IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV02042/2013

BETWEEN	**SYDNEY THOMAS**	**CLAIMANT**
AND	**ELAINE BROWN-THOMAS**	**DEFENDANT**

IN CHAMBERS

Germaine Smith instructed by Nigel Jones & Co. For Petitioner

Mrs. F. Barnes instructed by the Kingston Legal Aid Clinic for Respondent.

HEARD: 29th September, and 16th October 2015

Property (Rights of Spouses) Act – Matrimonial home acquired prior to marriage by one spouse – whether husband entitled to 50% - Delay in making application – separation but no dissolution of marriage – Whether time is to be extended.

BATTS, J.

[1] Two applications are listed before me. The first filed on the 8th April 2014 on behalf of the Petitioner for:

a) Permission to apply for division of property

b) That the time for filing be extended

c) A declaration that property, at Lot 483 2 East Greater Portmore St. Catherine comprised in Certificate of Title registered at Volume 1254 Folio 492 of the Register Book of Titles (the said land), is the family home.

d) That the Petitioner and the Respondent are each entitled to 50% of the said land.

e) That the value of the said land be determined by E. Maitland Realty and the cost be shared equally by Petitioner and Respondent.

f) That the Respondent pay the Petitioner the equivalent of half the value of the said land.

g) That if the Respondent was unable to pay the Petitioner then the property be sold and the net proceeds is divided

h) The Petitioner's attorney to have carriage of sale.

[2] The second application was filed on the 9th January, 2015 on behalf of the Respondent. The relief claimed was:

1) No extension of time is permitted for the Petitioner to bring this claim under the property (Rights of Spouses) Act.

2) That the Petitioner, SYDNEY THOMAS has no legal or beneficial interest in the property located at Lot 483 2 East, Greater Portmore in the parish of saint Catherine comprised in the certificate of Title registered at Volume 1254 Folio 492 in the Register Book of Titles.

3) The respondent is to pay to the Petitioner the sum of two hundred thousand dollars $200,000.00) as an ex gratia payment in full and final settlement of all claims against her and the property located at Lot 483 2 East, Greater Portmore in the parish of Saint Catherine comprised in the Certificate of Title Registered at Volume 1254 Folio 492 in the Register Book of Titles.

4) Costs and Attorney-at-Law costs of this claim is to be awarded to the Applicant.

[3] Several affidavits were filed however the Respondent elected to proceed without reliance on the Affidavits of Howard Facey and Norris Champagnie. Those affiants were unavailable to be cross-examined. The evidence before me consisted of the affidavits of Sydney Thomas dated 8th April 2014, 23rd January

2015 and 20th May 2015 that of Elaine Brown-Thomas 3rd February 2015, 9th January 2015 and 1st May 2015. All affiants were cross-examined. I will not in the course of this judgment repeat all the evidence lead but will refer to the same only to the extent necessary to explain my decision.

[4] It is common ground between the parties that they got married on the 10th July 2001 and moved into premises at Lot 483 2 East Greater Portmore, St. Catherine registered at Volume 1254 Folio 492 (referred to hereafter as the dwelling house). They lived there with the Respondent's children. It was then a one-room dwelling called a quad. The Respondent is the sole registered proprietor.

[5] During the course of the marriage, significant additions were made to the dwelling house. The extent of the parties' respective contribution to the additions is the subject of great dispute. The Petitioner contends that he contributed the majority of the financing and as he was a mason, a significant part of the labour for the addition as well. The Respondent denies this. The Petitioner says that for most of the marriage he worked hard, sometimes going away for extended periods to work. He alleges that in 2007 he left for St. Maarten to work. Upon his return to Jamaica in 2010, he did not have much work and this caused friction and quarrels in the household. As a consequence of one such quarrel in which she told him to "get out of her house," the Petitioner says he left the matrimonial home. This was in June 2012. The Respondent contends that the Petitioner did not reside there throughout the marriage and that the dwelling house was not the family home.

[6] The Petition for dissolution of marriage in which this property claim is brought, was filed on the 9th August, 2013. The Petitioner explains the delay in making that claim on the basis that (a) He was unaware of his rights as a spouse, (b) he was focussed on trying to get a steady job (c) he did not have enough money to hire an attorney (d) in June 2013 he was injured in a motor vehicle accident which left him immobile for several days. The Petitioner exhibits various receipts for building material to support his allegation of contribution to the construction.

[7] The Respondent in her affidavit evidence contends that after the marriage the Petitioner came to live with herself and her three children in her house. She says he had been deported from England and then lived at Pear Tree Hill, St. Andrew. They got married three or four months after they first met. She did this because of her involvement in the church and not wanting to ruin her reputation as a senior church member. She asserts that plans were already in place to improve the house prior to the Petitioner coming there to live and some material had already been purchased. She admits that relatives of the Petitioner cast steel for the foundation. She says that the house was purchased primarily with money sent to her for her son Norris whose father died in Canada. She denies that the Petitioner made any monetary contribution but acknowledges that he did do some work on the construction site.

[8] Interestingly the Respondent asserts that the Petitioner lost money (some of which he had borrowed) in various ventures: bee rearing, attempted purchase of a US Visa, purchase of an "old bike". His contribution to the household, she said, occurred whenever he was "visiting" up from Montego Bay. This took the form of $5,000 to $10,000 for electricity bills and for food. She explains the receipts exhibited by the Petitioner as items purchased by him on her behalf with funds she gave to him. She indicates that as the addition is not yet painted, the receipts for paint relate to somewhere else. The Respondent put forward documentary proof in the form of letters, to demonstrate the jobs she had. In the periods she did not work, she says her children then adults and working, were supportive.

[9] She contends that upon the Petitioner's return from St. Maarten she allowed him back into the house. However, he was abusive, smoked ganja, and practiced obeah. She moved out of the room. She contends that since early 2011 although they were both in the house they had separated.

[10] The Respondent explains her offer of $200,000 to the Petitioner (made in the response to Petition) as reflective of contributions made to the household. She supports her allegations with an impressive array of documentation and correspondence. The Respondent also contends that the Petitioner has a home in Pear Tree Hill St. Andrew and that that is the address stated in his divorce Petition.

[11] The Petitioner's sole witness was Michael Thomas his son. He grew up in Pear Tree Hill District. He stated that his father paid "lease" for the property in Pear Tree. He stated that he did electrical work on the addition to the house in Portmore where his father lived. He did not accept payment for that work. His brother did mason work as well.

[12] The Respondent called two (2) witnesses. The first was Enid Christie, the Respondent's niece. She states that she was aware that the Respondent received "maintenance" from Canada as she often collected her mail. She corroborated evidence about the Petitioner's bad habits. The second witness for the Respondent is Angella Easy. She is the Respondents neighbour and friend for over 20 years. She described the Respondent as a hard worker who woke early to get to work on time. She asserts that the Petitioner once told her that as the house belonged to the Respondent and her son he (The Petitioner) would not be spending any money on the property. She gave evidence of her observations which lead her to conclude that the marriage was not a happy one.

[13] For completeness, I should indicate that by way of an Affidavit in rebuttal the Petitioner traversed much of the evidence of the Respondent and her witnesses. He admitted however that he used to smoke ganja and drink alcohol but maintains that he had changed his life and became a Christian. He denies that he was a deportee and that he had been deported.

[14] Having seen and heard the witnesses cross-examined I must say that the Respondent impressed me as a generally truthful witness. This favourable

impression resulting largely from her demeanour was bolstered by the consistencies of her account with that of her witnesses, and the documentation.

[15] The Petitioner on the other hand was generally unconvincing. He, in cross-examination tried to explain his delay in applying because of his mental state as he was sick. He said or seemed to be saying this was a result of an accident. However there was no medical evidence provided about a mental condition. Interestingly, in cross-examination he was clear that he knew his rights and it was not a lack of knowledge about that which caused his failure to apply. He said also it was a lack of money as he could not afford an attorney. He was unable to say what was the cost of getting advice although he alleges that he consulted a Mr. Smith.

[16] I accept the Petitioner's account about his work habits in the course of the marriage. As he explained,

> *"I spent 4 years in the country but come home at the end of each month when the hotels being built."*

I accept also, as he said, that the Pear Tree District house was his "family home", but that it was on leased land.

[17] The following interesting exchange occurred while the Petitioner was giving evidence,

> "*Q. Suggest mortgage payments on Portmore house was paid solely by Mrs. Thomas.*
>
> *A: Yes, she paid mortgage. My money helps to pay it. After 2 or 3 years she married she leave her work. I support her from 2001 to 2011."*

[18] The Petitioner's sole witness, Michael Thomas was effectively reduced in relevance after the following exchange.

> *"Q. How many times you visited the house at Portmore*
> *A: Can't recall*

Q: suggest it was twice
A: (Pause) Disagree
Q: Mrs. Brown-Thomas paid you $4,000 to do electrical work
A: Can't recall it was long ago
Q: A part from the two occasions you visited the house no knowledge of anything at house, as you not there.
A: I visited more than once. As regards work I did some work when it was foundation."

This witness had stated in his affidavit that he worked without charge. It is apparent to me that he really was not aware, by personal observation, of the extent of any contribution his father may have made to the construction.

[19] The Respondent and her witness Angella Easy, gave strikingly similar evidence insofar as earnings from Norris' taxi was concerned. In the words of Miss Easy,

Q: You know Norris run taxi
A: yes
Q: She told you Norris gave her money
A: Yes every now and then but taxi bruk down about 99 times very often
Q: Did she tell you Mr. Thomas buy the taxi
Q: No I think they mek up and buy the taxi."

I am satisfied that Miss Easy was a truthful witness. I accept as she says that from as early as 2007 the marriage was not a happy one and that the Petitioner did express to her that the house, not being his, he would be making no financial contribution towards it.

[20] The documentation further supports the Respondent. In particular, that her son Howard regularly sent money from England, see the money transfer documents, the earliest one exhibited being 8th October 2007. Her receipt of payments from Canada consequent on the death of Norris' father is also evidenced by

documentation commencing in January 1989. As said earlier there was also documentary proof of her own employment history and salary.

[21] It is to my mind important to note that when the parties got married in 2001, the Petitioner was 60 years of age and the Respondent 50 years. The Respondent's two sons were almost grown men who were soon employed. I accept, and the documentation confirms that she received financial support from them and from overseas. I accept that the Respondent purchased the Portmore home in 1992 and moved in on 10th November 1992 as she stated, see in this regard her detailed account given during cross-examination of her purchase. The formal Transfer of Title was not recorded until 1995. It was then a one-room structure. I accept also that the plan to expand was made and that material had been purchased prior to the Petitioner moving into the house in 2001.

[22] I accept that when he moved into the house the Petitioner brought little else than the clothes on his back. I accept also, as the Respondent stated that the Petitioner did purchase some material, do some physical work and did get relatives to assist. As she said,

> *"Yes, when foundation dug he bring 2 sons, 2 friends and his brother.*
>
> *Q: did he speak to you before doing this.*
>
> *A: I pay somebody to dig the foundation. Mr. Thomas Bring the cement to cast foundation. He see what I doing and decide to buy cement."*

[23] The denial by the Respondent that there was any discussion whatsoever with the Petitioner about the construction does her no credit. I find that there was, as there had to have been, some discussion between the parties. The Petitioner did agree to assist primarily with manual labour and he did purchase some material towards the construction. The addition was substantial. As the Respondent itemises it was: a living hall, a verandah, a kitchen, and two rooms.

[24] I find as a fact that-

a) The dwelling house in Portmore was purchased by the Respondent

b) It was always her intention that Norris should have an interest in that house. There never was a declaration of trust nor any act or documentation to give effect to that intent. The Respondent does not therefore hold the said house or any interest in it in trust for Norris.

c) The Petitioner moved in with the Respondent in 2001 after their marriage. The marriage followed a short courtship of only a few months. The Petitioner was at the time recently and involuntarily returned from England and was virtually penniless.

d) The Petitioner assisted the Respondent to effect substantial additions to the dwelling house over the years. This assistance took the form of purchase of some blocks and cement and provision of some manual labour. He also assisted generally with household expenses such as utility rates and food.

e) At all material times the Petitioner acknowledged that the dwelling house belonged to the Respondent and they both regarded it as such.

f) The dwelling house was their family or matrimonial home.

g) The Petitioner commuted to and from work for considerable periods in the course of the marriage. He spent a great deal of time in Montego Bay going home only once or twice per month over a 4-year period. He also spent 3 or 4 years in St. Maarten.

h) It is not surprising therefore, that relations became strained between the parties.

i) By the year 2011 the parties were living separately within the house and conjugal relations had ended.

j) The Petitioner left the family (matrimonial) home in 2012.

k) The Petitioner has a “family house” in pear Tree District located on ”lease land.”

l) The Petitioner had a serious motor vehicle accident in 2013.He was hit from a motorbike and this affected his ability to earn an income.

m) It is this “disability” rather than any genuine belief in his entitlement, that has provoked or resulted in the Petitioner’s claim to an interest in the dwelling house.

[25] These being my factual findings, the issues for my determination are.

a) Was the application out of time?
b) If it was out of time should an extension be granted
c) If an extension is granted is the Petitioner entitled to a 50% interest in the dwelling house or to any relief at all.

[26] Both the Petitioner and Respondent made submissions, which assumed that the Petitioner’s application was out of time. This no doubt, because Section 13(2) of the Property (Rights of Spouses) Act provides-

“(2)

An application under subsection (1) (a), *(b)* or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.”

Subsection (2) cannot be properly understood without appreciating subsection (1) of Section 13.

13.-(1)
A spouse shall be entitled to apply to the Court for a division of property-

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) on the grant of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

[27] In expressing the time limit within Section 13 the legislature had in mind that provision had to be made for both the married and unmarried spouse. To the extent that Section 13(2) references "or separation", it was making allowance for those not legally married. In order to qualify for dissolution of marriage one has to have been living separately and apart for one year. Section 13(2) does not have the words "whichever is less", after the words "separation." This would have to be implied if the twelve-month limitation is to apply to married couples after separation where there has not yet been a dissolution of the marriage. The words "within twelve months" may be understood to mean "no later than". The generous manner in which the power to extend time is expressed also suggests that the legislature was seeking to expand not constrict the right of application. These are the considerations I had in mind when in the course of submissions, I indicated to both parties that as there had not yet been a dissolution of marriage the 12-month time bar had not begun to run against the Petitioner. It seemed to me he was entitled to apply at any time before 12 months after dissolution had expired.

[28] I have since considered the decision of ***Deidre Anne Hart Chang v Leslie Chang Claim 2010 HCV/03675*** a judgment of Edwards J delivered on the 22nd November 2011. Justice Edwards held,

> ***"If persons, such as the applicant, who intend to get a divorce, wish to apply before doing so, they must come within the 12 months or wait after their divorce and apply within the 12 months thereby allotted. Clearly this is subject to the courts discretion to extend time in cases of delay."***

This decision (which was not cited to me by the parties) means that the Petitioner ought to have applied within 12 months of separation. If out of time all he need do is, await the dissolution of marriage and then reapply within 12 months of such dissolution. Any application by a spouse for division of property must be made no later than 12 months of either dissolution, determination of marriage or separation. I concur with the reasoning and decision in that case, notwithstanding the absurdity involved. The clear words of the statute allow for no other conclusion. This is because it is the entitlement to apply which arises on separation, dissolution or termination of cohabitation.

[29] It therefore becomes necessary to consider when did time begin to run. The evidence I have accepted is that the parties were living separately although under the same roof since 2011. Is this termination of cohabitation or separation within the meaning of section 13(2). I hold that it is. The period of delay would then be 2 years, the Petition having been filed in 2013.

[30] This notwithstanding I will exercise my discretion to allow commencement of the claim. The Petitioner had been involved in a disabling accident. That reality caused him to rethink his attitude towards his legal rights and entitlements. In other words, it certainly is understandable that a change in economic circumstance would provoke a person to pursue a claim they might otherwise not bother to prosecute. Furthermore the Respondent has suffered no appreciable prejudice. Counsel submitted that she has, since the separation, expended money on the house. There is no evidence that this was considerable or in any way prompted by the Petitioner's failure to claim within 2 years. Bearing in mind also that the Petitioner can still apply within 12 months of the dissolution of the

marriage, whenever that may occur, I will extend the time within which the Petitioner is allowed to bring his claim.

[31] What then if any is the Petitioner's entitlement?

His counsel relies on Section 6,

> **"(1) Subject to subsections (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.**

Section 10 deals with Agreements and hence is not a relevant exception on the facts of this case. Subsection (2) deals with termination of cohabitation caused by death and is equally inapplicable.

Section 7 however is as follows:

> **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 within whom the Court is satisfied has sufficient interest in the matter.**

The Respondent made no formal application pursuant to Section 7(1). However no formal application is required see ***Stewart v Stewart 2013 JMCA 47*** Unreported Judgment 6 December 2013 @ Para 56 and ***Duncan v Duncan*** [2015] ***JMSC 75*** Unreported Judgment 24th April 2015 @ Para 12. In offering, or asking for an order that $200,000 be paid, I understood that the Respondent was acknowledging the value of some interest of less than 50%; See also the Respondent's Notice of Application and her counsel's Written Submission at Para 11. The Petitioner appears to understand that to be so and at Para 32 *et seq* of his counsel's submissions the arguments to meet Section 7(2) considerations were fully set out. In this regard I respectfully accept and adopt the broad statement of principle relied upon by the Petitioner and stated in ***Graham v Graham 2006 HCV 03158*** unreported judgment of McDonald-Bishop J (Ag.),as she then was, delivered on the 8th April, 2008, at Para 17 that,

> ***"Our statute is clear that in respect of the family home, the equal share rule must be taken as the general rule and should only be departed from if the parties by written agreement seek to oust its operation pursuant to section 10 or where, in the opinion of the court, it would be unreasonable or unjust to apply it. The principle of equality has thus been enshrined within our jurisprudence not as a mere aid to analysis but as the rule by which all considerations in respect of the entitlements to the family home must be governed. The legislature has sought to limit the broad exercise of judicial discretion in respect of adjustment of the family home."***

[32] On the facts of this case the factors I consider relevant and which to my mind lean against a 50:50 finding are as follows:

a) The fact that the property was already owned by the Respondent at the time of marriage

b) Their rather short courtship

c) The mature age of the parties at the time of marriage

d) The obvious hard work and sacrifice that the Respondent had made to acquire and improve it

e) The fact that all was not well between the parties from as early as 2007

f) The Petitioners long periods of absence from the family home.

g) The Respondent made all the mortgage payments

h) The Petitioner always regarded the dwelling house as belonging to the Respondent.

[33] I find that although the house was the family home within the meaning of the Act, the circumstances are such that it would be unreasonable and unjust for each spouse to be entitled to one-half of the family home.

[34] What then is the Petitioner's share of the family home if it is not to be 50%. The evidence to assist in this determination is sadly lacking. The Petitioner was unable to quantify his contribution in financial terms. The Respondent is content to suggest $200,000 as her estimate of the value of that contribution. Neither party has given evidence of the value of the property now that the addition has been done. Nonetheless, I have to do the best I can on the evidence before me. I bear in mind that the burden on this aspect lies on the Respondent. In this regard, the Petitioner did manual labour and provided some labour and material towards the addition. That addition converted a one-bedroom dwelling to a three-bedroom house. I therefore determine the Petitioner's share of the family home to be 30%.

[35] My decision is as follows:

a) That the parties having separated and the marriage not having as yet been dissolved time is extended for making this application.

b) It is declared that the property located at Lot 483 2 East Greater Portmore in the parish of St. Catherine and comprised in Certificate of Title Volume 1234 Folio 492 in

the Register Book of Titles was the family home within the meaning of the Property (Rights of Spouses) Act

c) That the Petitioner is entitled to a 30% and the Respondent to a 70% share of the said family home.

[36] It is my intention to make orders for determination of the value of the parties' interest, and for sale or purchase by one party of the other's interest. I would however wish to either have the parties "without prejudice" assistance with the formulation of those terms or to hear submissions if there is no consensus. I will therefore adjourn to a date to be agreed for that purpose. On that date, if an agreed minute of the Order is not presented I will hear submissions as to the terms to be included.

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David Batts
Puisne Judge
16th October, 2015