



[2019] JMSC Civ 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 00603

BETWEEN

TREVOR HEWITT

CLAIMANT

AND

ARLENE HEWITT

DEFENDANT

Miss Karlene Afflick instructed by Frances J. Barnes of the Kingston Legal Aid Clinic for the claimant

Miss Petrina Williams instructed by Zavia Mayne & Co for the defendant

Heard: 14 November 2018 and 25 January 2019

Division of [matrimonial property]– Family home – Whether property falls within the definition of the family home – Other property – Whether court can treat with claim as if made for division of property other than the family home – Relevant considerations. Property (Right of Spouses) Act sections 2,13 and 14.

EVAN BROWN J.

INTRODUCTION

[1] Mr. Trevor Hewitt, the claimant, by Fixed Date Claim Form (FDCF), seeks principally two orders from the court. The first order he seeks is that the property located at 6 Melnox Crescent, Temple Hall, St. Andrew be declared the family home. The second order flows from the first and is in the following terms, that he and the defendant, Mrs. Arlene Hewitt, are each entitled to a fifty percent share

of the family home. The property is in the sole name of Mrs. Hewitt. As a corollary of those two orders, he seeks also consequential orders relative to the valuation and sale of the property.

Background

- [2]** Mrs. Hewitt is the sole legal owner of 6 Melnox Crescent, Temple Hall in the parish of St. Andrew, registered at Volume 1252 Folio 920 in the Register Book of Titles. Before her marriage to Mr. Hewitt, she resided in the dwelling house on the premises, from 1994, along with her parents, Mary and Thomas Tracey. Mr. and Mrs. Tracey became the registered proprietors as joint tenants in 1992. Mrs. Tracey predeceased Mr. Tracey in 1998 and her death was duly entered on the Certificate of Title on 1 April 1999.
- [3]** After the death of Mrs. Mary Tracey, the land was transferred, by way of gift, to Thomas Tracey and Arlene Odette Tracey (now Mrs. Arlene Odette Tracey-Hewitt), as joint tenants. This transfer was registered on the 11 August 1999. When Miss Arlene Odette Tracey became Mrs. Tracey-Hewitt on the 18 December 1999, the fact of her marriage to the claimant was not entered on the Certificate of Title until 10 December 2003, the same date the fact of Thomas Tracey's death on the 25th December 2002 was noted.
- [4]** Mr. Thomas Tracey met the claimant in 1998 when he became engaged to the defendant. Mr. Tracey allowed the claimant to move into the home after his marriage to the defendant. The wedding reception was held at the premises and that very night Mr. Hewitt began residing at the premises.
- [5]** Together, Mr. And Mrs. Hewitt first occupied a small side of the house downstairs. The upstairs section of the house was then incomplete. After the completion of the construction upstairs, they vacated downstairs and started living upstairs. That was in or about the year 2000. While they lived upstairs, other members of Mrs. Hewitt's extended family lived downstairs in the middle section of the house. The small side of the house, which Mr. And Mrs. Hewitt

previously occupied, was rented. The extended family members removed from the downstairs section of the house in about 2015. Subsequently, this section of the house was also rented.

Submissions on behalf of the claimant

- [6] The claimant's counsel made wide ranging submissions. I distilled from those submissions that she is asking the court to consider the claim in the alternative, although it was neither pleaded nor presented that way. Therefore, if the claim for a declaration that the home the parties occupied was the family home is refused, I should go on to deal with it as other matrimonial property. To that end, ***Carol Stewart v Lauriston Stewart*** [2013] JMCA Civ. 47; ***Marlene Davis v Hugh Ashley Davis*** ([2018] JMCA Civ 99; ***Graham v Graham*** 2006 HCV 03158 (delivered April 8, 2008); ***Stack v Dowden*** [2007] UKHL 17; and ***Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam*** [2018] JMCA Civ 15, (***Hugh Sam v Hugh Sam***) among other cases were cited.

Submissions on behalf of the defendant

- [7] Counsel for the defendant submitted that the property which is the subject of the claim falls outside of the legal definition of the "family home". Section 2 (1) of the ***Property (Rights of Spouses) Act (PROSA)*** was cited and the concluding words, "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", emphasized. The second submission, which is premised on the acceptance of the first submission, was that since the claim was not brought on an alternate basis, consideration of the further evidence is irrelevant. I understand "further evidence" to be a reference to the evidence of the parties' respective contribution to the expansion of the dwelling house. Counsel urged the dismissal of the claim in its entirety with an award of costs to the defendant.

Issues

- [8] Three issues arise for my determination. Firstly, whether the property located at 6 Melnox Crescent, Temple Hall in the parish of St. Andrew was the family home? Secondly, if the property located at 6 Melnox Crescent, Temple Hall in the parish of St. Andrew is declared to fall outside the legal definition, is it competent for the court to go on to treat it as other matrimonial property which falls for division under other provisions of **PROSA**? The third issue is, is the claimant entitled to a share in the beneficial interest of the property?

Discussion and analysis

Issue number one

- [9] I will discuss the issues in the numerical order set out above. Therefore, was the property located at 6 Melnox Crescent, Temple Hall in the parish of St. Andrew the family home of the parties? The “family home” is defined in the interpretation section of **PROSA**, section 2. I quote section 2 (1):

*““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**”.* Emphasis added.

- [10] Firstly, there is no dispute that the dwelling-house in question is wholly owned by one of the spouses, namely Mrs Arlene Tracey-Hewitt. Secondly, there is ample evidence from which to conclude that they habitually used the dwelling-house at 6 Melnox Crescent as their only family residence. Lastly, it is an accepted fact that Mrs Tracey-Hewitt became the legal owner of the house by way of gift upon the death of her mother. The question for resolution is, did Thomas Tracey intend for Mrs Arlene Tracey-Hewitt alone to benefit from his gift of 6 Melnox Crescent?

- [11]** There is no direct evidence of Thomas Tracey's intentions at the time when he gifted the property to Mrs Tracey-Hewitt. That notwithstanding, I am of the view that the answer is discoverable from the evidence. Having given thought to the issue, I return an unqualified yes to this question. Three reasons constrain me to this conclusion. The first reason is that Mr. Thomas Tracey chose to give the property to only one of his three children, notwithstanding the fact that the other two were adopted. Mrs Tracey-Hewitt was the youngest of the three and, it appears to me, may well have been the Traceys' miracle baby, coming as she did, after they had adopted, not one but two other children. By choosing to exclude his adopted children, Thomas Tracey clearly intended Mrs Tracey alone to benefit from his earthly possession upon his death. This takes me to my second reason.
- [12]** Since Thomas Tracey intended that Mrs Tracey-Hewitt alone, of all his children, should benefit from his gift of 6 Melnox Crescent, did he by that same token intend that Mr. Hewitt should not benefit? To answer this question, I have regard to matters which must have been within his knowledge at the time he transferred the property to Mrs Tracey-Hewitt. Thomas Tracey met Mr. Hewitt in 1998 when he and now Mrs Tracey-Hewitt became engaged. Mr Hewitt's engagement to Mrs Tracey-Hewitt would have telegraphed to Thomas Tracey that Mr. Hewitt was well-intentioned and was not just on a romantic pilgrimage through his daughter's life.
- [13]** In addition to that, in or about August of 1999, Mrs Tracey-Hewitt was about three months pregnant as, according to her, she was seven months pregnant at the time of her marriage. For a number of women, pregnancy that is either at the end of the first trimester or on the cusp of the second trimester is alike a city on a hill, it cannot be hidden. So, it is more probable than not that Thomas Tracey was aware of the fact of Mrs Tracey-Hewitt's pregnancy. If indeed he was so aware, this fact could only have fortified in Thomas Tracey's mind that Mr. Hewitt was putting down tap root and not fibrous roots.

- [14] Thomas Tracey would have had all these matters in mind when he contemplated making a gift of 6 Melnox Crescent to his daughter. If he intended Mr. Hewitt to benefit from his gift to his daughter he had it within his grasp to put the matter beyond doubt by simply including Mr. Hewitt in the transfer. When Thomas Tracey allowed the couple to reside in his home, he opened the door of kindness to Mr. Hewitt, then a man of thirty-five years. He could have, with as much ease, bestowed upon Mr. Hewitt a proprietary benefit, if he so intended. He did not. That he did not is evidence in and of itself that he intended only his to daughter benefit from his gift.
- [15] I turn to set out the third reason for my affirmative answer to the question whether the donor, Thomas Tracey, intended Mrs Tracey-Hewitt alone to benefit from his gift of 6 Melnox Crescent. Not only did Thomas Tracey exclude his adopted children from his gift to Mrs Tracey-Hewitt, he did not encumber it with any interest to extended family. Mrs Tracey-Hewitt testified that other family members lived downstairs for whom she had financial responsibility. When Thomas Tracey gifted the property to himself and Mrs Tracey-Hewitt as joint tenants, he had the option of making the same gift but as tenants in common. Had he proceeded by that route, he could have gone on to bequeath his share to her with a life interest to any of the extended family. He, however, chose a method of giving which ensured that his share of the property would automatically devolve upon his offspring at his death.
- [16] When all these factors are taken into consideration, the method of giving, the exclusion of adopted siblings and the awareness that Mr. Hewitt was to become Mrs. Tracey-Hewitt's lifetime partner, the mind is impelled to one conclusion. That conclusion is as inexorable as it is irresistible. It is that Thomas Tracey intended Arlene Odette Tracey alone to benefit from his gift to her of 6 Melnox Crescent. I therefore agree with the submission of learned counsel for the defendant. The property falls outside the definition of "family home" in section 2 of **PROSA** and, consequently, cannot be declared to have been the family home of the parties. The equal share rule under section 6 of **PROSA** is therefore of no

application. Therefore, Mr Hewitt would not be entitled to a fifty percent share in the beneficial interest of 6 Melnox Crescent, by virtue of that statutory rule or a variation of the rule under section 7 of **PROSA**.

Issue number two

- [17] That takes me to the second issue, since the property falls outside the legal definition of the “family home”, is it competent for the court to treat it as other matrimonial property which falls for division under the other provisions of **PROSA**? This issue raises a procedural point. In essence, the submission of counsel for the defendant is this, the FDCF is non-compliant with rule 8.8 (a), (b) and (c) of the **Civil Procedure Rules, 2002** (CPR) since it makes no reference to the relevant sections of **PROSA** which call for a division of other property. That non-compliance makes any evidence relevant to such a consideration mere surplusage and should be disregarded accordingly.
- [18] The importance of a party properly pleading its case cannot be gainsaid. Pleadings are analogous to an architect’s drawing. It tells those constructing the house what is required from laying the foundation to erecting the superstructure. So it is with pleadings. They alert litigants to the case they have to meet. For the court, the pleadings provide the framework in which to distil the issues and make sense of the evidence. For an able exposition on this see **Hugh Sam v Hugh Sam**, *supra*, at paragraphs 42 – 48.
- [19] That notwithstanding, although the FDCF does not include a claim for a division of 6 Melnox Crescent as other property, the court is competent to consider the claim under that head: **Sidney Gordon v Hyacinth Gordon** [2015] JMCA Civ 39 (**Gordon v Gordon**). According to Brooks JA, at paragraph 16, “[d]espite a claim having been filed on an inappropriate basis there is, however, nothing to prevent the court, **in a proper case**, from dealing with property involved, as being other than the family home”. Emphasis supplied. I understand “a proper case” to mean one in which the FDCF was filed in compliance with section 13 of **PROSA**. That

is to say, firstly, at the time of filing the parties' marriage had been either dissolved or annulled or the parties were hopelessly estranged. Secondly, the application was made within twelve months of whichever of the preceding events the claim was based or the requisite application for an enlargement of time had been considered ante.

[20] In the instant case, the FDCF, for all its pleading deficiencies, discloses a claim which falls squarely within the requirements of section 13 of **PROSA**. Firstly, the parties separated in or about October of 2016. Since then, the defendant filed an action for recovery of possession against the claimant in the Corporate Area Parish Court. From that action and the evidence before me, I find that there is no reasonable likelihood of reconciliation between the parties. Secondly, having separated in or about October 2016, this claim was filed on 22 February 2017, well within the twelve months post separation prescribed by section 13 (2) of **PROSA**. This claim is therefore, palpably, "a proper case" in which the court may go on to deal with 6 Melnox Crescent as other matrimonial property.

Issue number three

[21] That takes me to the third issue, which calls for a consideration of the claim under section 14 (1) (b) of **PROSA**. The court is empowered thereunder to divide other matrimonial property, as it thinks fit, taking into consideration the factors specified in section 14 (2). Those factors are:

"(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account”.

- [22] There was no argument between the parties with respect to the ownership of 6 Melnox Crescent. Therefore, section 14 (2) (d) is not a relevant factor in the instant case. Of the several relevant factor listed in the subsection, the claimant relies principally on financial contribution. He alleged that he made a substantial financial contribution towards the building of the upstairs section of the dwelling house at 6 Melnox Crescent. In his affidavit he said he and Mrs Tracy-Hewitt built two bedrooms upstairs, with living and dining quarters, two bathrooms and a kitchen. He alleged also that a one bedroom apartment was added downstairs. He contributed seven million dollars to the construction of these additions.
- [23] His source of income was the twenty thousand dollars per week that he earned at his cousin’s refrigeration business between the date of his marriage and 2004 when the business was discontinued. Subsequent to that, he earned an income from former customers of the defunct business whenever his service was contracted. Additionally, between 2005 and 2011, he travelled to the United States of America where he laboured in identical employment in his cousin’s business. All told, he contributed over seven million dollars to the expansion of the dwelling house.
- [24] Mr. Hewitt was cross-examined about these allegations. He said he had no proof that he contributed to the expansion. He, however, implied that he had proof which was stored inside the house before he was locked out by Mrs Tracey-Hewitt. He said everything was in the house. Pressed as to what he meant by “everything” relative to proof of contribution, Mr Hewitt answered, “me no ‘ave anything to show”. Counsel sought to cast doubt on his employment status during the marriage, but he maintained that he was employed.
- [25] Mr. Hewitt was asked if he physically assisted with the construction at the property. He insisted that he carried “granite sand” from the river in the evenings after work. This material, he said, was used to make the wall smooth.

- [26]** He was also questioned about the one-bedroom apartment. He disagreed that the one-bedroom apartment was already part of the existing structure when he moved in. He did not accept either that Mrs Tracey-Hewitt lived in that section before he commenced living at the property.
- [27]** Mrs Tracey-Hewitt endeavoured to contradict Mr Hewitt on the foregoing assertions. To her knowledge he was never a refrigeration technician. If he in fact earned twenty thousand dollars per week, she was not advised of it. His trips abroad were for vacations, or so she was told. He never sent her any money while on those trips. On the contrary, it came as a surprise to her that he was employed while abroad. She had not known him to be steadily employed.
- [28]** According to Mrs Tracey-Hewitt, the upstairs section of the dwelling house was partially constructed by her father, from his own resources. After her father's death, she completed it by putting on the roof and installing the fixtures. The money to complete the house came from her father's savings which was left to her. She flatly denied that Mr Hewitt made any financial contribution to the completion of the building.
- [29]** Apparently to underline the unlikelihood of Mr Hewitt making any financial contribution to the construction, Mrs Tracey-Hewitt spoke to how the family unit was financed during the marriage. Mr Hewitt, she said, never maintained neither her nor their child. During the lifetime of her parents, she maintained Mr Hewitt from her earnings as a secretary and invigilator. After the death of her parents, the family lived off her inheritance from them.
- [30]** This inheritance was also used for business ventures, with Mr Hewitt's encouragement. The first venture was the purchase of a Coaster bus for use in the public transportation sector. The second was the opening of a wholesale. Both eventually failed.
- [31]** When Mrs Tracey-Hewitt was cross-examined, she said that when she met Mr Hewitt he was not working. He told her he was taking care of business for his

cousin who was overseas. She, however, did not expect to shoulder all the expenses of the household after the marriage. Whenever she asked him for money, he would say, "not because you see me leave here in the morning Arlene means that I go to a work". That was his stock response for the eighteen years of their marriage.

- [32]** Mrs Tracey-Hewitt was asked what type of man she married. The man she met was quiet and had the ambition to do business. The latter, she said, was because he came and saw the life she was living: access to different vehicles owned by her parents. Amazingly, it was suggested to her that both herself and Mr Hewitt were living off her parents' investment. That received the predictable affirmative answer. Her parents had sums of five and eight million dollars on fixed deposit. At the time of trial, they were depleted as, having consumed the interest payments, the principal sums were not spared.
- [33]** Having considered the evidence, together with my assessment of the parties, I find as a fact that expansion of the dwelling house was confined to the section upstairs. I reject Mr Hewitt's evidence of the addition of a one-bedroom apartment downstairs as an effort to embellish his claim. I accept Mrs Tracey-Hewitt's evidence that the upstairs section of the dwelling was partially constructed by her deceased father and that what was outstanding were the roof and fixtures.
- [34]** The next question of fact is the source of funds for this expansion. Only one credible source emerges from the evidence. That is, the legacy bequeathed to Mrs Tracey-Hewitt by her parents. I entertain grave doubts concerning Mr Hewitt's claim to have been earning twenty thousand dollars per week in his cousin's refrigeration business. First, he said he had proof of his income then in the next breath he said he was paid in cash and made no statutory deductions. Furthermore, from a common-sense point of view, a business which can pay an employee eighty thousand dollars per month, to an outsider, would appear to be on solid ground. And if it was on solid ground, his cousin's departure would not

have occasioned its closure, if Mr Hewitt is to be believed that he retained customers post closure and journeyed to the United States to labour in an identical endeavour.

[35] That takes me to Mr Hewitt's assertion that some of his financial contribution came from his several sojourns abroad, during which he toiled in his cousin's business. I adjudged this evidence to be unreliable for two reasons. Firstly, it lacked specificity. The absence of particulars manifested in two ways. The first notable absence of details lies in the rate of remuneration. This contrasts with the alleged weekly wage earned from the business in Jamaica. There is, therefore, no means by which the court could attempt to quantify the income earned. The second detail that may have assisted the court concerns the amount allegedly given to Mrs Tracey-Hewitt. No attempt was made to place before the court even an approximation of the sums remitted, either globally on each trip, or ever so often over the period of his stay in the United States.

[36] I come now to the second reason for characterising this evidence as unreliable, a total absence of documentation. While I accept that, as between each other, couples are not so scrupulous in their dealings to retain documents for future reference, the absence is more than a little curious in this case. The sum alleged to be involved in seven million dollars or some portion of it. Remitting such a large sum of money would have generated considerable paperwork. It is not plausible that all of it would have been lost or destroyed. Here, I might add, that having seen Mr Hewitt, I do not accept that he had relevant documents in the house which were destroyed when he was locked out. That said, I bear in mind that Mr. Hewitt did not say how his earnings were transferred to Jamaica.

[37] Moving from there to how the family unit was financed, Mr Hewitt was little more than a kept man. I return to his purported occupation. Mr Hewitt swore that all times he was a refrigeration technician. Mrs Tracey-Hewitt disputed this. She, however, was aware of the nature of the business Mr Hewitt's cousin operated. In addition to that, the marriage certificate, which is in evidence, lists his calling at

the time of the marriage as refrigeration technician. I therefore find as a fact that Mr Hewitt was at all material times a refrigeration technician.

- [38]** The critical question is whether this occupation facilitated the lucrative income Mr Hewitt would have the court believe it did. This question receives an unqualified negative answer. Further to what was said above regarding the unsoundness of this evidence, the consistency of his employment is also a relevant factor. In this regard, I accept Mrs Tracey-Hewitt's evidence that he did not hold steady employment. Whatever he earned from the odd engagement, as I understood it, he seemed to have kept for himself. Apart from the face-saving assertion that he contributed to the upkeep of the family, Mr Hewitt never even attempted to say that he regularly contributed any named sum to the household expenses.
- [39]** Mr Hewitt's impecuniosity was most palpable in the investment ventures undertaken for the benefit of the family. He accepted that it was Mrs Tracey-Hewitt who stocked the wholesale. He did not contribute even one red cent. Similarly, after Mrs Tracey-Hewitt bought the Coaster bus she was called upon approximately one month later to expend another four hundred and fifty thousand dollars (\$450,000.00) to replace its engine. Again, not even the princely sum of a red cent came from him. He admitted to telling an untruth in first saying that he had bought the bus from his income. On the subject of buses, I accept Mrs Tracey-Hewitt that the other bus was bought to enable Mr Hewitt to work on stoves.
- [40]** Mrs Tracey-Hewitt agreed with cross-examining counsel that the investments were undertaken because both parties were unemployed. Accepting that rationale for the business ventures, it emphasises that the parties' marriage was sustained by Mrs Tracey-Hewitt's inheritance and, when it came about, some of the rental of downstairs. That in turn fortifies the characterization of Mr Hewitt as a kept man. From the comfort of that position, I find that he made no financial contribution to the completion of the construction of the upstairs section of the dwelling house at 6 Melnox Crescent.

- [41] As a footnote, I observe that Mr Hewitt was represented in this trial by counsel from the Kingston Legal Aid Clinic. It is curious that the resources from which he contributed all of seven million dollars (\$7,000,000.00) to the construction of the upstairs of the dwelling house seem to have dissipated. From the lofty height of that financial contribution he now appears by legal aid.
- [42] Aside from his impugned financial contribution, Mr Hewitt alleged that he made a physical contribution during the construction. Under the provisions of **PROSA**, “contribution” means, among other things, “the performance of work or services in respect of the property or part thereof”. (See **PROSA** section 14 (3) (g)). Section 14 (4) of **PROSA** declares that there is “no presumption that a monetary contribution is of greater value than a non-monetary contribution”.
- [43] The alleged performance of work found no expression in Mr Hewitt’s affidavit. Neither was it mentioned in Mrs Tracey-Hewitt’s affidavit. Consequently, the question to Mr Hewitt, during cross-examination, which brought about the assertion that he carried sand, may well have been the result of a little too much zeal on the part of the cross-examiner. In any event, I accept Mrs Tracey-Hewitt’s flat denial of Mr Hewitt’s physical contribution, based on her credibility and Mr Hewitt’s inadequacy in that area. As she described it, he was not available to perform that service. He was gone early morning and his evenings were spent before the television until he fell asleep. I am therefore driven to conclude that Mr Hewitt made no contribution, financially or otherwise, to the completion of the construction of upstairs the dwelling house.
- [44] The result of the determination of the first issue is that the dwelling house at 6 Melnox Crescent was not, by operation of law, the family home. There is, therefore, no family. The import of this fact seems to be, there is no property to which Mr. Hewitt is entitled to a share in the beneficial interest, equal or unequal. I bear in mind also that this was not a marriage of short duration. They were married on 18 December 1999 and separated on or about November 2016. At the time of their nuptials Mr Hewitt was thirty-five years old. When he filed his

affidavit in 2017, he gave his age as fifty-two years. So that, after approximately seventeen years of marriage and some distance beyond his prime he must contemplate starting over from scratch.

[45] Taking up all these matters in the round, I have considered whether it would be fair for Mr Hewitt to walk away from this marriage empty-handed. From a thorough consideration of the evidence, it is fair to say that Mr Hewitt entered his marriage to Mrs Tracey-Hewitt in a like fashion how he came into this world. As I have found, during the subsistence of the marriage he was little more than, if not completely, a kept man. Against that background, the justice of the case demands that he should leave the marriage in the manner all flesh must leave this world. On a balance off probabilities, Mr Hewitt has failed to prove that he is entitled to a share in the beneficial interest in the property at 6 Melnox Crescent, Temple Hall St. Andrew.

Order

[46] The orders sought on the FDCF are refused. Judgment is entered for the defendant. No order as to costs.