[2016] JMSC Civ. 25

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2014 HCV 01319**

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|---|---|---|
| **BETWEEN** | **ALLICENT KELLY-LASISI** | **CLAIMANT** |
| **AND** | **JIMOH LASISI** | **DEFENDANT** |

Mrs. Pamela Benka-Coker Q.C. and Mrs. Debra McDonald for the Claimant

Mr. Gordon Steer and Ms. Kaye-Anne Parker, instructed by Chambers, Bunny & Steer for the Defendant

**Heard: 20th - 23rd October 2015, 23rd February 2016, 22nd April 2016 and 3rd May 2016.**

**Matrimonial Property – Parties separated - Family home - Marriage of short duration – Family home acquired before marriage by one spouse in the name of that spouse only - Variation of equal share rule - Factors to be considered- The Property (Rights of Spouses) Act**

**IN CHAMBERS**

**LAING, J**

**[1]** The Claimant claims that she is entitled to one half share in the premises located at 14a Lakehurst Drive, Palmer Heights, Manor Park, Kingston 8, being all that parcel of land part of Constant Spring Estate now known as Armour Heights in the parish of St. Andrew registered at Volume 1364 Folio 193 of the register Book of Titles ("the Property").

**[2]** In the alternative she asks the Court to declare the interest to which she is entitled in the Property.

**[3]** She also claims the sum of $150,000.00 being a loan she says was advanced to the Defendant, as well as other consequential orders and costs.

**[4]** The Claimant asserted that she and the Defendant were in a relationship for twelve (12) years before they got married in January 2013. She said that she lived with the Defendant together in a common law union at the Property for a continuous period from 2002 to 2008 when the Defendant's daughter came to stay at the Property. The relationship continued and she moved back into the Property in September 2012 and was married on 1st January, 2013.

**[5]** Her evidence is that the property was purchased after the relationship began but that whilst she resided at the matrimonial home she contributed financially to the maintenance and improvement of the overall household, including the payment of various utility bills, purchasing food, toiletries, cleaning supplies and the payment of the domestic helper. She said she also furnished the Defendant with money for the renovation and upkeep of various sections of the Property and improvements to the Property. She also fixes the date of separation from the Defendant at December of 2013.

**[6]** The Defendant averred that he met the Claimant in 2000 and a visiting relationship started which culminated in their living together for a period from August 2002 to September 2003. After that date the Claimant moved into her own apartment at 89 E Merrivale apartment complex and the visiting relationship continued with several interruptions in particular between 2009 and January 2013 when the relationship was a platonic one because the Claimant became a baptised Christian. In January 2013 after the marriage, the cohabitation at the Property was resumed.

**How long was the period of cohabitation before the marriage?**

**[7]** The Claimant in cross examination admitted that she moved out in 2008 because she wanted to go back into her church. She said that there was only one month when she lived at the Property while a daughter of the Defendant, named Quadrat, was also living there. The Claimant was not sure if the Defendant's daughter came to live with him in 2006 but was shown a landing stamp in respect of Quadrat Lasisi which indicates that she arrived on 8th July, 2006. The validity of this was not challenged.

**[8]** The Defendant also exhibited a letter from the Pre-University School at Taylor Hall, University of the West Indies, Mona, St. Andrew, confirming that Quadrat was registered for the academic year 2006-2007 and was expected to sit exams in May/June 2007.

**[9]** I accept that Quadrat visited Jamaica in July 2006 and attended the Pre-University School. The arrival of Quadrat is the reference point used by the Claimant to fix the time that she ceased living at the Property. I do not accept the Claimant's assertion as reflected in paragraph 3 of her Affidavit filed 14th March 2014, that she lived together with the Defendant in a common law union at the property from 2002 to 2008, when the Defendant's daughter came to stay at the house. I find that the cohabitation commenced in or about August 2002, and ended at the latest about one month after Quadrat's arrival in July 2006, that is, sometime in August 2006.

**[10]** In answer to the Court's question as to why she did not reside live there while Quadrat was also living there, since she had previously lived there with other relatives of the Defendant, the Claimant said she did not stay there during the period of Quadrat's residence because she went back to the church and wanted a different life. Therefore, on the Claimant's own evidence, it could not be seriously advanced that she continued to cohabit with the Defendant after Quadrat's arrival in 2006.

**[11]** The Defendant on the other hand asserts that the Claimant ceased living at the Property in 2003, however I do not accept this as correct based on my finding of fact that the Claimant was living at the Property up to the point when Quadrat arrived in 2006.

**[12]** Counsel for the Defendant submitted that there is no legal basis for the Court to take into account the period that the parties were cohabiting before the marriage and to include it in the calculation of the duration of the marriage for purposes of section 7(1)(c) of the Property (Rights of Spouses) Act ( "the Act"). I unreservedly agree with that submission as it relates to ascertaining the duration of the marriage. The language in 7 (1)(c) of the Act is patently clear and one can only conclude that it is deliberate. The legislators in the preceding subsection 7(1)(b) use both the words "marriage" and "cohabitation" which demonstrates and reinforces the distinction. I do not accept that if in 7(1)(c) they meant marriage and/or cohabitation they simply would not have drafted it in those terms.

**[13]** A considerable portion of the evidence produced on behalf of the Claimant was aimed at proving the duration of her residence at the Property prior to her marriage. For the avoidance of any doubt I confirm that I have reviewed this evidence but have not found it to be persuasive, in the context of my finding that the arrival of Quadrat in Jamaica is in fact the correct reference point to determine the upper limit of the date the Claimant ceased residing at the Property, and that that date was sometime in August 2006. For this reason given I do not find it necessary in this judgment to outline that evidence in detail.

**When did the marriage end ?**

**[14]** The evidence of the Defendant is that in mid-September 2013 he told the Claimant that the marriage was not going to work and he moved to a back room the following day. The Claimant in cross examination admitted that from about the 12th or 13th September, 2013 the Defendant continued living downstairs in a separate room and remained there up to the time she left. She admitted that they

did not have sexual intercourse from the time the Defendant moved downstairs and that the interaction between them was occasional and very limited. However the Claimant was unwilling to accept that the marriage ended for all intents and purposes on or about the 12th or 13th September, 2013.

**[15]** I find that the parties separated and lived separately and apart since the 12th or 13th September, 2013 notwithstanding the fact that they both continued to reside at the Property. I also find that the marriage ended at this time. For purposes of section 7(1)(3) the period of the marriage must be construed and being calculated up to the point when the marriage ended for all intents and purposes and not up to the time of the Petition for divorce or grant of the decree nisi or decree absolute.

**[16]** This position is derived from section 12(2) of the Act which provides as follows:

> *A spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the Court.*

In the case of **Carol Stewart v Lauriston Stewart** [**2013] JMCA Civ 47**(delivered 6 December) the Court accepted that this section includes the family home.

**[17]** In **Stewart v Stewart** and in **Brown v Brown [2010] JMCA Civ 12** the Court of Appeal traced the origins and development of the Act, and for purposes of this judgment I am of the view that there is no need for me to embark on a similar exercise. It is however necessary to examine the relevant portions of the Act for purposes of this claim, namely sections 6 and 7 which provide as follows:-

> *6. 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 marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.*
>
> *7.-1) Where in the circumstances of any particular case, the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-*
>
> *(a) that the family home was inherited by one spouse;*
>
> *(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
>
> *(c) that the marriage is of short duration.*
>
> *(2) In subsection (1) "interested party" means-*
>
> *(a) a spouse;*
>
> *(b) a relevant child; or*
>
> *(c) any other person with whom the Court is satisfied has sufficient interest in the matter*

**[18]** In the case of **Stewart v Stewart** the Court of Appeal gave valuable guidance as to the approach that should be taken in relation to section 7. The Court acknowledged that the use of the word including implies that the Court is entitled to consider other factors other than those listed in section 7(1).

**[19]** The Court explored the issue further as follows:

> *"[32] Another aspect of section 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in section 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the Court to depart from the equal*

> *share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that these may be considered.*
>
> *[33] It is true that the first two factors, (a) and (b) mentioned in section 7(1), contain the common element that there was no initial contribution from one of the spouses to the acquisition of the family home. The third factor, (c), does not, however, include such an element. It is conceivable that, despite the marriage being a short one, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses.*
>
> *[34] The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration."*

**Would it be unreasonable or unjust to apply the equal share rule?**

**[20]** The onus of disproving the applicability of the section 6 presumption is on the person who alleges that it would be unreasonable or unjust to apply it.

**[21]** A reading of section 7 leads to the conclusion that the determination of whether it would be unreasonable or unjust to apply the one half rule is not necessarily dependent on the existence of the section 7(1)(c) factors but rather that any one of those 3 factors may be taken into consideration in determining the appropriate apportionment of the parties respective interests. However, the mere existence of any of these 3 factors will *ipso facto,* usually support an opinion that it may be unreasonable or unjust to apply the one half rule.

**[22]** It is clear from **Stewart v Stewart** that the Court of Appeal views the existence of any one of the 7(1)(c) factors as providing a gateway for the adjustment of the equal share rule (see paragraph 34 quoted above).

**[23]** In this case there is no disputing the existence of two such factors and looking at all the circumstances of the case I am firmly of the opinion that "*it would be unreasonable or unjust for each spouse to be entitled to one-half the family home*".

**[24]** This conclusion therefore triggers the natural and necessary enquiry as to what might be an alternative reasonable order in respect of the family home. In such an assessment it is open to the Court to consider matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour and other property holdings in making the appropriate adjustment. There has not been a sufficient body of local case law developed as yet which defines all the factors that may be taken into account and the weight to be attached to each factor so this case has to be considered on its own facts taking into account the guidance offered by cases such as **Stewart v Stewart**.

**Contribution to the Family Home**

**[25]** The Defendant by his hard work and without any assistance from the Claimant purchased the Property prior to the beginning of the period of cohabitation in 2002. This was with the assistance of a mortgage dated 5th May, 2001.

**[26]** At paragraph 6 of her affidavit filed 14th March, 2014, the Claimant, averred as follows:

> *"That whilst residing at the matrimonial home, I financially contributed to the maintenance and improvement of the overall household including but not limited to the payment of various utility bills and other expenses such as light, water, telephone and I also hired and paid for a domestic helper. I also furnished the Respondent with money for the renovation and upkeep of various sections of the matrimonial property and improvements to the property. I exhibit hereto copy BNS cheque in the sum of $80,000.00 being deposit on windows marked 'AKL2' ".*

**[27]** The Claimant has not produced any documentary evidence which can support an assertion that she made significant contributions to the acquisition, conservation or improvement of the Property prior to the marriage and I find that this is so

because she did not make a significant contribution. She has produced evidence of the payment of some bills which do not specifically reference the Property, however I accept her evidence on this point that they related to the Property. I find that the Claimant paid only some of the bills and expenses associated with the Property. I do not accept that the Claimant would have paid all of the usual household expenses such as utility bills and the domestic helper's salary by herself without there being such an agreement in place and there is no evidence that there was any such agreement between the parties.

**[28]** It is therefore difficult to quantify the exact sum that she might have contributed by way of the payment of such expenses. However, even assuming that she did pay all these expenses for a year, the total sum would not have been very significant in the context of her claim for an interest in a multi-million dollar Property. There was no specific evidence produced as to the current value of the Property but having regard to the size and location of the Property in an "upscale neighbourhood" occupied by middle income earners, the Property is clearly of significant value. This was acknowledged by both Counsel when the Court made an enquiry as to the value of the Property during the closing submissions.

**[29]** This Court in assessing the Claimant's contribution must also acknowledge that the Claimant did derive a benefit from her occupation of the Property. For the most part she would have been one of the two consumers of the utilities and the other amenities in respect of which she paid or contributed.

**[30]** I do not accept that the Claimant bought paint and painted the bedrooms, bathroom staircase and sitting room downstairs there being no documentary evidence of this expenditure and the Court not accepting the Claimant's evidence on this point without more. I accept the Claimant's evidence that she made a payment of $80,000 which she gave the Defendant in 2012 which was used for renovations and specifically for a down-payment on windows for the Property evidenced by the cheque produced. The Defendant asserted that this sum was repaid but did not produce the cheque by which he says it was repaid. Mr Steer

for the Defendant submitted and I accept that in any event this sum is infinitesimal in the scheme of things when the value of the Property is considered.

**[31]** I appreciate that financial contribution carries no greater weight than non financial contribution but I have found no evidence of non-financial contribution worthy of consideration for purposes of the Court's assessment .

**Other Property**

**[32]** The Claimant purchased her own property at Merrivale Close as evidenced by a transfer dated the 25th April 2003 with the assistance of a mortgage. This purchase was during the period of cohabitation of the parties. The Claimant has borne the responsibility for this purchase and her mortgage obligation by herself and has rightly enjoyed the benefit of her property. There is no evidence of the Defendant deriving any benefit whatsoever from the Merrivale property as a result of her ownership.

**[33]** There is also a property in Atlanta which was purchased by the Defendant. On the Claimant's admission it was purchased without any contribution by her but the Court is not considering that property for purposes of this judgment since Counsel suggested that it may form the subject of a separate claim by the Claimant for an interest in that property.

**Conduct of the parties**

**[34]** In **Stewart v Stewart** the Court of Appeal made it clear that if a section 7 factor existed fairness would require the Court to "have regard to all the circumstances of the case". At paragraph 51 the following guidance was offered:

> *If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule. The Court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which parties commit themselves to sharing their lives on the basis of mutual trust in the*

> *expectation that the relationship will endure(the principles mentioned in **Graham v Graham** and **Jones v Kernott**, mentioned above ). Before the court makes any orders that displace the equal entitlement rule it should be careful to be satisfied that an application of the rule would be unjust or unreasonable.*

**[35]** The Court does not find that the Claimant directly or indirectly assisted the Defendant in making his mortgage payments.

**[36]** When the parties got married in 2012, the Property became the family home. However I have found no evidence that this was a marriage in which the parties were "*living and working together for the benefit of the union"*. There was no relationship of interdependence with defined roles of money-earner, home-maker or child-carer, nor was there any economic disparity between the parties arising from the way they arranged or conducted the marriage (see Lord Nicholls of Birkenhead's speech in **Miller v Miller**: **McFarlane v McFarlane [2006] 2 AC 618, 633**). This is perhaps not surprising given what Counsel for the Defendant has accurately described as a "*turbulent and tumultuous*" relationship between the parties over the years.

**[37]** The parties at the time of marriage were mature, financially independent individuals. They were not young people starting a life together who could have had a reasonable expectation that the relationship would endure based on the bliss experienced during their time together before the marriage. One was a born again Christian and the other, by some accounts, someone who appreciates alcohol who enjoys a good social event or "lyme". These are parties who are clearly very intelligent and they must have recognised at the time of marriage that given the history of their relationship there was a very real risk that the marriage might fail. I do not accept the submission of Counsel for the Claimant that:

> *"...it is unjust for the husband to rely on and benefit from circumstances which he himself created and engineered by unilaterally ending the marriage at a time when he gave it no opportunity to succeed, and where he had put the wife in an unenviable position of making the long term commitment to a marriage in which he had no interest".*

The ending of the marriage was not solely the fault of the Defendant. Given the history of the relationship between the parties, on an objective assessment one could reasonable conclude that the marriage was very likely to fail unless the interaction between the parties changed dramatically.

**Analysis and conclusion**

**[38]** The Claimant has her own property at Merrivale. She is approximately 47 years of age and in a good job. She has retained her furniture and other items that she took to the Property.

**[39]** The parties did not have a joint account nor did the parties have any children together.

**[40]** I find on a balance of probabilities that the Defendant has successfully discharged the onus on him of displacing the applicability of the section n6 presumption. Based on the circumstances of this case and in particular the fact that the Property was acquired before the marriage, as well as the fact that the marriage was one of short duration, I find that it would be unreasonable and unjust not to vary the equal share rule prescribed by section 6. I do not accept the submission of Mr. Steer on behalf of the Defendant that the Claimant should not be awarded any interest in the Property. I find that a fair award would be that the Claimant is entitled to 10 percent (10%) of the Defendant's legal and beneficial interest in the Property and that it would be unreasonable and unjust for the Claimant to be awarded a greater or lesser interest.

**[41]** I specifically wish to state that I do not find that the financial contribution of the Claimant as found by the Court earlier in this judgment, would by itself, justify this award, considering the purchase price of the property and the relative insignificance of such contribution when expressed as a proportion of the total value of the Property. I find that the contribution of the Claimant over nine (9) months or even a year for that matter, would not exceed 10 percent of the value of the Defendant's interest in the Property. The award is a composite figure

looking in the round at all the circumstances examined in this judgment. In my view it would be unreasonable and undesirable for the court to attempt to demonstrate with mathematical precision the specific contribution of each factor to this global percentage and I have deliberately chosen not to attempt such an exercise.

**[42]** I have considered the fact that there was a period of cohabitation prior to the marriage in my assessment of what is a fair award to the Claimant. Neither Counsel by their diligent research, nor the Court, were able to unearth any case law or other authorities which specifically suggest that this is a factor which the Court is entitled to consider. However, notwithstanding the absence of any supporting authority I am of the view that in considering "*all the circumstances*" the Court is at liberty to also take into account this period of cohabitation.

**[43]** I have found that this period of cohabitation began about August 2002 and ended at the latest about August 2006. This period was approximately four years and did not seamlessly transition to the marriage. During this period, the Claimant on her own evidence retreated to the home of her brothers whenever there was a quarrel until there was reconciliation. The occurrence of such quarrels does not appear to have been unusual. In all the circumstances therefore the Court does not consider that this period ought to have a significant impact on the Court's award.

**[44]** I am of the firm view that the Court in granting the Claimant an interest greater than 10 percent would be unreasonably and unfairly benefitting the Claimant at the expense of the Defendant whose Property was no doubt more suitable and was chosen to be the family home (as opposed to the Merrivale property). It is also of importance that the Property was so utilised for a relatively short period. Such an unfair result could not have been the intention of the drafters of the legislation.

**[45]** The Claimant is also claiming repayment of $150,000.00 that she avers she loaned to the Defendant. This claim gives a clear insight into the character of the Claimant. She is quite content to maintain a claim for what is a relatively small sum in the scheme of things, while at the same time seeking a 50 percent interest in the very valuable Property of the Defendant in which she played no part in its acquisition.

**[46]** The Defendant said that the $100,000.00 was not a loan and that the $50,000.00 was repaid by the Defendant's cheque dated 13th September 2013 naming the Claimant as payee. There are marriages in which each party manages his or her personal finances and a loan to the other is not unusual. This appears to be one such relationship and I do not accept that the Claimant would have given the Defendant $100,000.00 as a gift. The evidence has revealed nothing to suggest that the Claimant would have been so generous and since the Defendant has admitted to receiving this sum, I find that he is liable to repay it. However I accept the Defendant's evidence that the $50,000.00 paid by cheque was in respect of the $50,000.00 which forms the subject of the claim representing a to him and.

**[47]** For the aforementioned reasons I make the following orders:

1. The Claimant is entitled to a 10 percent share of the legal and beneficial interest of the Defendant in the premises located at 14 a Lakehurst Drive, Palmer Heights, Manor Park, Kingston 8, being all that parcel of land part of Constant Spring Estate now known as Armour Heights in the parish of St. Andrew registered at Volume 1364 Folio 193 of the register Book of Titles ("the Property").

2. The legal and beneficial interest of the Defendant in the Property as at the date of this judgment, taking into account any outstanding loan obligation to any bank or other financial institution in respect of the property, is to be valued by a licensed valuator to be agreed by both parties and the cost of the valuation is to be borne equally by both parties.

3. The Defendant is to pay the Claimant such sum as determined by the valuator within 6 months of the receipt of the valuation report.

5. The Defendant is to pay to the Claimant the sum of $100,000.00.

6. Liberty to apply.

7. Costs of the Application to the Applicant to be taxed if not agreed.