 4, 5, 6, 7 and 8 of the amended application. Accordingly, all that remained to be considered at the date of hearing were orders 1 and 3(c). However, at the commencement of the hearing, the applicant indicated that she would no longer be proceeding with order 1 requesting maintenance.

[5] Order 3(c), which is before the Court for consideration, seeks:

> *"3. That all the properties (real and personal) now currently owned jointly by the Applicant/Claimant and the Respondent be divided equally between the Applicant/Claimant and the Respondent, in particular:*
>
> *(a)...*
>
> *...*
>
> *(c) all sums and amount held jointly by the parties in account situate at Stocks & Securities Limited."*

[6] At the hearing, attorney-at-law, Mr. Lindell Wellesley, who was on record for the applicant, made an application for his name to be removed from the records due to a conflict of interest. The application was granted. The applicant indicated that she wished to proceed without legal representation, and she understood the effect of that decision. The court had explained the implications to the applicant.

THE EVIDENCE

A. *THE APPLICANT'S EVIDENCE*

[7] The applicant's evidence is contained in her viva voce evidence as well as five (5) affidavits filed July 25, 2012, May 14, 2013 (affidavit in reply), May 15, 2013 (supplemental affidavit in reply), April 2, 2014 and June 18, 2014.

[8] She states that the account in question belongs to her and the respondent. This account was to be theirs together as newlyweds, independent of his children's mother. It was started, shortly after they were married, in both their names only. The children's names were later placed on the account based on an agreement between the parties that it would be prudent to do so, as they were minors. If the parties predeceased them, the children would automatically inherit the proceeds of the account. The Chief Executive Office (CEO) for SSL being the godfather of the respondent's daughter, it was presumed that he would hand over the funds to the children at a reasonable age. The children do not have access to the account, further; the applicant's name was never added to an existing account there.

[9] She states that the account, which was assigned the number 22153, was started with an opening balance of seven hundred thousand Jamaican Dollars (JA$700,000.00). This was a gift to her from the respondent. The respondent informed her that he was giving her a gift of money which would be placed in a bank account that he was going to open on her behalf with the said funds. He told her he would take care of everything in setting up the account and all that was required of her was to attend the offices of Paul Chen Young & Company (PCY & Co) to sign some documents. This she did, and completed the bank's signature cards. The children never signed a contract as they were minors.

[10] The balance was later increased to one million Jamaican dollars (JA$1,000.000.00), and the parties agreed that neither of them would withdraw the principal amount of the balance without the consent of the other party. The profits derived from other investments held by the parties would be deposited into the account to increase the principal and the profits gained.

[11] In or around 2006, the company changed to SSL. Both parties were asked to attend the office to sign new forms and to update account particulars. They did so, and her name 'became' the principal account holder of the joint account.

[12] During the marriage, the parties received monthly interest payments by way of cheques made payable in both their names. She would withdraw sums from the account without the respondent's consent to settle bills and expenses on the couple's behalf. She states that she spent freely for her own use and benefit without accounting to the respondent, and would instruct the company to make cheques payable to various third parties for specific payments. Both parties also shared in the liabilities incurred as a result of any default with the account.

[13] She wrote to the company November 1, 2013, requesting that fifty percent (50%) of all profits generated by the account be paid directly to her. This request the company complied with. She also requested that withdrawals by the respondent for payment of charges relating to properties owned or occupied by him cease. However, she was informed that the company would, as instructed by the respondent, take these sums out of his half-share of the monthly interest. The account was still being maintained by both parties and they both shared equally in the profits, by way of separate monthly interest payment cheques in equal amounts.

[14] In **cross-examination**, she maintained that the relevant account was a brand new account started for both parties. She admitted that there was another account with Elaine Lewis, the respondent's aunt. This was not the account that the parties had. Elaine Lewis' name was added to overshadow the true owners of the account as the respondent did not want his children's mother to get information from the account. The applicant's name was not on the account the parties started, and Mr. Hew did not add names on the account at his convenience.

[15] She later stated that Elaine Lewis was added to the parties' account to overshadow the account, but was subsequently removed. However, when defence counsel, Mr. Steer, asked her "but you just said her name was never on the account", her reply was "you are trying to twist what I said". Her evidence unfolds as follows:

Q – This account at Paul Chen Young, since you raised it, did it ever have on it the name Elaine Lewis?
A – Not the account that he and I had.

Q – What account at Paul Chen Young was Elaine Lewis on?
A – Elaine Lewis name was added to an account that was there to overshadow the true owners of the account, because he never wanted his children's mother to get information from the account.

Q- But it is not that account your name was on?
A – That's the account we had.

Q – But didn't you just say Elaine Lewis' name was on another account?
A – I said her name was not on the account we started.

Q – Would Mr. Hew add names at his convenience on the account?
A -- No he wouldn't.

Q – Was both parties names, you and he, held on the account nonetheless the respondent's aunt Elaine Lewis name was added to overshadow the account?
A – Yes.

Q – So was Elaine's name placed on the account?
A- Yes, it was placed on the account and removed subsequently.

Q – But you just said her name was never on the account?
A – You are trying to twist what I said.

Q –I had asked you did the account at Paul Chen Young have the name Elaine Lewis and your response was not the account he and I had?
A – Yes I did say that.

Q – Mr. Hew had that account prior to knowing you?
A – Which account?

Q – Same account you are claiming a share in?
A – He never had that account prior to me

[16] As the cross-examination continued, her evidence further deteriorated when Mrs. Hew stated that she was absolutely sure she had no other account in her name alone at either PCY & Co or SSL, but later conceded that it would be true to say that she also held an account with PCY & Co and the respondent's name was added. She was saving in that account and added the respondent's name to it, as well as her mother's. This account was at PCY & Co and then SSL; a different account from the one she is claiming 50% in.

[17] She states that the respondent was not giving the proceeds from the fixed deposit at PCY & Co to his children and their mother. Those proceeds used to come from the financial institution in the form of cash. It was when an issue with the children's mother concerning cash began, that he asked the institution to draw a cheque, instead of paying cash, for a paper trail. It would only be true to say that the proceeds held at PCY & Co, now SSL, in the account in both parties' names were given to the respondent's children and their mother whilst a minimal amount came to the parties' household. When the respondent had financial issues with his children's mother, he would ask the institution to cut a cheque to her in order to create a paper trail.

[18] When asked if paragraph 40 of her affidavit filed May 14, 2013 was true, *"that the proceeds from then from the fix [sic] deposit held at Paul Chen Young & Co. Ltd.*

Now Stocks & Securities Ltd. In both our names was giving [sic] to his children and their mother while a minimal amount came to our household", the applicant responded that it was not a yes or no answer, and that as she had said before, that was done to create a paper trail since the children's mother was claiming that the respondent was not maintaining his children.

[19] Mrs. Hew vaguely recalled a letter from Hugh Croskery from SSL stating that Mr. Hew solely made the initial investment and this she said was not true. She admitted that she did not bring any evidence to show she had ever put any money into the account. She denied ever seeing a document exhibited by Mr. Hew that stated that the relevant account was initially opened with the names Raymond Hew and Elaine Lewis, and the children's names were added to the account. Upon being shown this document, she said it was not a true representation of the facts.

[20] Mrs. Hew further stated that she signed the individual account opening form, but could not recall if the account number was 22153 (the relevant account). She knows, though, that the children's names were not on it. Upon being shown the opening form that was exhibited to her own affidavit (June 18 2014), and identifying the document, Mrs. Hew admitted that the names of the children, Abigail and Raymond Jr. were stated on the document, but disagreed that when the document was signed by her, the children's names were on it. She explained that the form came about when the divorce had started and she was called to sign the form based on a change in protocol at the institution. Upon going there, she was informed that the respondent had enquired if his children's names would be re-added to the form. She informed them that the children's names were on the form. She didn't have an issue with this and just signed it. The document has no date.

[21] When asked if the account had the number 22153 when it was opened, Mrs. Hew stated she believed that at the time it was opened it had a different number. Although she did not remember whether the same account number travelled from PCY & Co to SSL, Mrs. Hew admitted that in her June 18, 2014 Affidavit, at paragraphs 7 and 8, she stated that she had attended the offices of PCY & Co and

completed the bank's signature's cards, at which time the account number 22153 was assigned to the account.

[22] She requested via letter dated November 1, 2013, that SSL pay her 50% of the interest from the relevant account. She has been receiving 50% of the interest ever since, usually between $25000.00 - 29000.00 (Jamaican) per month (applicant's Affidavit for Specific Disclosure filed April 2, 2014).

[23] She was not aware that Mr. Hew had the same account coming from Eagle Merchant Bank (EMB). When asked whether she was in a position to dispute Mr. Hew's evidence that the account at SSL came from EMB, Mrs. Hew stated that it was not a yes or no answer and that whatever went on at EMB she could not speak to. She knew that he used to work at EMB but could not recall that account coming over to each company.

[24] It was an agreement between both parties that she receive 50% of the interest. The respondent had objected to this, but the company wrote a letter requesting an official document indicating that this would be the situation going forward or else they could not share the proceeds. The respondent wrote a letter to SSL to freeze the money on the account. Closer to the end of the month when the proceeds would have been due, the respondent wrote another letter to the institution asking them to share the money 50/50. It proceeded on this basis. She denied that the respondent only did this because he would suffer too.

[25] Mrs. Hew agreed that, before the net interest to be divided is paid out, the company pays maintenance bills for the respondent. Two cheques are cut for two different stratas for property maintenance in respect of the property he currently resides in and there is also another that he rents out. One that he had prior to meeting the applicant. She believes that this should be taken from his half share because she wasn't gaining any benefit from it. She does not believe that the children would be entitled to a share of interest generated from the account.

[26] The parties made investments in Olint that disappeared because of Olint's situation. They were both sued. She did all the monthly calculations for the investments in the Olint account. There was another fixed deposit account in both their names. It was her account. She admitted that Mr. Hew had removed her name from the account in question after they had an argument. She could not remember whether that was in 2009, 2010 or earlier. The company later implemented policies to allow for both parties to sign to remove a name, but prior, to that anyone could remove a name. Her name was re-added in the same week it was taken off. The account was built up over time and produced sufficient interest. She disagreed with the suggestion that the relevant account was never built up over years, but agreed that she had said that the respondent used the interest to maintain the children and a minimal amount came to her.

[27] In **re-examination**, Mrs. Hew sought to make it clear that the account opening document was not from files that SSL had there. It was drawn up throughout the process of the divorce. This, again, I find inconsistent with paragraph 4 of her affidavit filed May 14, 2013, the applicant, in response to paragraph 3 of the respondent's affidavit filed November 12, 2012, had stated that "the account referred to by the respondent had the petitioner's [applicant's] name on it from the account was held at PCY & Co., and then subsequently renamed to SSL, where both parties signed the opening form".

B. *THE RESPONDENT'S EVIDENCE*

[28] The respondent's evidence is contained in his viva voce evidence as well as three (3) affidavits filed November 12, 2012, March 18, 2014 and July 11, 2014.

[29] He states that the account at SSL is in the names of Natalee Hew, Raymond Hew, Raymond Hew Jnr. and Abigail Hew. This account, on February 20, 2014, had a balance of JA$9,653,876.78 (respondent's Affidavit for Specific Disclosure, March 18, 2014). The monthly interest in the sum of JA$17,000.00 to $24,000.00 is paid to the parties.

[30] He denies that the account was opened in 2003 as alleged by the applicant. He states that the account was opened several years prior to him having met the applicant. He has had the investment for around twenty years from when he had worked at the company, EMB, which is now called SSL. The account and funds initially came from EMB, which was transferred to PCY & Co and when PCY & Co closed, to SSL. The applicant has never contributed to the funds. All funds were provided solely by him. The applicant's name was added in 2003 when the funds were transferred to SSL. It was not intended that she would have a share in the investments; her name was only added as a matter of convenience as she was his wife. If he died she would be able to handle things and take care of his children. He made no gift to her as alleged, and at all material times the account had the names of his two (2) minor children.

[31] At different times during the investment he had placed persons on the account and taken them off as convenience dictated. The applicant could only withdraw interest if he gave permission. On most occasions he collected the interest himself.

It is from these same funds in SSL that he got the money to invest in Olint, and it is from both of these investments he got the cash to invest in his real property. The applicant has never contributed to these investments.

[32] He denies the applicant's allegation that returns from the properties and investments were used to cover normal living expenses for both of them as their only source of income. During the marriage he allowed the applicant to take money from the investments to pay the utility bills, but if she needed money for other reasons she would request to use it. He also gave her some money from the funds toward her schooling. She once took US$6000 from the account without his permission, but when he expressed his displeasure she paid it back.

[33] At various times during the marriage, the applicant engaged in work from which she gained income. These include a jet ski business venture in Negril with her sister from which she derived United States dollars; a job at an air conditioning

company in Spanish Town and a job at Guardian Life that he assisted her in getting. She never contributed any money from these sources of income to the investments. It is not true that the applicant currently had no source of income as she had taken $500,000.00 from him upon leaving. She has a property in Negril which she built up from funds he gave her from the investments. He believes she is deriving rental income from this property. She finished her studies and obtained a degree in Human Resources, with the support of his money. During the marriage she also saved up funds from the investments that he gave her, from which she built a property in Negril on a plot of land owned by her father. He gave additional funds for the property's construction. She solely collects rent from this property.

[34] Throughout most of the marriage, he hired a helper who looked after the household duties.

[35] As at the date of his affidavit filed November 12, 2012, he was unemployed, and had been for around ten (10) years. His investments and properties were his only source of income. He has not had any tertiary education and does not have a wide earning capacity. He has to be concerned with the needs of his children, who were aged 10 and 13 at the date of his affidavit of November 12, 2012. These needs were likely to climb upon them attending tertiary institutions.

[36] He only agreed for the interest to be divided equally between himself and the applicant as he needed the money and SSL refused to pay out the interest to him alone. The applicant had attempted to have his name removed from the account, but this was refused and SSL decided to pay her half of the payments from the account pending the decision of the Court. In any event, he asserts that since there are four (4) names on the account, his children would be entitled to fifty percent (50%) of the interest at the very least.

C. *DOCUMENTARY EVIDENCE*

[37] The following documents were tendered and admitted into evidence as exhibits:

i. **Statement of account from SSL** (exhibit 1) dated March 23, 2009 indicating a balance of $287,973.55 brought forward as at said date in respect of account #22153.

ii. **Email from Wealth Advisor** of SSL, Jean-Ann Panton, sent March 14, 2014, to Chairman & Executive Wealth Advisor, Hugh Croskery (exhibit 2) – This email states that SSL's records shows that the relevant account (account # 22153) was initially opened with the names Raymond Hew and Elaine Lewis, and that his children's names (Raymond Hew (Jnr) and Abigail Hew) were then added. The email also indicates that, in 2003, Mr. Hew removed Elaine Lewis' name from the account and then added Natalee Williams whose name was amended to reflect Natalee Hew upon their marriage, and the updated documents were then completed with Mrs. Hew as the primary account holder and Raymond Hew (Snr) &/or Raymond Hew (Jnr) and Abigail Hew.

iii. **Undated SSL Individual Account Opening Form** (exhibit 3)– The form has Mrs. Natalee Hew as the principal of the account (account # 22153), whilst Mr. Raymond Hew's name is indicated under the section entitled emergency contact, as well as the first name entered under the heading "*Account Details (limit 3)*". The two children's names appear underneath. On the bottom of the same page, under the heading "*Signatories*", the Principal is indicated as Natalee Hew, and underneath Raymond Hew is indicated as a joint holder. Of note is that beside the heading "Signatories" there is an instruction to *"Please indicate in the box to the right, either "A" or "B"; "A" – signs alone "B" – signs jointly)"*. Both parties indicated "A".

iv. **Receipt for Deposit to SSL account** (account # 22153) (exhibit 4) dated April 18, 2008 in the sum of US$35,000.00.

v. **Letter from Mrs. Hew to SSL** (exhibit 5) dated 1st November 2013 requesting that the interest to be paid on the account "be paid going forward with 50% issued in cheque to Natalee Hew".

THE APPLICANT'S SUBMISSIONS

[38] The applicant proposes that she is entitled to a half share of the account based on the presumption of the law of equality under Section 6 of the Property (Rights of Spouses) Act (PROSA), which includes money.

[39] In respect of this proposition she relies on the common law cases of **Stack v Dowden** [2007] UKHL 17 and **Abbot v Abbot** [2007] UKPC 53 that where property is held jointly in the names of two parties, the party who asserts that the interests are to be held otherwise has the burden of proving why this should be so and submits that the respondent has failed to discharge this burden.

[40] The applicant further relies on **O'Connor v Shearer and Another** HCV 291 and 2769 of 2005, **Fowler v Baron** [2008] EWCA (Civ) 377, **Gissing v Gissing** [1970] 2 All ER 780, **Pettitt v Pettitt** [1946] 2 All ER 384. ***Gissing*** and ***Pettitt*** are relied on for the principles in respect of common intention and constructive trust. In that regard, the applicant asserts that the evidence discloses that the parties always shared a common intention to acquire property jointly for their joint benefit, and although both parties started the account, she would have been prepared to accept that the respondent would be entitled to 50%, even if it was held solely in her name.

[41] **Jones v Maynard** [1951] Ch. 572 is cited for the stance that each party is entitled to an equal share based on the principle of equality. She submits that where the husband and wife opened a joint bank account, the Court held that the principle of equality ought to be applied, and that the wife was entitled to a half of the final balance and half of the value of the investments existing at the date when the account was closed.

THE RESPONDENT'S SUBMISSIONS

[42] The respondent submits that the claimant should not be awarded any beneficial interest in the relevant account as she made no contribution financial or otherwise to the acquisition, conservation or improvement of said property, and it would be manifestly unfair for her to benefit therefrom.

[43] It is submitted that PROSA is the only applicable legislation in the case at bar, and that the relevant property falls within the definition of property under Section 2(1) of the Act. Accordingly, the factors to be considered are those set out under Section 14 of the Act. The applicant does not meet those factors.

[44] It is argued that, where a party seeks a share in this type of property (property that is not the family home), that party must show their contribution, whether financial or otherwise, to the acquisition, conservation or improvement of the property in question, and that the applicant has made no such contribution. The respondent maintains that all the funds in the account were due to his sole efforts and the applicant made absolutely no contribution whatsoever. Further, it is submitted, there was no assertion by the applicant, either in her affidavit evidence or viva voce evidence, that the applicant had put her own money into the account. On her own evidence, it can be deduced that the applicant invested no money in the account, based on her continuous assertion that the money was a gift to her. Moreover, her assertion that the money in the account was built up over time due to money from other investments, including Olint, does not assist the applicant, as it is her own evidence that this money came from the interest from the relevant account itself.

[45] In relation to the source of funds used to 'build up' the account, it is also argued that the applicant provided no documentary evidence, and she contradicted her position that the money in the account was 'built up over time', when she 'conceded' that the investments failed to materialize.

[46] Section 14 of the Act, it is asserted, does not contemplate gifts and in this respect relies on the case of **Thomas v Thomas** [2016] JMCA 57. Reliance is also placed on the decision of **Abbot v Abbot** [2007] UKPC 53, which it is submitted, was

considered by the Court of Appeal in **Thomas** in respect of the presumption of advancement.

[47] It is further asserted that since there are four (4) persons on the account, the Court could not award the applicant more without disturbing the shares of the other holders of the account consequently the Court is barred from making a determination in respect of the beneficial interest held by the children as the children are not parties to the application.

[48] In respect of the evidence, it is submitted that that of the respondent ought to be preferred as it is supported by documentary evidence.

[49] The respondent argues that, as he was able to remove the applicant from the account and re-add her at will, which is undisputed, is an indication that the respondent acted as the sole owner of the account. It is submitted that the respondent has been the 'only constant' since the opening of the account. The bank account existed long before the parties were married. His aunt was placed on the account. The children were added; the aunt was taken off and replaced with the applicant. Subsequently the applicant was removed and then re-added.

[50] In placing reliance on what the money in the account was used for, it is asserted that the applicant, in cross-examination admitted that the money was taken from the account and given to the children's mother. This is in line with his contention that the money in the account was for the use and benefit of the children. The respondent further contends that it is significant that the applicant failed to press the respondent on her assertion that the money had been a gift, albeit that she was unrepresented.

[51] It is also contended that, by virtue of Section 12 of the Act, which provides that the interest of a spouse ought to be determined as at the date of separation, the fact that dividends are now paid out equally to the parties, and have been so paid since separation, does not assist the applicant. The only reason the payments are being divided equally is because the respondent consented to these payments after the

bank froze his account pursuant to a written request from the applicant. Further the funds only became available after he agreed for the funds to be shared with the applicant.

The respondent submits that the applicant's behaviour at the hearing was not consistent with a witness of truth, as she was abrasive and difficult. When confronted with contradictory evidence stated she could not recall.

[52] In relation to hardship, it is submitted that the Court ought to have regard to the property that has been transferred to the applicant in the matter, and that the respondent is unemployed "unable to enjoy the fruits of his investment and hard work over the life of his career". In that regard, it is posited that it would be unjust if the Court does not refuse the orders sought. Although, she has been receiving 50% of the interest, the applicant is not entitled to such, and therefore has received this money to the detriment of the respondent and his children. It is contended that this money ought properly to be repaid by the applicant to the respondent.

[53] Consequently, it is submitted, any presumption of advancement that would apply to the applicant would apply to the children also, and the Court ought to find that the presumption of advancement has been rebutted. The Court also ought to make an order removing the applicant's name from the account.

ISSUES

[54] I find that the following issues of law arise:

i. Is the applicant entitled to a beneficial interest in the relevant account?

ii. If so, is she entitled to a 50% share?

In assessing the issues of law, the following issues of fact arise for determination:

a) When was the account opened? Is the relevant account one and the same as that opened by the respondent at EMB?

b) What was the intention of the parties as it relates to beneficial interest when the account was started?

LAW & ANALYSIS

[55] **Section 13(1)** of **Property (Rights of Spouses) Act (PROSA)** entitles a spouse (including former spouse) to apply to the Court for division of property in specified circumstances, such as where the parties have separated and/or are divorced among others. There is no dispute that the applicant falls within the circumstances of the section and is therefore entitled to bring her claim.

[56] By virtue of **Section 2(1)** of **PROSA** which defines "property" 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 other right or interest whether in possession or not to which the spouses or either of them is entitled"*, the relevant property, money in the SSL bank account, qualifies as property that can be divided by the Court.

[57] **Section 14** of **PROSA** empowers the Court to divide property other than the family home based on the factors outlined at subsection (2). It provides**:**

> *"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 or 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.

[58] **Section 15** (1) further empowers the Court to make an order altering the interest of either spouse in property other than the family home "*as it thinks fit*" **sub-section (2)** prohibits the Court from making such an order unless it is satisfied that *it is just and equitable to do so*, **sub-section (3)** requires the Court to consider the following:

> *"(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."*

[59] In relation to the entitlement of a spouse to property, **Section 4** of the **Act** sates:

> *"**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 provisions are made by this Act, between spouses and each of them, and third parties."*

How this provision is to be treated by the Court was enunciated by Morrison JA in **Glenford Greenland v Camille Greenland**, Court of Appeal, SCCA No. 71/08

(oral judgment delivered January 20, 2009). The learned Judge of Appeal expressed that notwithstanding the fact that the above section precludes the presumptions of common-law and equity in respect of property falling under the Act, *“what section 14(2) does is in effect to import the same things that would have been of significance in determining the legal position when the property was owned jointly before the Act, which is to say contribution, agreement between the parties, duration of the marriage and other relevant factors”* (page 6).

Morrison JA concluded that the Act does not entirely rule out *‘a consideration of the earlier approach under the common law because the factors in section 14(2) to some extent replicate what was the former law’*. That is to say that the Court may have regard to the common law approach to the extent that such is embodied in the requirements set out in **Section 14(2)**.

[60] Both parties have relied on common law cases dealing with the equitable presumptions and rules. The applicant in particular has relied on the equal share rule in **Section 6** of the Act, and the common law cases that speak to equal sharing of property and the common intention of the parties. The respondent focused on the element of contribution in **Section 14(2)** and its assertion that the applicant made none to the relevant account. In short, the applicant relied more heavily on the common law principles than on the provisions of **Prosa** unlike the Respondent.

[61] **Section 6** of the **Act** clearly does not apply as the relevant property is not the family home as is required for that section to become operational. The section provides:

> *“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 . . . .*

[62] It seems to me that there is nothing in **Section 14(2)** to indicate that the question of contribution is the overarching determinant of a spouse’s entitlement to ‘other property’, as is inferred by the respondent. In fact, that section, as well as **Section 15**, quite clearly indicate the other factors that ought to be taken into account, and

the requirement that the Court is 'satisfied that it is just and equitable' in all the circumstances, to make whatever order it is making looms large. In **Eutetra Bromfield v Vincent Bromfield** [2015] UKPC 19, Lord Wilson said the following in relation to the approach that the Court ought to take in circumstances involving division of property between spouses under **PROSA**:

> *"5. … **The Property (Rights of Spouses) Act** (which also, and enviably, confers rights on certain non-marital cohabitants) **confers** on the court following divorce limited redistributive powers in relation to the family home and **wider such powers in relation to other property: sections 13-15. It requires the court, in any redistribution of other property, to take into account not only the financial contributions, direct or indirect, which would have been relevant to the creation of an equitable interest in property but other contributions and indeed all other circumstances which the justice of the case requires to be taken into account: section 14(2) and (3)**." [emphasis added]*

[63] Taking the **Section 14(2)** factors, into consideration the first one of note is that the applicant made no contribution to the funds in the account. This she readily admitted, in that, her case has consistently been that the funds in the account were a gift to her, as well as, and conflictingly so, that the account was to be for both parties as a married couple. The defendant disputes the application mainly on this ground, and asserts that **Thomas v Thomas** [2016] JMCA 57 shows that **Section 14** of the Act does not contemplate gifts but requires contribution. I am not attracted to this assertion. From a reading of the section, I am unable to find anything to indicate that a spouse cannot be held to have an entitlement to a share in 'property' if such entitlement arises from a gift, rather than contribution.

[64] I have found that contribution is not the only factor to be considered by the Court, neither is it the overarching factor or condition precedent. Further, **Section 14(4)** states that ". . . there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution". Hence, I do not find the words of Phillips JA in **Thomas** to be precluding gifts as has been submitted. I form the view that the point that was being made was that a legal interest in property by way of a name endorsed on title is not one and the same as the beneficial interest in the

title, in that, regardless of the reason for the appellant's name being placed on the title, whether by way of contribution or gift, the court had a duty to examine the extent of the appellant's beneficial interest in the property. At paragraph 61 of ***Thomas***, Phillips JA stated:

> *"...If he had not made any financial or other contribution to the acquisition of the property (as the learned judge so found) and the property was not being given to him **for love and affection**, the question would be: what would have been his entitlement to an interest in the property at the time?" [emphasis added]*

I find, therefore, that a transfer based on love and affection may well be considered.

[65] In assessing the approach to how the property should be divided, she said the following at paragraph 67:

> *"There was no indication as to how the beneficial interest was to be shared by the parties. On the basis of all the authorities, the presumption would be that the interest would be shared equally. However, that presumption is rebuttable by evidence to the contrary, for example, "evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship" (see Lord Hope in **Stack v Dowden** [2007] UKHL 17 at paragraph 8). One would also have to examine the general intention of the parties by the conduct of their affairs throughout the marriage with particular regard to this deputed property (see **Stack v Dowden** and **Abbott v Abbott** [2007] UKPC 53)."*

[66] The learned judge then went on to decide that the judge at first instance was correct to conclude that the appellant had made minimal contribution to the property and thus was entitled only to 5% interest, commensurate with his contribution. She then went on to assess the issue under **PROSA**, finding that such an assessment would yield no different result. She stated that this was so because one would have to review the factors set out in **Section 14(2)** which constitute contribution under the **Act**, and that there had been no evidence of contribution by way of any of the factors set out therein.

[67] In the case of **Joycelin Bailey v Durval Bailey** [2016] JMCA App 8, an application for a stay of execution of judgment pending appeal, in dealing with entitlement of spouses to funds in a joint account, Phillips JA again dealt with a similar issue to that in **Thomas** (***Bailey*** being delivered prior to ***Thomas***), at para. 51, stated:

> *"...I agree with the submissions of Counsel for the respondent that the general principle in relation to joint accounts is that monies held therein belong to the account holders in equal shares."*

[68] This finding was on the principles espoused in **Jones v Maynard**, which she described as the leading case on the subject, quoting Vaisey J at page 575 (para. 51).

> *"In my judgment, **when there is a joint account between husband and wife, and a common pool into which they put all their resources**, it is not consistent with that conception that the account should thereafter (in this case in the event of a divorce) be picked apart, and divided up proportionately to the respective contributions of husband and wife, the husband being credited with the whole of his earnings and the wife with the whole of her dividends. I do not believe that, when once the joint pool has been formed, it ought to be, and can be, dissected in any such manner. In my view a husband's earnings or salary, when the spouses have a common purse, and pool resources, are earnings made on behalf of both; and the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid in by the husband or the wife, is quite inconsistent with the original fundamental idea of a joint purse or a common pool. [emphasis added]*
>
> *...*
>
> *I think that the principle which applies here is Plato's definition of equality as a 'sort of justice': If you cannot find any other, equality is the proper basis. When moneys were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality, and not some proportional entitlement to be arrived at by an inquiry as to the amounts contributed respectively by the husband and wife to the common purse. Where one is searching for justice, as one must, and cannot find any other secure and sound basis, I think that equality is the best rule."*

[69] Reliance was placed on **In re Bishop (deceased) National Provisional Bank Ltd v Bishop** for the approach the Court should take in these circumstances. In that case the Court held at pages 458-460 (as cited in Bailey) [1965] 1 Ch 450:

> *". . . In the absence of some circumstances or some evidence of intention that the joint account was to have a limited operation or was set up and kept up for some special purpose, each spouse has power to draw on the joint account not only for the benefit of the spouses but for his or her own benefit.*
>
> *...the circumstances in relation to the joint account have to be regarded in order to ascertain the reason for its existence and to see whether it existed for some specific or limited purpose.*
>
> *...**in considering what the intention of the parties is, one has to look at the surrounding circumstances. For example, one may take surrounding circumstances into consideration so as to decide whether a transfer into the name of the wife is a gift or whether a resulting trust is intended**..." [emphasis added]*

[70] Accordingly, in ***Bailey***, Phillips JA noted at para. 54 that what the Court was required to do was 'to assess whether the relevant joint accounts were for some specific purpose and were to have a limited operation'. In finding that the applicant had no real prospect of success in asserting on appeal that the trial judge erred in finding that the respondent was entitled to 50% of the funds in the accounts, and that the applicant was to account therefor, her Ladyship considered that the purpose of the account, as could be gleaned from the evidence, was for the parties' savings and pension, and that the funds were rolled over to allow them to increase for that purpose. As such, the applicant's "willy-nilly" withdrawal of sums and removal of the respondent's name and addition of the children's names in lieu thereof, without the respondent's consent, did not appear to be in keeping with the original purpose relative to the opening and operation of the account.

[71] It is to be noted, however, that while the rationale of the court cases is that the Court will not "pick apart" the sums contained in the joint account in such cases to decipher the proportion contributed by each party [see para. 52 in **Bailey**], in the

case at bar there was no 'pooling of funds' as there was in ***Bailey*** and ***Thomas***, as only the respondent provided funds in the account.

[72] It is also to be noted, however, that, ***Bailey*** was not decided based on the principles of **PROSA**, and as such there was no assessment of the **Section 14** factors or mention of the exclusion of common law and equity presumptions in **Section 4**. Phillips JA, although rejecting the presumption of advancement as being no longer relevant, applied the presumption of resulting trust. In ***Thomas***, In taking a similar approach, her ladyship first applied common law principles in assessing the division of property between the spouses, and thereafter, alternately, assessed the matter under **Section 14** of **PROSA**, to which she found the result would have been the same. In ***Thomas***, there was also no mention of the exclusionary provision in **Section 4**. It seems to me that this approach, notwithstanding the exclusion in **Section 4**, based on these authorities and in light of the dicta of Morrison J in ***Greenland***, it may be permissible for the Court to have regard to presumptions of resulting trust and equality.

[73] I find the case of **Clover Robinson v National Commercial Bank &Ors** [2015] JMCA Civ 3 useful, albeit that the issue before the Court was survivorship rights in respect of two (2) joint accounts wherein the original holder died only days after adding the appellant to the accounts as joint holder. The Court was concerned with the issue of whether, the surviving account holder, although holding a legal interest in the funds in the accounts, also held the beneficial interest, considering that she had provided none of the funds held therein. At paragraph 27, Brooks JA discussed what he described as 'established principles' in matters of this nature. The first of note, is that "a gift of pure personalty, by way of transfer, raises a presumption of a resulting trust in favour of the transferor" (**Fowkes v Pascoe** [1874-80] All ER Rep 521; **Pecore v Pecore** [2007] 1 SCR 795.

[74] Secondly, the presumption is rebuttable by evidence that the transfer was intended by the transferor to be a gift to the transferee (**Bank of Nova Scotia Trust Company (Caribbean) Limited v Simeon Smith-Jordan** (1970) 15 WIR 522), or

may be displaced (under the common law) by the presumption of advancement which reverses the burden of rebuttal by presuming the transfer was a gift and requiring the transferor to show that it was not (in cases of special relationship such as husband and wife or parent and child).

[75] Thirdly, evidence other than that of a documentary nature may be used to rebut or displace the presumption, such as circumstances that indicate the transfer was for convenience rather than a gift [**Marshall v Crutwell** (1875) LR Equity Cases 328; **Stoeckert v Geddes** PCA No 66/1998 (delivered 13 December 1999); **Reid v Grant and Reid** (1976) 14 JLR 176]. This evidence of rebuttal may show the intent of the transferor, and if that intention was changed over time this would also be considered.

[76] Fourthly, a statement in the terms of the joint account that the funds are available to either account holder during their joint lives and upon death is conclusive of legal interest but not necessarily the beneficial interest.

[77] Accordingly, Panton P in his judgment in **Clover Robinson** opined that 'the entitlement to a beneficial interest in funds in a joint account will depend upon the application of the presumption of a resulting trust and whether it has been displaced or rebutted', and that the circumstances of each case must be examined to assess whether the relevant funds are to be considered as 'remaining the property of the transferor in equity, or a gift to the transferee.

[78] Based on the above, I have formed the view that the approach to be taken in relation to division of joint bank accounts is as follows:

i. Ordinarily, the starting point when a question of division of a joint bank account arises between spouses is that the account is to be divided in equal shares where both parties have contributed financially and pooled their funds, regardless of the proportion of financial contribution by each party. However, the equal shares may be varied based on the circumstances, such as cogent evidence of a higher contribution by one

party, evidence of an intention that a gift was intended, or evidence that the account was for a specific and or limited purpose. **[*Bailey v Bailey]***

ii. Where only one person provides the funds, there will be a resulting trust in favour of the person who provided the funds, in that the other person holds the beneficial interest in the funds on trust for him or her. This may also be rebutted by evidence that the funds were intended to be a gift from the provider of the funds to the other account holder, in that the provider intended for the other person to have a beneficial interest in the money, or evidence that the money was intended only for a specific or limited purpose.

iii. It seems to me that what is crucial in matters of this nature is the intention of the parties as to who is to hold beneficial interest in the property. Was it intended to be a gift from the spouse who provided the funds to the other spouse? Was the other spouse added as a matter of convenience or for some other special purpose? Was it intended that the party who did not contribute financially was to have a beneficial interest (See **Heseltine v Heseltine** [1971] 1 All ER 952; **Clover Robinson v National Commercial Bank &Ors** [2015] JMCA Civ 3).

iv. PROSA adds the element of non-financial contribution as being referable to an entitlement to the funds.

Was the account/money intended to be a gift to the applicant? Was it intended for a limited purpose?

[79] It is undisputed that the applicant did not put any money into the account and as such, I find that the account was not a ‘pooling of resources’ that might compel the court to divide it equally. The applicant’s evidence as to the circumstances in which the account was started is unreliable. She deponed that the money in the account was a wedding gift to her from the respondent, but thereafter gave evidence that the account was treated as theirs together as newlyweds. She stated that they

made an agreement that neither of them would withdraw the principal balance without the consent of the other party, and the monthly interest cheques were drawn up in the names of both parties.

[80] It is interesting to note that the even though the applicant states that she would withdraw sums from the account without the consent of the respondent or having to account to him, she speaks specifically only to making withdrawals for bills and expenses on the couple's behalf. On the evidence, the money in the account was used to pay maintenance fees for properties held by the respondent, as well as expenses for the children. There is no evidence that the applicant used money from the account for her own personal affairs. In fact, she gave evidence that the money that she earned from certain employment she used to take care of her personal needs and buy groceries. The ways in which the money was used leads me to believe that the account was for family expenses. I find that if it were a gift to the applicant she would have been at liberty to use the funds as she pleased for her personal use.

[81] I find the applicant's testimony less reliable than that of the respondent, and accept the respondent's unchallenged evidence that the account was started from when he used to work at EMB. This coupled with exhibit 2 the email indicating that the account was started with the names of the respondent and Elaine Lewis buttress this finding. I also accept that the children's names were on the account prior. However, I am of the view that whether the account was started before or after the respondent met the applicant, the pertinent question is: what was the intention with which she was added as a joint holder? The e-mail indicates the applicant was added in the year of their marriage as she deponed, but the evidence of how the funds were used throughout the marriage, indicate that the money was used to take care of bills and expenses and other family needs. Both parties had access, jointly and severally, to the account. On this basis, I conclude that the account was not a gift for the sole use of the applicant, but was an account for the parties to take care of the needs of their new family.

[82] I have also formed the view that there was no intention for the applicant to have a beneficial interest in the funds outside of taking care of the bills and expenses of the family. This is evident from the fact that the applicant used the money she earned from her various jobs to purchase personal items, as well as for her school fees which she paid for "from her own resources". This is the applicant's evidence.

Did the applicant make a non-financial contribution referable to the acquisition, conservation or improvement of the funds in the account?

[83] The applicant made no financial contribution to the funds in the account. **Section 14(2)** of **PROSA** makes it clear that non-financial contributions made by a spouse fall within the definition of 'contribution' that may give that spouse an entitlement to a share in property. Contribution is defined in section 14(3) as follows:

> *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 dependent 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*
>
> *(2) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution. [emphasis added]*

[84] The applicant gave evidence that she cared for the respondent's minor children from his previous marriage, including cooking for them, combing their hair, getting them dressed for school, and doing homework. She managed the household affairs and did the household chores. The respondent encouraged her to resign from more than one job on the basis that, in his view, she didn't need to work, and likewise, discouraged her from her studies that he didn't see the need for further studies. She deponed that he did deliberate acts to derail her study periods, such as bringing the children for her to take care of for weeks at a time. Despite this, she was able to complete a diploma in management studies and an associate of science in business administration that she paid for herself. There is also evidence that she started a Bachelor of science program in human resources management, which she has completed. Her testimony is that whilst in school, she managed the investors on the respondent's Olint account by providing receipts for deposits, generating emails, doing monthly calculations for interest to be paid, making arrangements for funds to be collected, packaged and delivered as well as balancing the books. The respondent's evidence on the other hand, is that he had hired a helper for most of the marriage.

[85] However, there is no evidence that the applicant used any of the money she earned at her various jobs to contribute to the household expenses, or that she did any of the other factors outside of caring for the children, managing the household

and assisting with the management of the investments. The question that arises is whether these things amount to a direct or indirect 'contribution' to the acquisition, conservation or improvement of the relevant property? I am of the view that they do. This is so because these actions are things that would have cost the respondent money if he were to have hired persons to do all the work for him. The parties being married for about ten (10) years.

[86] In dividing the relevant property, I also consider that the applicant has tertiary level qualifications while the respondent does not. She is also younger than the respondent, which gives her a greater earning capacity than the respondent. The respondent was unemployed for about ten (10) years and his investments, including the relevant property, are his only source of income, whilst the applicant has been employed on and off throughout the relationship. At the date of his Affidavit of Disclosure, March 17, 2014, the respondent had two (2) properties from which he was collecting rental income, outside of the SSL account from which he received income. At the date of her Affidavit of Disclosure, April 2, 2014, the applicant had one (1) property from which she received rental income, outside of the interest she was receiving from SSL. Based on all the circumstances, I find that it is fair to award the applicant 25% of the moneys in the account.

[87] I could not find that the children would have a beneficial interest in the account, on the basis that the addition of their names to the account, without more, does not create a trust in their favour, and that the presumption of a resulting trust would apply.

DISPOSAL

[88] The authorities dictate that where a joint bank account stands to be divided between spouses, where the parties have pooled their resources, the starting point is that the account is to be divided equally. However, if only one party provided the funds, the account is to be divided based on a presumption of resulting trust. This would mean that the non-contributing spouse would hold the funds on trust for the

contributing spouse. These presumptions, of course, may be overridden by evidence of a contrary intention or that it was intended to be a gift from one spouse to the next, or that the account was for a limited purpose.

[89] In the context of **PROSA**, the question of non-financial contribution is a factor that can discharge the presumption of resulting trust. In the court's consideration, what is just in all the circumstances looms large.

[90] In this case, the parties did not pool their resources, but rather, the respondent provided all the funds in the account. The funds were used to further invest, pay household bills, property maintenance fees, and to pay for the care of the respondent's children. In my view, these funds were not a gift to the applicant but were intended to take care of the needs of the family. This is also evident from the evidence that the applicant used money from her employment to take care of her personal needs. The applicant also gave evidence that she had other investments in her name only.

I find that she assisted in taking care of the respondent's children from a previous marriage, managed the household and the investments and these actions in my view to amount to a non-financial contribution to the property that entitles her to a beneficial interest in the property. I would therefore award the claimant 25% of the sums and amount held in the SSL account.

ORDER

1. The applicant is entitled to 25% of the sums and amount held in the SSL account.

2. The applicant pays 75% of the respondent's costs

3. The respondent pays 25% of the applicant's costs.