

Miss Christine Whyte instructed by Nigel Jones and Co for the Defendant.

15th of June and 24th of November 2017

SHELLY –WILLIAMS J,

Background

[1] The parties were married on the 31st of January 2009 and they were divorced on the 10th of June 2013, having been separated from September 2010. Prior to the marriage the parties cohabited, however, there are differing views as to when the cohabitation commenced. There is one child born to the Claimant prior to her marriage to the Defendant, that the Claimant alleges to be the child of the marriage.

[2] The Claimant filed a Fixed Date Claim Form in which she is sought the following orders from the court:-

The Claimant Antoinett Nancy West-Lehmann, housewife of Lot 18 Bonham Heights, Ohio Rios, in the parish of Saint Ann claims against the Defendant Peter Lehmann of 121 Rivera Boulevard, Tower Isle in the parish of Saint Mary as to the respective interest of the Claimant and the Defendant in all that parcel of land part of Bonham Spring situate in the parish of Saint Ann being Lot numbered 4 (Also known as Lot 18 Bonham Heights) and being land registered at Volume 1076 Folio 828 in the Register Book of Titles (the property).

1. A declaration that the Claimant and the Defendant are both each entitled to one half beneficial interest in the property.
2. The property be valued by a reputable valuator and the Defendant pay the cost of the said valuation.
3. The Defendant should notify the Claimant's Attorneys-at-Law if he intends to exercise the option to purchase the Claimant's interest in the said property within fourteen (14) days of the date of this Order.
4. If the Defendant chooses to exercise the option to purchase that he sign the Sale Agreement and deliver the required deposits to the Claimant's Attorneys-at-Law within fourteen (14) days of advising them of his intention to exercise the option.
5. The Defendant do deliver to the Claimant's Attorneys-at-Law within forty-two (42) days of signing the said Sale Agreement a letter of commitment from a reputable financial institution for the balance purchase price on each agreement.
6. If the Defendant should choose not to exercise the option to purchase or if he fails to comply with paragraphs 4 and 5 hereof or any of them then:
 - i. The said property will be sold by private treaty or public auction with the valuation being the reserve price. The

Claimant's Attorneys-at-Law shall have carriage of Sale of the said property in any event.

- ii. That upon the failure of any of the parties to execute any of the documents relevant to execute a registrable Transfer of the said property then the Registrar of the Supreme Court be empowered to sign on their behalf.
- iii. That all the costs of valuation and transfer be borne by the Defendant.
- iv. That the Defendant pays to the Claimant the sum of \$20,000 being maintenance for their minor child K.L.B.
- v. That the Defendant pays to the Claimant such sum or sums weekly or monthly for the maintenance of herself.
- vi. That the Defendant do bear the cost of this application.
- vii. That the Claimant do have such further or other relief as the Court may deem fit.
- viii. Liberty to apply

[3] In support of her Fixed Date Claim Form the Claimant filed three affidavits. The Defendant in response filed one affidavit. The Defendant contended that the parties were married for a short period of time and that the said property was purchased prior to the marriage. He contended that the property is not the

matrimonial home. In the alternative if it is judged to be the matrimonial home that the Claimant is not entitled to 50% beneficial interest in the said home.

- [4] The Defendant contended that no award should be made in relation to maintenance for the Claimant and/or her son. He further contended that the Claimant's child was not a child of the marriage.

Issues

- [5] There are essentially three issues in relation to this case namely:-

- a) Whether the property is the matrimonial home, and if it is, whether the Claimant is entitled to 50% beneficial interest in it.
- b) Whether the child is a child of the marriage and entitled to maintenance?
- c) Whether the Claimant should be granted maintenance?

The Law

- [6] Section 2 of The Property (Rights of Spouses) Act (PROSA) defines matrimonial home as:-

"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;

- [7] How the matrimonial home is to be divided is detailed in Section 6 of PROSA which states that:-

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

[8] Sykes J in the case of **Peaches Shirley-Stewart v Rupert Stewart**_unreported, Claim No 2007 HCV 0327 (heard November 6, 2007) opined at paragraph 22 of his decision on the meaning of family home as follows:

It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended. A harsh result does not necessarily mean that such a result was not intended. The Act was not conferring a general power to reorder property rights in all kinds of property owned by the spouses. The Act confines itself to the family home."

[9] The starting place and the usual position in relation to the matrimonial home is that 50% is to be awarded to each party, however the law allows for a departure from this position under limited circumstances. Section 7 of PROSA states that:-

- (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.*

[10] In the case of **Carol Stewart v Lauriston Stewart**_[2013] JMCA Civ 47 Brooks JA, stated at paragraph 26 onwards that:

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 the 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.

[11] In relation to maintenance the starting point when considering issues of maintenance is the Maintenance Act. Section 8 (1) of the Act states that:-

Subject to subsection (2) every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent's unmarried child who-

- (a) Is a minor;..*

[12] Section 8 of the same Act defines the category of minors who are entitled to be maintained. In this case the Claimant seems to be relying on subsection 3(c) which states that:-

(3) *For the purposes of this Act, a person is the parent of a child if-*

- (c) *the person is a party to a marriage or cohabitation and accepts as one of the family a child of the other party to the marriage or cohabitation.*

[13] The Matrimonial Causes Act Section 2 defines 'relevant child' as-

- (a) *a child of both parties to the marriage in question; or*
- (b) *a child of one party to the marriage who has been accepted as one of the family by the other party"*

[14] In defining a child of the family **Rayden on Divorce**, 11th Ed., (1971), p 867 states:

"Now, under the provisions of the 1970 Act, to establish that a child is a child of the family it is sufficient to show that the child was treated by both parties as a child of the family."

[15] With regards to the maintenance to be paid for the child of the marriage, the court, in arriving at a decision should take into consideration Section 14 of the Maintenance Act. Section 14 (4) states that:-

In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in section 5(2), 9(2) or 10(2), as the case may require, and

- (a) *the respondent's and the dependant's assets and means;*
- (b) *the assets and means that the dependent and the respondent are likely to have in the future,*
- (c) *the dependant's capacity to contribute to the dependant's own support.*
- (d) *the capacity of the respondent to provide support,*

- (e) *the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;*
- (f) *the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;*
- (g) *any legal obligation of the respondent or dependant to provide support for another person's;*
- (h) *the desirability of the dependant or respondent staying at home to care for a child;*
- (i) *any contribution made by the dependant to the realization of the respondent's career potential;*
- (j) *any other legal right of the dependant to support other than out of public funds;*
- (k) *the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*
- (l) *the quality of the relationship between the dependant and the respondent;*
- (m) *any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

Claimant's Submission

[16] Counsel for the Claimant Ms. Brown submitted that the Defendant had invited the Claimant to live with him prior to the marriage i.e. from 2005 and that the cohabitation prior to the marriage should be taken into consideration. She argued that after the marriage the parties continued to reside in the house in question and as such Section 6 of PROSA applies in this matter. She argued

that there is nothing that was placed before the court that would lead to any other conclusion.

[17] She further argued that the if the court was minded to consider Section 7 of PROSA that the court should take into consideration the improvements that the Claimant had made to the said property namely the hanging of curtains, the planting of flowers and just generally maintaining the home.

[18] In relation to the child counsel for the Claimant argued that the Defendant had taken on the responsibility of this child and cannot now seek to resile from this position. She argued that the Defendant:-

(a) Sent money to the Claimant and he was aware that moneys were being used from it to maintain the child.

(b) would take the child to and from school and give him lunch money.

[19] In relation to maintenance for the Claimant, Ms. Brown argued that the Defendant was aware that the Claimant was not working and was not in a position to maintain herself. She argued that in light of the profession and that income of the Defendant that he was in a position to pay the sums being requested.

Defendant's submission

[20] Counsel for the Defendant argued that the property was not the matrimonial home. In the alternative if it is the matrimonial home then she argued that section 7 should apply as:-

(a) The house was owned by the Defendant prior to the marriage.

(b) The marriage was a short one.

(c) The Claimant did not contribute in any tangible or intangible way towards the matrimonial home.

- [21] She argued that it is the Defendant, who during the course of the marriage would send money to the Claimant to maintain the property. After the parties were separated and then divorced, it is the Defendant who had the full responsibility of maintaining the home. Counsel for the Defendant argued that no award should be made under this claim.
- [22] In relation to the maintenance for both the minor child and the Claimant counsel for the Defendant Ms Whyte, argued that none should be awarded. She argued that the Claimant had given evidence that she had worked prior to and during the course of the marriage as she had a shop at a market. She further argued that the Claimant had been divorced from the Defendant for a number of years and had maintained herself during this period of time.
- [23] In relation to the minor child counsel argued that the child was never accepted as a child of the marriage. She argued that although the Defendant would have known that moneys that were sent to the Claimant was being used for the maintenance of the said child, acquiesce would not amount to acceptance. She argued that the evidence of the Defendant is that the child is being maintained by his father and no award should be made for the said child.

Analysis

The Matrimonial Home

- [24] The main issue to be decided is whether or not the property can be defined as the matrimonial home. In examining whether or not this can be described as the matrimonial home I considered the evidence and the law relating to this. The evidence of the Claimant, which was not contradicted, is that the Defendant had asked her to move into his home which she did. Although the Defendant was not living full time in Jamaica, when he travelled to Jamaica, he resided at the said home with the Claimant. It is whilst residing in the said property that the parties got married. During the course of the marriage this was the only home that the

parties resided in and shared as their own. It is whilst the Claimant was residing at the home that the Defendant applied for and obtained the divorce. Based on these facts I have no doubt that the property in question was in fact the matrimonial home.

Should section 7 of PROSA be applied?

[25] The fact that the property is deemed to be the matrimonial home the next issue is whether or not there should be a divergence from the fifty percent distribution of the property as provided for by section 6 of PROSA. It was Brooks JA, in the case of **Carol Stewart v Lauriston Stewart [supra]** who indicated at paragraph 63 that

Since contribution, by itself, does not qualify as a section 7 factor, there was no section 7 factor proved and, therefore, there was no basis to consider a departure from the statutory rule of an equal division.

In the case of **Stewart** the parties had been married in 1978 and separated in 1996 and had contributed towards the matrimonial home making financial and non-financial contributions. That is not the circumstances of this case so I will depart from the 50% rule.

[26] Due to the circumstances in this case it would be unreasonable and unjust to award a 50% beneficial interest in the said property to the Claimant. I will rely on Section 7 of PROSA and depart from the usual award of 50% interest in the matrimonial home for the following reasons:-

Short Marriage

[27] The parties were married in January 2009 and the absolute was granted July 2013. The parties however had separated from September 2010. This is clearly a case of a short marriage as the marriage would have lasted for under two years from the marriage to the date of separation. Even if I took into consideration the

full length of the marriage to the date of the divorce it would still qualify as a short marriage

[28] Counsel for the Claimant argued that the parties had resided together prior to the marriage, that is from 2005 and that the court should take the period of cohabitation into consideration. She further argued that the period the parties were together was in fact roughly eight (8) years and as such this could not be considered a short relationship. I note at this time however that in giving her evidence the Claimant gave contradicting evidence as to when the period of cohabitation commenced as she gave the year of 2004 and then 2005. The Defendant acknowledged that the parties did reside together prior to the marriage but he gave the date the Claimant moved into his home as 2007.

[29] In reviewing the evidence, I did not find the Claimant to be a convincing witness. She was very hesitant in her answers and contradicted herself on a number of occasions. I found the Defendant to be forthright in his answers even when the answers were not to his advantage. I believe the Defendant's evidence that the parties started to reside together in April 2007, and got married shortly afterwards in January 2009. This would clearly qualify as a short marriage whether you compute from the time of cohabitation, to the time of separation after marriage or from the time of the marriage to the time of separation.

Improvements to and ownership of the property by the Defendant prior to marriage

[30] There is no issue that the property was owned by the Defendant before the marriage. The issue is whether the Claimant had made any improvements to the property or contributed whether financially or otherwise towards it. The Claimant gave evidence that she had planted flowers on the property and she had hung curtains in the house. These are the improvements highlighted by counsel for the Claimant in her submissions. The Defendant denied that she had planted flowers but agreed that she had hung some curtains in the house. The Defendant

on the other hand gave evidence that he would send money to the Claimant to maintain the property and when he returned to Jamaica he realized that the property had not been maintained and even found at one time that the pool was green in colour.

[31] I do not find that the hanging of curtains and paying household bills from money forwarded to Claimant by the Defendant for less than a two year period, to be enough to have gained a substantial stake in the property in question.

[32] I do find that Section 7 of PROSA applies in this case as the marriage was a short one and that the home was owned by the Defendant prior to the marriage. I do not find that the Claimant contributed in any substantial or real manner to the improvement of this property whether tangible or intangible, financially or otherwise.

[33] Counsel for the Claimant had argued that if the court was to deviate from the fifty percent (50%) award for the matrimonial home that the lowest percentage to be awarded to the Claimant should be thirty percent (30%). I cannot agree with counsel for the Claimant. The Claimant has not demonstrated, and the evidence presented to the court does not support the fact that any award should be made under this claim.

Maintenance

[34] In relation to the child the first issue is whether or not the child is the child of the marriage. The evidence of the Claimant is that the Defendant treated the child as his own and actually called the child his son. The Claimant gave evidence that when the Defendant was in Jamaica he would drop the child to school and pick him up. He would also give him lunch money for school. The Claimant gave evidence that the Defendant would send money to her for the maintenance of the property and she would use some of the money for the maintenance of the child. She also gave evidence that the Defendant had taken out a life insurance policy in the name of the child

[35] The Defendant gave evidence that he did take the child to and from school and occasionally gave him lunch money when he visited Jamaica over two month periods. He acknowledged that he sent money to the Claimant for the maintenance of the said property and that he was aware that the Claimant was using some of that money for the maintenance of the child. His evidence though was that this was without his consent. His evidence is that he had sent money to the Claimant for the maintenance of the house as he had no bank account. He agreed that he had taken out an insurance policy in the name of the child. His evidence however, which was not denied, is that the father of the child maintains the child, pays his school fees and takes him to school.

[36] The first issue to be addressed is whether the Defendant had ever maintained the child. Maintenance of a child seems to suggest that there must be a deliberate act by a party towards a child. The evidence of the Defendant, which I accept is that he never agreed to maintain the minor child. The fact is that without the agreement of the Defendant the Claimant spent money on her child and that cannot be deemed to be an agreement in relation to maintenance.

[37] The question is whether or not the actions of the Respondent amounts to him accepting the child as a child of the marriage. In answering this question I reviewed at a number of factors namely that;-

(a) The Defendant apart from occasionally giving the minor child lunch money did not make any deliberate financial contribution towards him.

(b) That the child did reside on the property with the Claimant and the Defendant but that this would have been for a short period of time, that is, on the visits of the Defendant to Jamaica.

(c) I note that the Defendant, maintained an insurance policy for the child. I do not find however that an insurance policy, taken out in the name of the child by the Defendant is definitive evidence of acceptance of the child as a child of the marriage.

- [38] I accept the unrefuted evidence of the Defendant that the father of the child is maintaining him, paying his school fees and taking him to school. In light of this I would not deem the child to be a child of the marriage and I will not make any awards for maintenance of the said child.
- [39] The Claimant in addition has not demonstrated that this is a child in need of maintenance. There was no evidence placed before the court as to the monthly expenses of the child. The court was not provided with any evidence that would allow it to award any sums for maintenance for the minor child.

Maintenance for the Claimant

- [40] The Claimant in her affidavit and her viva voce evidence indicated that she is not working and as such she is asking the court to award her a sum as maintenance for herself. The Claimant gave evidence that prior to the marriage and during the course of the marriage she had operated a shop in the market but since then she no longer operates the shop. Her evidence is that she now lives off the kindness of her children. The Defendant gave evidence that he is currently working but has since remarried and has the responsibilities of his new wife and child.
- [41] The Claimant has not indicated in her Fixed Date Claim Form nor in her affidavits what sum ought to be awarded. She did not outline her bills to assist the court as to the amount that is to be awarded to her. What was produced to the court was a blanket statement that the Claimant wished to be awarded periodical sums as maintenance.
- [42] The age of the Claimant was never divulged but she appears to be a much younger person than the Defendant. There was no evidence given as to why she is not currently working. There was no evidence that she was suffering from any illness or infirmity. No evidence was solicited as to her monthly bills and why she is in need of maintenance.

[43] Despite the lack of evidence, the Defendant had maintained the Claimant during the course of the marriage and the Claimant is currently not working and has not worked for a number of years. In keeping with the principle of a clean break and taking all the issues into consideration I will award the sum of one million dollars to the Claimant as maintenance. The sum is to be divided into four tranches and paid over one year period.

Order of the court is that

1. The Claimant is not awarded any share in the property.
2. The Claimant is to vacate the property on or before the 31st of January 2018.
3. The minor child is not a child of the marriage and no award will be made in relation to maintenance for him.
4. The Claimant is awarded the sum of one million dollars for maintenance. The sum is to be paid in four tranches ie:-
 - a. The first \$250,000.00 to be paid the last working day in February 2018.
 - b. The second \$250,000.00 to be paid the last working day of May 2018.
 - c. The third \$250,000.00 to be paid the last working day in August 2018.
 - d. The fourth \$250,000.00 to be paid the last working day of November 2018.
5. Each party to bear their own cost.