



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 365

IN THE MATTER OF THE PARTITION ACTS 1855 AND 1914

AND IN THE MATTER OF 4 SYLVAN DELL ROAD, PAGET PARISH, BERMUDA

BETWEEN:

LEROY MACQUILLIAN STEVENS

Petitioner

-v-

GINA MARIE ASTWOOD

Respondent

## JUDGMENT

(In Court)

Date of Hearing: August 12, 2011

Date of Judgment: August 26, 2011

Mr. Edward King, Edward Ishmael-King, for the Petitioner  
The Respondent in person

## Introductory

1. The Petitioner and the Respondent jointly own the Property they until recently cohabited with their children. The Petitioner seeks an order for the sale of the Property and the equal division of the proceeds and the costs of the Petition, the Respondent being unable to take up his offer to buy out his 50% share. The Respondent opposes this application on the sole ground that, having regard to the best interests of the children of the relationship, the Court ought instead of ordering an immediate sale make a *Mesher* order, by analogy with orders made in matrimonial proceedings, postponing such a sale to allow the children to remain in the family home.
2. The Petition was presented on October 27, 2010 and first heard on November 18, 2010. On that date Mr. Peniston appeared for the Respondent and accepted that it would be difficult in law to object to severance of the joint tenancy. However, he did also state the best interests of the children of the relationship should be paramount. I ordered a valuation of the Property by an independent valuer to be appointed by the Court if not agreed. No agreement was reached and on January 27, 2011, I ordered the property to be appraised by Rego Sotheby within 8 weeks. On March 2, 2011, the Property was valued at between \$800,000 and \$825,000,
3. By letter dated March 15, 2011, the Petitioner requested the Respondent, who at this point was representing herself, to indicate by March 31, 2011 whether she wished to buy his 50% share of the Property. Her response appears to have been to file an Affidavit dated May 4, 2011 requesting the Court to make a Mesher order so that the children of the family could continue to live in the only home they had known since 1999. On May 5, 2011, the Petitioner filed a Summons issued on May 9, 2011 supported by his Second Affidavit dated May 5, 2011 seeking an order for sale.
4. On the hearing of this Summons (on May 26, 2011), I ordered that the Petition should be set for hearing and that the Petitioner's counsel should prepare a skeleton argument explaining why the Respondent should not be entitled to seek a *Mesher* order. The Respondent insisted that she wished the Court to determine this issue after being advised by the Court that its resolution against her could have consequences in terms of costs. This issue was directed to be determined as a preliminary issue before the Court decided whether the order for the sale of the Property would be made on traditional partition action or modified *Mesher* quasi-matrimonial terms.
5. On the hearing of the Petition, in advance of which Mr. King had filed the 'Petitioner's Skeleton Argument', the Respondent sought an adjournment on the grounds that she had the previous day been refused legal aid and had been told to reapply. Bearing in mind the nature of the present action and her interest in the Property, there seemed to me to be no

realistic prospect of her obtaining legal aid. Bearing in mind that the Petition had been listed for hearing unconditionally in the knowledge that the Respondent was not represented (although it was hoped that she might obtain representation in the interim), I refused her adjournment application.

### **Legal findings: the legal basis for Mesher orders**

6. The starting point for any consideration of whether this Court possesses the jurisdiction to make a *Mesher* order postponing the sale of a property jointly owned by unmarried cohabitees is to identify the legal basis on which such orders are made. Such orders are made under the statutory jurisdiction conferred by the Matrimonial Causes Act 1974 to apportion the jointly-owned property upon a divorce. Bermudian cases considering *Mesher* orders include: *Trott-v-Trott* [1993] Bda LR 6 (Court of Appeal for Bermuda, Henry JA); *Trott-v-Trott* [1998] Bda LR 13 (Court of Appeal for Bermuda, Cons JA); and *B-v-B* [2010] Bda LR 28 (Wade-Miller, J). In *Trott-v-Trott* [1998] Bda LR 13, Sir Derek Cons opined as follows (at page 4):

*“The main thrust of the husband's attack upon the Judge's Order is made against those parts which make up what is commonly known as a Mesher Order. It is argued, inter alia, that in this respect the Judge concentrated too heavily upon the needs of the wife and child, ignoring those of the husband and overlooking the fact that the Order might deprive the husband for many years of the benefit of what the Judge found should be his far greater interest in the property and that indeed, having regard to his age, when the Order finally terminated the husband would be unable to raise money on the house to pay off whatever would then become due to the wife and he would thus most unfairly be forced to sell it.*

*It was submitted that instead of the Mesher Order the proper Order should have been one for an immediate lump sum, taking into account the husband's provision of the matrimonial home from the very outset of the marriage, but excluding the value of the taxi and taxi permit, which the Judge had put at \$90,000. It was emphasised that the wife had no right to a ‘share’, as the Judge had put it, of that asset; that she had not, as he found, contributed to its acquisition, and in any event it was the taxi that enabled the husband to earn his livelihood and it should not be put in jeopardy in any way.*

*The wife strongly opposed the suggestion of an immediate lump sum, other than in an amount that could certainly not be raised by the husband, however he marshalled his resources. Only with that amount, it was said, could she arrange suitable and secure accommodation for herself and the daughter. One the other hand, if the Court were minded in principle to*

*confirm the Mesher Order, she was willing to offer certain concessions, which in the event we find eminently reasonable on her part and which have been of considerable assistance in guiding us to our eventual conclusion.*

*The Mesher Order has come in for harsh criticism in the English courts—see e.g. Mortimer v. Mortimer [1986] 2 FLR 315—and appears likely to have been made recently only in those rare cases where the family assets were sufficient to provide suitable homes for both parties. But its use has remained not uncommon in Bermuda. This may reflect a difference in attitude to the possession of land here, where the circumstances are very different from those in England and where houses are sold or resold much less frequently.*

*Be that as it may we are satisfied that it was appropriate to make such an Order in the present instance.”*

7. The cited passage makes it clear that the Bermudian courts have made Mesher orders more frequently in Bermuda than in England where they were first made, undoubtedly (in my view), because of the greater difficulties here in purchasing property. It is implicit in all of the above cases that the jurisdiction under which such orders are made is the statutory jurisdiction to deal with ancillary relief applications. The same is true of modern English cases as well. For example, in *Miller-v-Miller* [2006] UKHL 24, Baroness Hale in the course of an analysis of the rationale underlying the broad powers conferred under the Matrimonial Causes Act 1973 in relation to the disposition of property rights upon divorce noted as follows:

*“142. Of course, an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the needs of one party or the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution: see, eg, the observations of Munby J in *B v B (Mesher Order)* [2002] EWHC 3106 (Fam); [2003] 2 FLR 285. Recognising this is one reason why English law has been so successful in retaining a home for the children.”*

8. The seminal case of *Mesher-v-Mesher* [1980] 1 All ER 126 itself contained no explicit analysis of the legal basis for the order made. The appeal to the English Court of Appeal

was an appeal against orders made on an ancillary relief application in respect of a transfer of the husband's entire interest in the former matrimonial home to the wife and modest child maintenance payments to be made by the husband. Davies LJ, having reviewed the facts, concluded as follows:

*“It would, in my judgment, be wrong to strip the husband entirely of any interest in the house. I would set aside the judge's order so far as concerns the house and substitute instead an order that the house is held by the parties in equal shares on trust for sale but that it is not sold until the child of the marriage reaches a specified age or with leave of the court.”*<sup>1</sup>

9. Nevertheless, it is well recognised that the Bermudian Matrimonial Causes Act 1974 is derived from the 1973 English<sup>2</sup> counterpart legislation. The statutory powers conferred under Part IV of the 1974 Act (“FINANCIAL RELIEF FOR PARTIES TO MARRIAGE AND CHILDREN OF FAMILY”) are described in the first section of the relevant Part of the Act:

***“Financial provision and property adjustment orders***

25 (1) *The financial provision orders for the purposes of this Act are the orders for periodical or lump sum provision available (subject to this Act) under section 27 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation and under section 31(6) on proof of neglect by one party to a marriage to provide, or to make a proper contribution towards, reasonable maintenance for the other or a child of the family, that is to say —*

(a) *any order for periodical payments in favour of a party to a marriage under section 27(1)(a) or 31(6)(a) or in favour of a child of the family under section 27(1)(d), (2) or (4) or 31(6)(d);*

(b) *any order for secured periodical payments in favour of a party to a marriage under section 27(1)(b) or 31(6)(b) or in favour of a child of the family under section 27(1)(e), (2) or (4) or 31(6)(e); and*

(c) *any order for lump sum provision in favour of a party to a marriage under section 27(1)(c) or 31(6)(c) or in favour of a child of the family under section 27(1)(f), (2) or (4) or 31(6)(f),*

*and references in this Act to periodical payments orders, secured periodical payments orders, and orders for the payment of a lump sum are*

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<sup>1</sup> At page 128d.

<sup>2</sup> Matrimonial Causes Act 1973, which applies to England & Wales but not Northern Ireland or Scotland: section 55.

*references to all or some of the financial provision orders requiring the sort of financial provision in question according as the context of each reference may require.*

(2) *The property adjustment orders for the purposes of this Act are the orders dealing with property rights available (subject to this Act) under section 28 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say —*

- (a) any order under section 28(1)(a) for a transfer of property;*
- (b) any order under section 28(1)(b) for a settlement of property; and*
- (c) any order under section 28(1)(c) or (d) for a variation of settlement.”*

10. The English provisions on which section 25 is based may be found in section 23 in Part II of the 1973 English Act. Section 29 (“*Matters which court is to have regard in deciding how to exercise its powers under ss.27 and 28*”) is substantially based on section 25 of the English Act. Section 28 of the Bermudian Act (“*Property adjustment orders in connection with divorce proceedings, etc.*”) is substantially based on section 24 of the English Act.

### **The case for a Mesher order**

11. In the past, the Bermudian courts have made *Mesher* orders in the context of ancillary relief applications made in matrimonial proceedings governed by statutory rules derived from English counterpart provisions. Such orders have not been made under common law rules nor by way of a broad and generous application of the provisions of section 6 of the Minors Act 1950, which provides as follows:

*“6. Where in any proceedings before any court the custody or upbringing of a minor, or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”*

12. The Respondent's application invites the Court to have regard to section 6 of the Minor's Act 1950 (to which Mr. Peniston implicitly referred at the initial hearing of the Petition) in the way the Court deals with the present application under the Partition Acts of 1855 and 1944. This would require the Court to find either that:

(a) *the custody or upbringing of a minor...is in issue; or*

(b) *the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question...*"

13. Apart from the fact that the Respondent has sought to bring the upbringing of the children into issue, it is not immediately obvious that their upbringing is properly in issue in the present Partition Acts action. Nor can it be asserted that the Property belongs to the children or is held in trust for them. It appears to be common ground, however, that the unmarried parties bought the Property jointly in 1999, and lived together with the children in it for some 10 years before the Petitioner left in the wake of a Domestic Violence Order in favour of the Respondent.

14. Such facts would clearly, in the context of divorce proceedings, engage the Court's discretionary jurisdiction to consider postponing the sale so that the children and their mother could remain in the former matrimonial home. A further argument that might be advanced in support of the Respondent's application derives from the following provisions in the Children Act 1998:

## "PART IIA

### *EQUAL STATUS OF CHILDREN*

#### ***Abolition of distinction between legitimate and illegitimate children***

*18A (1) Subject to subsection (2), for all purposes of the law of Bermuda a person is the child of his natural parents and his status as their child is independent of whether he is born inside or outside marriage.*

*(2) Where an adoption order has been made under the Adoption of Children Act 1963 or the law of any other jurisdiction, the child is in law the child of the adopting parents as if they were the natural parents.*

*(3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2).*

*(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished and the relationship of parent and child and kindred relationship flowing from that relationship shall be determined in accordance with this section.*

*(5) This section applies in respect of every person whether born before or after this Act comes into force and whether born in Bermuda or not and whether or not his father or mother has ever been domiciled in Bermuda.*

*[Section 18A inserted by 2002:36 s.3 effective 19 January 2004]*

***Rule of construction***

*18B (1) For the purpose of construing an instrument or statutory provision, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under section 18A.*

*(2) The use of the words "legitimate" or "lawful" shall not prevent the relationship being determined in accordance with section 18A.*

*[Section 18B inserted by 2002:36 s.3 effective 19 January 2004]*

***Application***

*18C This Part applies to —*

*(a) any statutory provision made before, on or after the day this Part comes into operation; and*

*(b) any instrument made on or after the day this Part comes into operation,*

*but does not affect —*

*(c) any instrument made before this Part comes into operation; and*

*(d) a disposition of property made before this Part comes into operation.*

*[Section 18C inserted by 2002:36 s.3 effective 19 January 2004]*

***Purpose***

*18D The purpose of this Part is to ensure that the rights of a child are not affected by the fact that his parents were not married.*

*[Section 18D inserted by 2002:36 s.3 effective 19 January 2004]”*

15. Section 18A of the Children Act abolishes all distinctions between the status of children based on their parents being married or not. Section 18B apparently provides that, *inter alia*, any statutory reference to children by reference to children of married parents shall be construed so as to include the children of unmarried parents. Section 18C provides that this rule of construction applies to any statutory provision whether made before or after the entry into force of Part IIA of the Act. This would arguably support a construction of provisions of the Matrimonial Causes Act 1974 which expressly refer to children as encompassing the children of unmarried parents; however, the child maintenance



provisions of this statute are generally regarded as being replicated in the Children Act 1998 in any event. Does section 18B have the effect that, as read with the property transfer provisions of the Matrimonial Causes Act, this Court has the discretion to make a *Mesher* order in the interests of all children without regard to the marital status of their parents? This contention is far less straightforward and far more controversial in terms of the scope and effect of section 18B of the Children Act. It would potentially interfere with vested property rights, including those accruing under statutes such as the Partition Acts, in a dramatic and unanticipated manner.

16. Section 18A, enacted in Bermuda in 2002, is substantially similar to sections 5 of the New South Wales Status of Children Act 1996. Section 6 of the latter Act governs the construction of references to children in instruments but not in legislation in terms broadly similar to section 18B of the Bermuda 1998 Act. In other words, the Australian legislation only sought to equalize the status of all children in the context of construing instruments (presumably primarily trust deeds and wills); it did not seek to modify the terms of other statutes dealing with children.

#### **The Petitioner's submissions against a Mesher order**

17. Mr. King for the Petitioner submitted that the Court had no jurisdiction to make a Mesher order because the 1974 Act did not apply to the parties. Further, the Partition Acts did not make provision for the Court to take into account the accommodation needs of children who were not parties to the Petition. This issue did not fall for determination in the present proceedings.
18. The Petitioner's counsel also pointed out that section 5 of the Partition Act 1855 did not apply, because they were not infants holding an interest as co-tenants:

#### ***"Infants***

5 (1) *Where it appears to the Supreme Court that the interests of any infant would be affected by any partition under this Act, the Court shall direct the Registrar to inquire and report thereupon; and if it is satisfactorily made to appear to the Court that the interests of the infant will not be unjustly or injuriously affected by the proposed partition, the Court, if it thinks fit, may order the Registrar to execute any deed for perfecting such partition as attorney for the infant for that purpose appointed by the Court:*

*Provided that in every such case it shall be competent to the infant at any time within twelve months after attaining his full age and not afterwards, or in the event of the death of the infant before attaining such age, for the heirs, executors, administrators or assigns of the infant at any time within twelve months after the death of the infant and not afterwards, to apply to the Supreme Court in a*

*summary way to set aside such deed, so far as relates to the infant, his heirs, executors, administrators and assigns, for any legal or equitable cause whatsoever; and it shall be competent to the Court to set the deed aside, if it is made to appear to the Court that there is any legal or equitable cause whatsoever for setting the deed aside.*

*(2) Unless and until any such deed is set aside as aforesaid it shall be as effectual to all intents and purposes whatsoever as if the infant had executed the deed personally, and at the time of the execution thereof had been of full age.”*

19. So the 1855 Act expressly deals with the rights of infants (or minors), but in terms which clearly imply that the phrase “*the interests of any infant would be affected by any partition under this Act*” (section 5(1)) contemplates only ownership interests which would entitle the infant to execute any relevant deed (section 5(2)).
20. Finally, Mr. King submitted that the only way the children of cohabitants could enjoy the similar rights to those available under the Matrimonial Causes Act 1974 would be through legislative intervention. By way of illustration, he referred the Court to the Cohabitation Relationships Act 1998 (Trinidad & Tobago)<sup>3</sup>. This legislation empowers the Trinidad & Tobago High Court to make child maintenance and property transfer orders analogous to those provided for under the Matrimonial Causes Act 1974.
21. This argument on its face seems highly persuasive. In England and Wales as well, express legislative provision has now been made to empower the courts to make property adjustment orders in relation to property jointly owned by cohabiting couples, be they same-sex civil partnerships or opposite-sex cohabitants: Civil Partnerships and Certain Rights of Cohabitants Act 2010<sup>4</sup>.

**Legal findings: does the Court possess jurisdiction to make a Mesher order when adjudicating a petition under the Partition Acts?**

22. The jurisdiction to make an order postponing the sale of jointly owned property to enable the children of a family whose parents have separated arises under provisions of the Matrimonial Causes Act 1974 expressly designed to:
- (a) apportion the rights of divorced parents in respect of property in which they were jointly interested during the marriage; and

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<sup>3</sup> Act No. 30 of 1998: see section 6(a).

<sup>4</sup> Act No. 24 of 2010: see sections 118, 174.

- (b) take into account the obligations of the parent who does not have primary care and control of the child or children of the family to maintain such child/children and (where applicable) the ‘custodial’ parent as well.

23. This statutory regime explicitly places marital assets into a separate legal box and subjects them to distinct legal rules which do not apply to jointly owned property generally. The power to make property adjustment orders, for instance, depriving a husband of his entire interest in the former matrimonial home of which he is the sole legal owner in discharge of his statutory obligations to his wholly dependent ex-wife and children, is only conceivable in this special statutory realm. In recognition of the substantial similarity that certain non-marital relationships bear to marriage, the matrimonial statutory regime has been expressly extended beyond marital relationships by legislation such as the Cohabital Relationships Act 1998 (Trinidad & Tobago) and the Civil Partnerships and Certain Rights of Cohabitants Act 2010 (England & Wales).
24. In my judgment similar express legislation would be required in Bermuda to empower the Court to interfere with the property rights of non-married couples under the general law. If section 18B of the Children Act 1998 (as amended in 2002) is construed as retrospectively taking away the Petitioner’s right to an order for sale of the Property he acquired in 1999, this would potentially represent a compulsory acquisition of his property in violation of section 13 of the Bermuda Constitution. Section 13 provides as follows:

***“Protection from deprivation of property***

*13 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—*

*(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and*

*(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and*

(c) *provision is made by a law applicable to that taking of possession or acquisition—*

(i) *for the prompt payment of adequate compensation; and*

(ii) *securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and*

(d) *giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.*

**(2) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—**

**(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—**

(i) *in satisfaction of any tax, rate or due;*

(ii) *by way of penalty for breach of any law or forfeiture in consequence of a breach of any law;*

(iii) *as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;*

(iv) *by way of the taking of a sample for the purposes of any law;*

(v) *where the property consists of an animal upon its being found trespassing or straying;*

**(vi) in the execution of judgments or orders of a court:**

(vii) *by reason of its being in a dilapidated or dangerous state or injurious to the health of human beings, animals or plants;*

(viii) *in consequence of any law with respect to prescription or the limitation of actions; or*

(ix) *for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of reclamation, drainage, soil conservation*

*or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out),*

*except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or*

*(b) to the extent that the law in question makes provision for the taking possession or acquisition of any of the following property (including an interest in or right over property), that is to say—*

*(i) enemy property;*

*(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of twenty-one years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;*

*(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or*

*(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.*

*(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds.” [emphasis added]*

25. Legislation may validly provide for property interests to be interfered with pursuant to the enforcement of judgments or court orders; but this is by way of exception to the

general rule that property rights cannot simply be taken away. It is well settled common law rule of statutory construction that legislation should not be construed in way which will interfere with fundamental rights or vested rights under contracts. For instance, in *Land and Property Limited-v-Restormel Borough Council* [2004] EWLands LCA\_47\_2002 (9 August 2004), the Lands Tribunal (at paragraph 189) referred to “*the canon of statutory construction, that an intention to take property without compensation is not to be imputed to the legislature unless expressed in unequivocal terms (Central Land Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744 at 752), and with section 3 and Article 1 of the First Protocol in Schedule 1 to the Human Rights Act 1988 (see Lithgow v United Kingdom [1986] 8 EHRR 329)*”<sup>5</sup>. On the other hand, the Judicial Committee of the Privy Council has famously held that a court interpreting the fundamental rights and freedoms provisions of Bermuda’s Constitution ought “*to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms*”: *Minister of Home Affairs -v- Fisher* [1980] A.C. at (per Lord Wilberforce).

26. So the property rights protected by section 13 of the Constitution must be construed broadly and any legislation which potentially interferes with such rights must be construed narrowly with any ambiguities resolved against interfering with property rights. It is impossible to fairly say that the following statutory provisions of the Children Act 1998 unambiguously empowers this Court to extend the property adjustment powers conferred by the Matrimonial Causes Act to unmarried couples in order to serve the best interests of their children:

“18A ...(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished and the relationship of parent and child and kindred relationship flowing from that relationship shall be determined in accordance with this section....

18B (1) For the purpose of construing an instrument or statutory provision, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under section 18A.”

27. It is certainly possible, adopting a very broad and liberal construction of sections 18A-18B of the 1998 Act, to view these provisions as empowering the Court to apply the property adjustment provisions of the Matrimonial Causes Act as read with the related

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<sup>5</sup> Also see *Re First Virginia Reinsurance Ltd.* [2003] Bda LR at pages 9-10.

child maintenance provisions as empowering this Court to make a Mesher order in a non-matrimonial context of cohabitation. But such a liberal construction is not permissible to the extent that it would clearly involve taking away (wholly or in part) the right of joint tenants to sever their tenancy and obtain a sale under the Partition Acts. Moreover, all the Children Act expressly purports to do is to ensure that any statutory provisions expressly dealing with children do not discriminate based on whether or not the children's parents were married or not.

28. The statutory power to make Mesher orders does to some extent depend on the interaction between the property adjustment powers directed at property owned by the husband and wife and the child maintenance provisions (as read with section 6 of the Minors Act, which makes the interests of minors a paramount consideration). But the crucial statutory power is the power to adjust the interests of the husband and wife in jointly owned property. It is far from clear that sections 18A and 18B were intended to go so far as to influence the construction not only of statutory provisions referring to children, but also statutory provisions which are merely related to provisions which deal with children's rights. Such a construction is particularly unattractive as the Children Act provisions are expressed to have retroactive effect, and the property adjustment powers *prima facie* interfere with fundamental property rights as well as vested rights under pre-2002 conveyances (such as the parties 1999 deeds in the present case). Moreover, as Mr. King rightly pointed out, the Court is presently dealing with an application under the Partition Acts, the provisions of which make no reference to children save (by necessary implication) children who are legally interested in the jointly-owned property.
29. Accordingly, the only arguable point which I have been able to identify<sup>6</sup> in support of the Respondent's contention that this Court may make a *Mesher* order in a non-marital context must be rejected.
30. Although the argument, initially raised by Mr. Peniston, has been rejected, the helpful arguments advanced by Mr. King do serve to identify a possible need for law reform in this area if the spirit of the Children Act's abolition of the distinction between children born within and without marriage is to be given legal force in the context of property adjustment orders made on the termination of cohabitational relationships. After all, the relationship between the parties to the present proceedings lasted for at least 10 years, far longer than many marriages; and yet the Court has no power to deal with joint property and child maintenance in the same joined-up way as is possible in matrimonial proceedings merely because the children's parents never married.

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<sup>6</sup> I saw no need to invite the Petitioner's counsel to address this point which I only identified after reserving judgment.

## Conclusion

31. The Petitioner is entitled to an order that the Property be sold on the open market and the proceeds distributed equally after all costs and expenses have been deducted. Subject to hearing the parties, I would order that all such expenses should be shared equally so that the Respondent is given credit for 50% of the actual mortgage payments she has made (over and above rental income applied to the mortgage debt) since the Petitioner left the Property in 2009.
32. The Petitioner originally fairly prayed for an order that the costs of the Petition should be shared by both parties. My provisional view, subject to hearing counsel for the Petitioner, is that although the Respondent has raised a legal point which this Court has rejected, such an order would still meet the justice of the present case. In inviting the Court to make a *Mesher* order in relation to a cohabitational relationship which this Court has found it has no jurisdiction to make in this context, the Respondent has helpfully identified the need for law reform in this area if Parliament wishes to give fuller effect to the policy objectives underlying section 18A of the Children Act 1998.

Dated this 26<sup>th</sup> day of August, 2011

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KAWALEY J