



[2017] JMSC Civ. 62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV03341

BETWEEN	SIMON GEORGE McCORMOCK	CLAIMANT
AND	CECILE ALICIA NADINE McCORMOCK	DEFENDANT

Mr. Trevor Cuff for the Claimant

Mr. Clifton Campbell for the Defendant

Property Rights of Spouses Act, sections 26, 7, 12, 13, 14 – whether family home if one spouse owned property with former spouse during marriage – Both Residence and Ownership tests to be satisfied to be considered family home -

HEARD: November 30, 2016, February 10, 2017, April 21, 2017 and April 28, 2017

CORAM: WINT-BLAIR, J (Ag.)

[1] After a trial involving both parties, the court reserved judgment and requested further submissions on the issue of whether or not it was necessary for an extension of time to be granted. Straw, J on the May 30, 2016 made an order granting leave to the claimant to apply for an extension of time. The court drew the attention of counsel to the decision of the Court of Appeal in **Saddler v Saddler; Hoilette v Hoilette and another** [2013] JMCA Civ. 11. Further submissions were filed by counsel for the claimant only.

[2] Having reviewed those further written submissions, I have interpreted the consent order made by Straw, J on May 30, 2016 as granting an extension of time in respect of the claimant's application under the Property (Rights of Spouses) Act 2004. ("PROSA")

- [3] As the parties had obtained a decree absolute by time this the trial came on for hearing, I have treated the matter as being brought under section 13(1)(a) of the Property Rights of Spouses Act which would also mean that the application was within time.
- [4] The claimant sought by way of fixed date claim form filed on July 11, 2014 a declaration that each party is entitled to a fifty percent interest in the property known as West Ascot, Greater Portmore, in the parish of St. Catherine being the lot numbered Eighty-Three on the plan of Reids Pen and being all of the land comprised in the Certificate of Title registered at Volume 1297 Folio 845. (“the Greater Portmore property”).
- [5] The defendant in a notice of application for court orders filed May 6, 2016 sought to invoke the provisions of section 7 of PROSA to request the court to vary the statutory equal share rule. She has done so by opposing the claimant’s application on the grounds that she had owned the property with Paul Sinclair, a former spouse, as tenants in common. Neither side denied that this property was where the parties lived and raised their family. They had moved into the property after their marriage on January 10, 1998.
- [6] In 2000 Paul Sinclair died and the defendant solely purchased his share of the property.
- [7] The central issue to be decided was whether the property at Greater Portmore was the family home within the meaning of PROSA.
- [8] The Property Rights of Spouses Act provides in section 2 as follows:

“2. – (1) *In this Act -*

... ‘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;”

- [9] The claimant relies on section 6 of PROSA for a division of the property at Greater Portmore.

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

- (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
- (b) on the grant of a decree of nullity of marriage;*
- (c) where a husband and wife have separated and there is no likelihood of reconciliation.”*

- [10] The defendant relied on section 7 of PROSA in advancing her claim for a 100% share of the property as she had already owned the Greater Portmore property at the time of the marriage.

- [11] *“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.”*

- [12] In this case, as a former spouse, the defendant is entitled to make an application to the court to ask for a division of the family home upon the occurrence of any one of the trigger events set out in section 6(1).

[13] In relation to the court's power, with respect to applications made pursuant to section 13, section 14 then provides, in so far as the family home is concerned:

"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;"

(b) ...

[14] Whether the Greater Portmore property was the family home involves a mixed question of both fact and law it is for this court to determine whether the statutory definition of the family home has been satisfied.

[15] For this property to qualify as the family home it must satisfy all the elements of the statutory definition and one of those elements is that it must be "*wholly owned by either or both of the spouses*". There are two tests that of residence and that of ownership. Both tests must be satisfied in order for a court to make the finding that a dwelling house qualifies as a family home within the meaning of PROSA.

[16] The undisputed evidence is that the defendant purchased the property at Greater Portmore with Paul Sinclair in 1995. They were registered owners holding the property as tenants-in-common. They lived there until Paul Sinclair moved out of the said property leaving the defendant living there. The defendant married the claimant in 1998 and they lived and raised their family in the Greater Portmore property. Paul Sinclair died in 2000 possessed of his interest in the said property.

[17] In 2011, the defendant purchased Paul Sinclair's share in the property from the Administrator of his estate for \$760,000.00. The claimant made no contribution to this payment.

[18] The marriage of the claimant and defendant was dissolved by way of decree absolute dated August 15, 2015.

The Law

[19] In PROSA family home means:

“the dwelling-house that is 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.”

[20] Under PROSA, the family home is treated differently from other property owned by either or both of the spouses. the Act creates a statutory rule of equal entitlement to the beneficial interest in the family home.

[21] Section 7(1) explains the method by which the statutory rule may be displaced. It authorises the court to vary the equal share rule at the request of a party wishing to dispute the application of that rule. Section 7(1) also sets out some of the circumstances that could displace that statutory rule.

[22] In the case of 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.” Brooks, JA in **Carol Stewart v Lauriston Stewart [2013] JMCA Civ 47** at paragraph 27 said:*

“At least three things are apparent from section 7(1):

a. *The section requires the party who disputes the application of the statutory rule, to apply for its displacement.*

b. *The use of the word “including,” implies that the court is entitled to*

consider factors other than those listed in section 7(1).

c. The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.”

[23] There is no dispute as to the provisions of (a) or (c) as set out in the statute above at section 7. It is (b) with which we are concerned.

Analysis

[24] The intention of the defendant as demonstrated by the undisputed evidence was that the parties would have lived together as man and wife at the Greater Portmore property. She admitted in her affidavit filed on October 9, 2015 at paragraph 5 that they were married on January 10, 1998 and lived together in the said property with the two children of the marriage.

[25] The Greater Portmore property was without question the principal place of residence of the parties. It is the question of ownership that falls to be considered by this court.

[26] The evidence is clear that at the date of the marriage, the property was owned by the defendant and Paul Sinclair, however, it became wholly owned by her by transfer dated January 18, 2011. The parties before the court separated in 2006, this transfer clearly was post-separation. There was therefore no basis on which it could be concluded that during the marriage the defendant was solely entitled to the legal or beneficial interest in the land.

[27] Mr Sinclair had died in 2000, his estate had a vested interest in and rights as registered proprietor of the property. As such, the estate had all the rights and privileges bestowed by the Registration of Titles Act. One such privilege being the inviolability or indefeasibility of his title in the absence of fraud. So, as a registered owner, he was the legal and beneficial co-owner with the defendant for the purposes of the law and on these facts. The fact is he was a registered proprietor of the property during the pendency of the marriage.

[28] As a result, the property does not qualify to be treated as the family home for the purposes of PROSA as it was not wholly owned by the claimant. While the residence test was passed, the ownership test has failed.

[29] Where property falls outside of the definition of the family home as provided in PROSA, the court may still consider its division pursuant to section 14(1)(b) which provides:

[30] “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 (5), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2).

[31] (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 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.

(3) 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 dependant 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.*

(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.

[32] Having concluded that there is no family home in this case, the respective contributions of both parties have to be evaluated in light of sub-sections (2) and (3) of section 14 of the Act.

Evidence of claimant’s contributions

[33] Mr. McCormack said he renovated the property by building a garage, extending the master bedroom, adding a kitchen and washroom. He had the entire house re-tiled and, grilled. He built a retaining wall with a gate to the front of the property and changed wooden bathroom windows to sliding glass ones. The front windows were enhanced with a cathedral window and he had a metal door

installed to the back of the property. The money for this renovation came from his salary as a police officer and other income derived from odd jobs.

[34] The parties had joint chequing and savings accounts from which they both made withdrawals to meet the expenses of the household and their children. However, he agreed that he paid none of the household bills save the bills for his phone. These accounts were closed before the parties separated.

[35] He admitted in cross-examination that the improvements to the house were financed by way of mortgages taken out by the defendant on the property. The mortgages were repaid solely by the defendant from her account. He made no payments on either loan.

Evidence of defendant's contributions

[36] She owned the property before marriage and had lived there solely after Paul Sinclair had moved out. The property was mortgaged to the National Housing Trust in the sum of \$727,905.00 and is registered at Volume 1297 Folio 845 of the Register Book of Titles. She paid all taxes and utility bills for the Greater Portmore property. She took out home improvement loans from the NHT and VMBS to improve the said property which she repaid without aid of the claimant.

[37] In cross-examination, she admitted that the household expenses were paid from the joint account into which his salary was deposited.

Analysis

[38] The fact that the defendant had lived alone in the property before the claimant moved in is significant. It means that she had the sole responsibility for paying the taxes and utilities on the property as she was its sole occupant. It stands to reason that she continued paying these bills as she had been accustomed to and the evidence was that the accounts were in her name. There is no evidence that the claimant's name was added to any of these accounts.

[39] There is uncontroverted evidence that the parties pooled incomes and the expenses of the household and family were funded from their joint accounts. The physical payment of the bills by the defendant cannot be interpreted to mean paid from funds generated solely by her on the evidence.

[40] In **Graham v Graham** 2006HCV03158, McDonald-Bishop,J(Ag.) (as she then was) stated that:

“I do not agree that contribution can automatically and without more, be declared as irrelevant. It must be for the court to determine in the circumstances what considerations are relevant and then to decide on the weight that should be accorded to each in light of the intent and purpose of the statute to ensure fairness. The contribution of the parties, and indeed third parties, to the marital union and to the family assets might be a relevant consideration once there is a challenge to the application of the 50/50 rule. It must be that on a totality of the circumstances when all things are considered and evaluated, including but not limited to contribution, that the court would be able to say whether or not sufficiently good reason exists for a departure from the rule within the ambit of section 7.”

[41] I find that as the Greater Portmore property is not the family home. The sole contributions which led to its being acquired, improved upon and extended came from the defendant. The claimant lead no credible evidence of any payments towards the renovation to which he averred. He gave no dates to show when he would have undertaken the construction or produced any receipts to show what money was spent on the renovation of the property.

[42] Any household expenses paid for the upkeep and maintenance of that property would have been funded from the joint bank account held by the parties, this means that the defendant would also have been contributing to the maintenance of the property although the figures were not provided.

[43] In all the circumstances of the case as presented by the parties and applying the principle of fairness; in my judgment, the defendant is entitled to a 100% share in the Greater Portmore property.

The Woodlawn property

- [44] The defendant sought court orders by way of a notice filed on May 6, 2016 which was heard jointly with the fixed date claim form. The defendant sought a division of property situated at Woodlawn in the parish of Manchester, registered at Volume 1359 Folio 817 pursuant to section 14 of PROSA. However, in her affidavit filed on October 9, 2015 she prays at paragraph 26 that the court grant her a one-half interest in the said property.
- [45] Although the claimant did not claim this property in his fixed date claim form, he has indicated his desire for a 100% share in the property in an affidavit filed on November 23, 2016.
- [46] Both sides agree that it was the intention of the parties to build a home for their family on this land. They were both from Manchester and had the intention of returning to live there.
- [47] The parties' joint bank accounts had been closed before they separated in February 2006. The deposit on the Woodlawn property was paid in March 2006.

Evidence of claimant's contribution

- [48] On or about February 16, 2007, he purchased the property for \$1,200,000.00. The funds came from his salary as an Inspector of police in the sum of \$350,173.16 and a mortgage loan from the NHT in the sum of \$849,826.84. The defendant made no contribution to this purchase. Though the title was in the claimant's name only, he intended to add the defendant's name to it.

Evidence of defendant's contribution

- [49] She located the property, placed bids on it. She paid the deposit jointly with the claimant. There is no evidence before the court to indicate how much the deposit was and how much of that was paid by the claimant. She admitted that the mortgage payments were made by the claimant only. She has not placed any

material before the court to satisfy the conditions set down in sections 12(2) or 14(2) and (3) of the Act.

12.(2) 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.

[50] The unchallenged evidence of the claimant is that the property was purchased one year after the parties had separated. It is a stretch in credulity to imagine that the parties having gone their separate ways for over a year, that the defendant would be paying money into a property with the claimant where her name was not being placed on the title and there is no evidence that the parties had reconciled at any point or had even attempted to do so. The defendant has not given cogent evidence in this regard. The defendant cannot therefore claim an interest in this property.

[51] The defendant's application for a 50% share in respect of the property at Woodlawn, in the parish of Manchester is therefore refused.

[52] The court now makes the following orders:

1. The court declares that the defendant is entitled to a 100% percent share in the property the property known as West Ascot, Greater Portmore, in the parish of St. Catherine being the lot numbered Eighty-Three on the plan of Reids Pen and being all of the land comprised in the Certificate of Title registered at Volume 1297 Folio 845.
2. That the property situate at Woodlawn in the parish of Manchester registered at Volume 1359 Folio 817 of the Register Book of Titles is declared to be the property of Simon George McCormack.
3. Costs of the application to be paid by the defendant.

4. Costs of the claim to be paid by the claimant.
5. Liberty to apply.