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**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 77/2001**

**SUIT. NO. E. 460 of 1999**

**BEFORE:     THE HON. MR. JUSTICE FORTE, P.  
                 THE HON. MR. JUSTICE LANGRIN, J.A.  
                 THE HON. MR. JUSTICE PANTON, J.A.**

<b>BETWEEN</b>	<b>PAUL WAYNE BARNES</b>	<b>APPELLANT</b>
<b>A N D</b>	<b>MARJORIE RICHARDS-BARNES</b>	<b>RESPONDENT</b>

**Miss Judith Cooper** for the appellant  
No appearances for the Respondent

**February 27 and July 5, 2002**

**LANGRIN, J.A.:**

This is an appeal by Paul Wayne Barnes, concerning an action commenced by Originating Summons whereby the respondent Marjorie Barnes sought the following orders :

- (1) That the applicant is entitled to a one hundred percent (100%) interest in the matrimonial home situate at Lot # 84 Greenvale Housing Scheme, Mandeville, in the parish of Manchester being the land comprised in Certificate of Title registered at Volume 1243 Folio 502 of the Register Book of Titles.
- (2) That the Respondent within one (1) month of the Order herein give the applicant a registrable transfer of his interest in the said property.

(3) That failing (1) and (2) above the Court makes a determination as to the respective interests of the parties in the said property.

(a) That the applicant be allowed to purchase the Respondent's interest by paying the current market value thereof within four (4) months of the Order in exchange for which the Respondent shall give to the applicant a registrable Transfer of his interest in said property.

(4) That the applicant is entitled to a one hundred percent (100%) interest in the furniture, household effects, appliances and other articles contained in the matrimonial home."

Campbell J (Ag.) as he then was, heard the matter and made the following declarations and orders:

1. That the Applicant is entitled to eighty per cent (80%) interest in the matrimonial home, and the respondent to Twenty percent (20%).
2. That the Applicant be allowed to purchase the Respondent's interest by paying the current market value hereof within four (4) months of this Order, in exchange for which the Respondent should give the applicant a registered Transfer of his interest in the said property.
3. That the cost of the Transfer is to be borne equally between the parties.

It is against this judgment that an appeal was lodged. The grounds of appeal are:

- (1) The Learned Trial Judge misdirected himself in law when he held that the Respondent is entitled to Eighty Percent (80%) of the matrimonial home, and Appellant Twenty Percent (20%).
- (2) The Learned Trial Judge failed to evaluate or to properly evaluate the evidence before him.

(3) The Learned Trial Judge took into account factors that he should not have.

(4) That the decision of the Learned Trial Judge is against the weight of the evidence.

We allowed the appeal on the 27<sup>th</sup> February, 2002 and promised then to put our reasons in writing. This we now do.

The undisputed facts are that the parties were married in September 1991 and resided in Mandeville, Manchester. Prior to the marriage they had a child in 1989 and on the 18<sup>th</sup> January, 1997 another was born. They lived at various places owned by the husband's relatives. Sometime in 1991 the husband purchased a parcel of land at Greenvale in the parish of Manchester for approximately Forty Three Thousand Dollars (\$43,000.00). This purchase was financed solely by the husband.

In 1993 the wife made an application to the National Housing Trust for a loan to build on the land. The husband agreed to join in the application and bought Ten Thousand Dollars (\$10,000.00) worth of Bonds in order to qualify them for a loan. A loan of One Million Dollars (\$1,000,000.00) was granted to them based on the wife's points and the husband's bonds. The loan contract was made in the names of both parties. The money was used to finance the construction of a three (3) bedroom dwelling house on the land purchased by the husband which became the matrimonial home.

The said home situated at Lot 84, Greenvale Housing Scheme, Mandeville is comprised in Title registered at Volume 1243 Folio 502 of the Register Book of Titles. The husband and wife were the registered proprietors as joint tenants on 10<sup>th</sup> November, 1995.

The relationship between the parties deteriorated and after the birth of the second child in March, 1997 the husband removed from the matrimonial home. Prior to that date the husband contributed to the household expenditure and also to the mortgage payments at the National Housing Trust. Improvements to the house include a grill, paved driveway and fencing around the property which were done by both. However, a substantial portion of the improvements were effected by the wife who also did timely maintenance repairs of the property.

The husband in his defence claimed that both parties are equally entitled to the matrimonial home and that each party is entitled to fifty percent (50%) of the value of the matrimonial home.

Before this Court the main challenge to the learned judge's order was in respect of the declared beneficial interest of eighty percent to the wife and twenty percent to the husband.

The Learned Trial Judge in a written judgment made the following correct observations:

"I find that the Applicant has since the Respondent's departure been solely responsible for the mortgage payments, such arrears, that have accrued, and all the household expenses.

It is clear from the evidence that there was no agreement between the parties either expressed or to be implied at the time of the acquisition as to their respective beneficial entitlements in the event of the breakdown of the marriage. The Court is therefore empowered to make a determination of their respective beneficial entitlement based on their conduct and contributions, thereby giving effect to their presumed common intention at the time of the acquisition of the property."

In **Pettitt v Pettitt** [1969] 2 All E.R. 385 at page 412 Lord Diplock stated the powers of the Court in determining the property rights as between husband and wife when he said:

"...Ever since 1882 husband and wife have had the legal capacity to enter into transactions with one another, such as contracts, conveyances and declarations of trust so as to create legally enforceable rights and obligations, provided that these do not offend against the settled rules of public policy about matrimonial relations. Where spouses have done so, the court has no power to ignore or alter the rights and obligations so created, though the court in the exercise of the discretion which it always has in respect of its own procedure may in an appropriate case where a matrimonial suit between the spouses is pending or contemplated adjourn the hearing or defer making an order for the enforcement of the right until the spouses have had an opportunity of applying for ancillary relief in that suit under the provisions of Part 3 of the Matrimonial Causes Act 1965, which do confer power on the court to vary proprietary rights, on granting a decree of divorce."

Further Lord Diplock at p. 413 went on to say:

"...When a "family asset" is first acquired from a third party the title to it must vest in one or other

of the spouses, or be shared between them, and where existing family asset is improved this, too, must have some legal consequence even if it is only that the improvement is an accretion to the property of the spouse who was entitled to the asset before it was improved. Where the acquisition or improvement is made as a result of contributions in money or money's worth by both spouses acting in concert the proprietary interests in the family asset resulting from their respective contributions depend on their common intention as to what those interests should be."

Lord Diplock also recognised that:

"It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the courts should give effect to it".

In the instant case it is demonstrably clear that both parties had a common intention to share equally the proprietary interest in the property which both parties had shared in building. They contributed equally to the deposit, mortgaged the house in their joint names and subsequently registered the title in both names as joint tenants.

In **Forrest v Forrest** Civil Appeal No. 78/99 unreported (Ratray P, Forte and Wolfe JJA) delivered on April 7, 1995 Forte J. A. as he then was, had this to say at page 11:

"If the court is to give effect to the common intention of the parties, the conclusion must be that they should share equally as that was their obvious intention at the time of the acquisition and at least up to the time of their separation. The question to be decided, however, is whether

the payment of the mortgage arrears entitles the wife to a greater share in the property, than that which they intended at the time of the acquisition. In my view, in the absence of evidence as to an agreement either expressed or implied between the parties to vary the original beneficial interest, as was clearly in the intention of the parties at the time of the acquisition, the court can do nothing else but give effect to what was the common intention of the parties. There being no such evidence in this case, the court cannot vary the beneficial interest of the parties based on mortgage payments being paid by one of the parties. However, the wife would be entitled to recover the share of the mortgage arrears payment, to which the husband would have been liable to pay, that is, 50% thereof."(emphasis supplied)

Where a husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares (see **Gissing v Gissing** [1970] 2 All E.R. 780 and **Cobb v Cobb** [1955] 2 All E.R. 696).

We agree that these are correct principles of law which may be applied in the instant case. The wife having discharged the obligation of the husband in paying the full extent of the mortgage she is entitled to be repaid out of the security the amount of the sums which should have been paid by him.

We conclude that the payment of the arrears of the mortgage by the wife cannot entitle her to a variation of her interest in the property

which has been established to be that of 50%. She would, however be entitled to be repaid half of the amount she paid on the mortgage as sums of money advanced on her husband's behalf. The wife is entitled to be paid by the husband one half of the total mortgage paid as of May, 1997. The determination of this sum is to be made by the Registrar of the Supreme Court.

The Learned Trial Judge fell into error when he failed to apply these principles to the instant case.

For the foregoing reasons the appeal was allowed and the Order made by the Court below set aside.

The Court granted the following declarations:

- That the parties should hold the property in equal shares.
- A valuation of the property should be done and the cost of the valuation should be borne equally by the parties. The respondent to have first option to purchase the property exerciseable within four months after receiving the valuation. Thereafter, if the respondent does not exercise her option, then the property is to be put on the open market and sold.
- The Registrar of the Supreme Court is empowered to sign all documents necessary to effect a registrable transfer should either party be unable or unwilling to do so.



- The respondent is entitled to receive from the appellant half (1/2) of the total mortgage payments made by the respondent since May, 1997. The Registrar of the Supreme Court is to determine the amount of such payments.

Costs of the appeal to the appellant to be taxed if not agreed.

**FORTE, P:**

I agree.

**PANTON, J.A.:**

I agree.