

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
FAMILY DIVISION**

No. 455 of 2000

JUNE GRAHAM

APPLICANT/WIFE

AND

OWEN PROUTE

RESPONDENT/HUSBAND

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court

2013: May 29

2014: February 20

April 11

Appearances:

Ms. Jaydene Thomas for the Applicant

Mr. Arthur Holder for the Respondent

DECISION

The Applications and Orders

[1] By an application filed 31 July 2000 (“the First Application”), in so far as relevant, the Applicant sought the following orders:

- 1(a) that the Applicant and the Respondent be granted joint custody of the child of the union, namely: Kiah Leslie Proute who was born on 8 September 1990;

- (b) that the Applicant be granted care and control of the said child of the union;
 - (c) that the Respondent be granted liberal access to the said child of the union;
 - (d) that the Respondent pay the Applicant the sum of \$600.00 per month towards the maintenance of the said child of the union
2. that it be declared that the property situate at #206 Lowlands Park in the parish of Christ Church, in this Island is joint owned by the Applicant and the Respondent in equal shares;
 3. that it be declared that the Applicant pay to the Respondent one-half of the value of the above mentioned matrimonial property in full and total satisfaction of this share and interest therein;
 - 4...
 - 5...

[2] On 23 March 2001, **Inniss J** ordered the Respondent to pay to the Applicant the sum of \$400.00 per month towards the maintenance of the minor child of the union, commencing on 30 April 2001 and thereafter on the last day of each succeeding month until further order.

[3] Having failed to comply with the order of **Inniss J** the Applicant, on 4 October 2002, filed an application (“the Second Application”) seeking the following orders:

1. that the Respondent attend before this Honourable Court and be orally examined on all matters relating to his failure or refusal to comply with the order of the court [made] on 23 March 2001;
2. that the Respondent produce any and all documents or things in his possession, power or custody relating to his failure or refusal to comply with the said order;

3. that the Respondent be ordered to pay the arrears of maintenance in the sum of \$6,400.00 and/or any other sum that is due to the Applicant;
4. that the Respondent show cause why he should not be committed to Glendary Prison for contempt of court;
5. that the Applicant and the Respondent have joint custody of the child of the union namely Kiah Leslie Proute;
6. that the Applicant have care and control of the said child of the union...with liberal access to the Respondent;
7. that the Applicant is entitled to a 65% share in the property at Lowlands, Christ Church by virtue of section 57 of the Family Law Act, Cap. 214 of the Laws of Barbados;
8. such further orders as the court deems fit.

[4] The Second Application was supported by an affidavit of the Applicant which was filed contemporaneously with that application.

[5] By a consent order made by **Payne J** on 29 September 2003, the Respondent's salary was garnished on a monthly basis in the sum of \$400.00, as maintenance for the minor child, with effect from October 2003 and the Respondent was ordered to pay to the Applicant the sum of \$1000.00 towards the arrears of the maintenance on or before 15 October 2003.

[6] By a further order made by **Richards J** on 3 November 2006 it was ordered that custody of the minor child Kiah Proute be vested in the Applicant and Respondent jointly with care and control to the Applicant and liberal access to the Respondent and that the property at #206 Lowlands Park, Christ

Church be valued by Frankyn & Franklyn, land surveyors, with the costs of such valuation to be shared equally by the Applicant and the Respondent.

- [7] Five years later the property still had not been valued and on 7 October 2011 **Alleyne J (Ag)**, as he then was, ordered the Respondent, within 7 days, to direct Mr. Stephen Wiltshire of Felicity Ltd. to value the said property and provide the valuation report as soon as is reasonably practicable, the costs of such report to be shared equally by the parties.

The Background

- [8] According to the unchallenged evidence of the Applicant in her affidavit filed 31 July 2000, she and the Respondent first lived together in a rented apartment in Newbury, St. George from 1986. In September 1991, together with their daughter Kiah, they moved into the house at #206 Lowlands Park, Christ Church (“the property”). That property was bought jointly with the assistance of a mortgage obtained from Barfincor. The Applicant paid the down payment and commitment fees and the mortgage insurance whilst the Respondent paid the installments on the mortgage from his monthly salary.
- [9] In 1999 the relationship between the Respondent and the Applicant broke down irretrievably and on 1 August 1999 the Applicant moved out of the property with Kiah, taking up residence at her father’s home.

The Issues

[10] As a result of the orders made by **Inniss J, Payne J** and **Alleyne J (Ag)**, earlier referred to, the three remaining issues for the court's determination relate to:

1. the duration of the union;
2. the respective share and interest of the Applicant and the Respondent in the property; and
3. the arrears of maintenance, if any, now due to the Applicant by the Respondent in respect of Kiah.

The Duration of the Union

[11] On behalf of the Applicant, it was contended that the parties cohabited in a union other than a marriage for some 13 years while, on behalf of the Respondent, it was contended that the union lasted some 12 years.

[12] In this regard the Applicant, in her affidavit filed 31 July 2000, stated that they lived together from 1986 to 1 August 1999 when she moved out of the property.

[13] The Respondent has not filed an affidavit in response to that of the Applicant, nor has it been suggested to the Applicant under cross-examination that the duration of the union was not 13 years. It must be noted, however, that although in earlier proceedings before the court the Respondent contended that the union ended in 1993, Mr. Arthur Holder, Counsel for the Respondent, in his submissions filed 28 May 2013 stated

that the union commenced in 1986 and ceased in 1998, some twelve years later.

[14] I therefore accept the affidavit evidence of the Applicant that the union lasted 13 years and I so find.

The Contributions

[15] It is common ground between the parties that the Applicant paid the deposit of \$8 000.00 together with the commitment fees on the mortgage and that the Respondent paid the installments on the mortgage by monthly deductions from his salary.

[16] The Applicant asserts that she paid all the utility bills and the mortgage insurance. The water bill was in the name of the Respondent while the electricity and telephone bills were in her name. The Respondent did not provide money to assist with the running of the household.

[17] The Respondent disputes that the Applicant paid the utilities by herself. He asserts that, notwithstanding that the electricity bill was in the name of the Applicant, he gave her money towards the payment of that bill. He further asserts that he contributed significantly towards the payment of the other utility bills and the food and also obtained a loan in the sum of \$20 000.00 to purchase all the furniture for the property.

- [18] He stated in his affidavit that the Applicant went overseas to pursue her studies from 1994 to 1997 and that any direct contributions made by the Applicant to the preservation and conservation of the property was minimal.
- [19] He denied that the Applicant made any significant or worthwhile contribution towards the running of the house and the maintenance of Kiah. And he also denied that the Applicant paid the mortgage insurance.
- [20] However, he admitted under cross-examination that he was not aware that the Applicant had exhibited documents to show that she had indeed paid the mortgage insurance for the period 2003 to 2011 in the sum of \$38.93 per month.
- [21] Thus I reject the affidavit evidence of the Respondent that the Applicant did not pay the mortgage insurance and find that, in addition to the deposit and the commitment fees, the Applicant also paid the mortgage insurance.
- [22] I also reject the affidavit evidence of the Respondent that the Applicant did not make any significant or worthwhile contribution to the maintenance of Kiah. The order for the maintenance of Kiah, the ongoing arrears of maintenance under that order and the garnisheeing of the Respondent's salary on a monthly basis in respect of that maintenance shows unequivocally that the Respondent, certainly after the breakup of the union, did not voluntarily provide for Kiah. The level of his reluctance strongly

suggests that, in all probability, he was equally recalcitrant during the existence of the union in maintaining Kiah adequately.

[23] The Respondent has not produced any evidence of the alleged loan of \$20 000.00 which he said was used to purchase the furniture in the property. Nor has he stated how the loan was repaid. It seems to me that, in the same way he produced the accounts showing payment of the mortgage directly from his salary, he could and should have produced documentary evidence of that alleged loan and its repayment.

[24] Indeed, the Applicant has denied that they purchased any furniture for the property except for a new stove purchased by her and asserted that they took all the furniture from the apartment they were renting in Newbury, St. George to the property. I accept this affidavit evidence of the Applicant and reject that of the Respondent on relation to the alleged loan.

[25] The Applicant deposed in her affidavit filed 1 October 2012 that she paid to have all the cupboards in the property built and installed and also had the bathroom tiled. She stated further that she tiled the walls of the kitchen herself. None of this has been challenged by the Respondent.

[26] Finally, the Applicant deposed in her foregoing affidavit, that she had borrowed the sum of \$10 000.00 to assist the Respondent with medical bills and to accompany him to Scotland for surgery following a vehicular

accident in 1992 which left him incapacitated for two and a half years. During this time she cared for and nursed him and “babied him” back to health. No documentary evidence was produced to substantiate that alleged loan.

[27] Even if substantiated, I do not consider that it ought properly to be regarded as a contribution to the acquisition, improvement or conservation of the property.

[28] I am satisfied that, on the evidence before me, the Applicant bore the brunt of running the household including the payment of the utilities, the purchase of food and the maintenance of Kiah. It was the fact of her financial contribution that allowed the Respondent to pay the monthly installments on the mortgage.

[29] I therefore find that the Applicant made both a direct and indirect financial contribution to the acquisition, improvement and conservation of the property. And I reject the evidence of the Respondent that her contribution thereto was minimal.

The Non-Financial Contributions of the Parties

[30] On the evidence before me, I am satisfied that the Applicant also made a significant non-financial contribution in her role as a mother, homemaker and spouse of the Respondent.

- [31] In her role as spouse, she cared for and supported the Respondent through what must have been a difficult period of his life following the vehicular accident which resulted not only in serious injury to the Respondent but also a fatality. Of her role as a mother and homemaker, nothing more needs to be said.
- [32] In *Proverbs v Proverbs*, **Civil Appeal No. 7 of 2001 (date of decision 28 March 2002)** the court emphasised that the contribution of a spouse as a homemaker must not be treated in a token way.
- [33] Mr. Holder cited the case of *Granville O'Neal Cox v Ray Elizabeth Cox*, **Civil Appeal No. 19 of 2005 (date of decision 21 June 2007)** at para [42] where the Court of Appeal, approving the cases *In the Marriage of Mahon (1982) FLC 91-242* and *Scott v Briggs (1991) 14 Fam LR 661*, accepted that the expression 'homemaker' is a sexually neutral term that includes husbands. The court then went on, at para [43], to approve the explanation of the concept of 'homemaker' as outlined in *Green v Robinson (1995) 18 Fam LR 594 at p. 613* as having a "different and wider connotation than housekeeping or maintaining a house. It involves the creation of an emotional ambience of stability." It illustrated how a male spouse, by having and using skills related to home improvement, may exercise those

skills for the mutual advantage of the parties in the relationship thereby leading to a more pleasant enjoyment of the domestic relationship.

[34] Thus, Mr. Holder impressed upon the court that the Respondent also played a role in creating stability in the home environment. The problem of the Respondent is that this is a bald assertion of Counsel in his submissions and is wholly unsupported by any evidential basis. In any event, at issue is the contribution of the Applicant as a homemaker.

[35] In this regard it is significant that throughout the length of these protracted proceedings, the Respondent has filed only one affidavit, on 8 May 2012, in response to the Applicant's affidavit filed 4 October 2002 and has left unchallenged the Applicant's affidavits filed 31 July 2000 and 1 October 2012 respectively. The Respondent also has not challenged the affidavit of Mervyn Hope filed in support of the Applicant on 7 June 2012. Further, no statement of financial circumstances has been filed on behalf of the Respondent.

[36] The Applicant seeks an order under **s. 57 of the Act** altering the interests of the parties in the property so as to vest in her a 65% share and interest in the property.

[37] **S. 57(2) of the Act** prohibits the court from making such an order unless it is satisfied that, in all the circumstances, it is just and equitable to do so.

[38] **S. 57(3)(d) of the Act** mandates that the court, in considering what order should be made under **s. 57 of the Act**, must take into account, *inter alia*, the matters referred to in **s. 53(2) of the Act** in so far as they are relevant.

[39] I now turn to consider those matters which are relevant to this case:

(a) *The age and state of health of each of the parties:* No evidence has been adduced of the age or the state of health of either the Applicant or the Respondent. It seems to me that both parties must be enjoying relatively good health and that there is no significant age differential that would place either party at a disadvantage and thus impact on the order;

(b) *The income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment:* In this case, the property in issue is the only property of the parties. Both parties are civil servants and are in receipt of a monthly income and both parties have the physical and mental capacity for gainful employment. As to their financial resources, in neither case is there any or sufficient evidence that would allow me to make a finding on their respective financial resources;

(c) *The financial needs and obligations of each of the parties:* No evidence has been adduced of the financial needs and obligations of the Respondent beyond the implicit financial needs to support himself, since his obligation to support Kiah ceased on her attaining the age of 21 on 8 September 2011.

In her affidavit filed 4 October 2003, the Applicant deposed to having several financial obligations including payments for her car; monies owed to the Student Revolving Loan Fund and to the bank for student loans and for maintaining herself and Kiah. Kiah has, since the filing of that affidavit, completed her university education and, since October 2012, has been employed.

No evidence as to her current financial needs and obligations has been adduced beyond the implicit financial need to support and maintain herself.

(d) *Where the parties have separated, a standard of living that is, in all the circumstances, reasonable:* The Applicant moved out of the property in August 1999, leaving the Respondent in occupation thereof. It appears that there is a high probability

that the Respondent has been able to continue to maintain and enjoy a reasonable standard of living.

On the other hand, the Applicant returned to her father's home where she is still residing. She wishes to enjoy a standard of living that approximates that now enjoyed by the Respondent. She is therefore seeking funds to acquire her own home by a payment from the Respondent equivalent to a 65% share or interest in the property.

I am not satisfied that her demand is altogether reasonable as it may create an equally patent imbalance in their respective standards of living; and

- (e) *Any fact or circumstance which in the opinion of the court the justice of the case requires to be taken into account: Almost 14 years have elapsed since the Applicant first filed the First Application seeking orders, *inter alia*, in relation to the property.*

That is an inordinate length of time which seems in a large measure to be attributable in one way or another to the Respondent.

Doubtless this delay has caused financial implications for the costs to the Applicant of either purchasing or constructing a house using the monetary value of any share and interest she may be awarded in the property.

There is, however, no evidence before the court on which to assess that financial cost and take it into account in making an order in relation to the property.

Assessing the Contributions

[40] I am satisfied that the Respondent made the greater direct financial contribution to the acquisition of the property in repaying the mortgage. I am also satisfied that, after the initial direct contribution of the Applicant to its acquisition in paying the deposit on the purchase price and the commitment fees, she made, over the years, further direct financial contributions by paying the mortgage insurance on a monthly basis and also indirect financial contributions by: (a) paying for the cupboards to be built and tiling the bathroom and the kitchen; and (b) paying for the utilities and purchasing the food.

[41] And I find that these indirect financial contributions allowed the Respondent to pay the mortgage by monthly deductions from his salary.

[42] Taking into account the non-financial contributions of the Applicant as spouse and homemaker, in addition to her direct and indirect financial contributions over the years, I find that the Applicant has made a substantial contribution to the acquisition, improvement and conservation of the property. In my judgement, the direct financial contribution of the Respondent has been offset by the contributions of the Applicant. I therefore reject the Respondent's contention that her contribution was minimal.

[43] Moreover, this is a union that lasted some 13 years and the property was purchased in the joint names of the parties.

[44] Accordingly, I order that the Applicant and the Respondent are each entitled to a one-half share and interest in the property situate at #206 Lowlands Park.

[45] The property has been valued in the sum of \$275 000.00 by Stephen Wiltshire of Felicity Ltd. and that valuation has been accepted and agreed by both parties.

[46] Accordingly, it is ordered that the Respondent shall, on or before 18 July 2014, pay to the Applicant the sum of \$137 500.00 in satisfaction of her share and interest in the matrimonial home. In the event of default of payment of the said \$137 500.00 within the time stipulated, the Respondent

shall pay to the Applicant interest on the said sum at the rate of 6% per annum from 19 July 2014 until paid in full.

The Arrears of Maintenance

- [47] On hearing the matter on 20 February 2013, I made an order that Counsel for both parties should agree, in writing, the arrears now due and owing by the Respondent taking into account any sums paid after May 2012, the date in which Kiah completed her tertiary education.
- [48] On 7 April 2014, Counsel for the Applicant filed an affidavit in which she deposed that, in compliance with that Order, she caused to be sent to Mr. Holder, for his comments, a letter dated 21 February 2014. That letter was exhibited as **Exhibit "JOT"**. She subsequently spoke to Mr. Holder who informed her that he was awaiting further instructions from his client. Subsequent to that conversation, she has left several messages with the office of Mr. Holder but has not received a response.
- [49] In **Exhibit "JOT"** Counsel calculated that for the period April 2001 to September 2003 the Respondent had paid maintenance in the sum of \$12 000.00 (\$400 x 30 months). And for the period June 2012 to February 2014 he paid maintenance in the sum of \$8 400.00 (\$400 x 21 months). Therefore, she said, the Respondent was still in arrears of \$3 600.00 (\$12 000.00 - \$8 400.00).

[50] However, the correct calculations should be as follows:

Monies paid April 2001 to Sept 2003: \$400.00 x 29 months = \$	11 600.00
Less monies paid June 2012 to Feb 2014: \$400.00 x 21 months =	<u>7 600.00</u>
	\$ 4 000.00

[51] In the absence of calculations or submissions from Counsel for the Respondent I find, and so hold, that the Respondent has overpaid the sum of \$7 600.00. However, he is still in arrears in the sum of \$4 000.00 to the Applicant.

Costs

[52] In her written submissions filed 22 May 2013 Counsel for the Applicant urged the court to order the Respondent to bear the costs of these proceedings on the basis that the Respondent: (i) has been responsible for the significant delay in this case and, on several occasions, had to be summoned to appear in court; and (ii) has not tried to settle this matter.

[53] However, there is no application for costs in either of the Applicant's applications filed 31 July 2000 or that filed on 4 October 2002. Accordingly, Counsel's submission is rejected and each party shall bear his or her own costs in accordance with the general rule that each party to proceedings under the Act shall bear his or her own costs.

Disposal

[54] In disposition of the application I make the following orders:

1. The Respondent shall on or before 18 July 2014 pay to the Applicant the sum of \$137 500.00 in satisfaction of her share and interest in the property situate at #206 Lowlands Park, Christ Church;
2. In the event of default of payment of the said \$137 500.00 within the time stipulated, the Respondent shall pay to the Applicant interest on the said sum at the rate of 6% per annum from 19 July 2014 until paid in full;
3. The Respondent shall pay to the Applicant the outstanding arrears of maintenance in the sum of \$ 4 000.00 on or before 18 July 2014 and, in default of payment within the time stipulated, the said sum shall carry interest at the rate of 6% per annum from 19 July 2014 until paid in full;
4. Pursuant to **s. 94(1) of the Act**, each party will bear his or her own costs of these proceedings;
5. Liberty to apply.

Elneth O. Kentish
Judge of the High Court