NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 427 OF 2000

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT

A N D

IN THE MATTER OF PREMISES OF LOT 874 FOURTH BARRACUTA WAY BRAETON PHASE 3 ST. CATHERINE

BETWEEN	FREDRIKA SONIA EWEN	APPLICANT
	ERROL AUGUSTUS EWEN	RESPONDENT

HEARD: MAY 6, 2002, MAY 10, 2002

DAYE J. (Ag.)

By originating Summons dated the 9th October, 2000, the applicant sought the following relief:

(1) A Declaration that the applicant is the owner of 50% of the premises at lot 874 Fourth Barracuda Way, Braeton, Phase 3, in the Parish of St. Catherine.

(2) A Declaration that the Respondent holds his Interest in the said premises on trust for the Applicant.

(3) An order that the said premises be transferred into the joint names of the Applicant and the Respondent and a registered Title be issued in Their names as Joint Tenants.

(4) That such further or other order be made in That premises as this Honourable Court seems fit.

The summons was supported by an affidavit by the applicant dated the 5th of October, 2000.

This application is brought under sec. 16 of the Married Women's Property Act. Applications under this section of the Act do not confer any rights on either party. The section is merely procedural and resort has to be made to the common law and or equity and particularly the law of trust to establish or determine one or either party's claim or right. This was stated by our Court of Appeal by Harrison J. A. in Pinnock v Pinnock S.C.C.A. 52/96. He stated as follows as page 10:

> "The claim ... is made by originating summons filed under the provisions of sec. 16 of the Married

> Women's Property Act ... is a procedural section giving to the court the power merely to declare the rights of the parties. In that respect the court has no power to re-distribute or adjust the shares in the property, as it thinks justice demands, but only to declare the existing rights". (see also similar dicta of Downer J.A. Chin v Chin S.C.C.A. 115/96 at page 16).

He went on further to add:

> "There is no special law applicable to matrimonial property. There is no principle of community of property as between spouses".
> (Pettit v Pettit [1969] 2 ALL E.R. 385)

I make reference to these dicta on sec. 16 of the Act because counsel for the respondent in his written and oral submissions appear to suggest the statutory provisions for bringing an application under the Married Women's Property Act in Jamaica is different from the statutory provision in the United Kingdom and therefore, the English cases are not applicable. Our Court of Appeal has applied the principles of the law of trust to claims for beneficial interest in property.

From the affidavits of the parties:

(a) Fredrika Ewen dated 19th October 2000,

(b) Errol Ewen dated 13th November, 2001

(c) Supplemental affidavit of Fredrika Ewen dated December 3, 2001,

(d) Further affidavit of Errol Ewen dated 23rd November, 2001.

The facts hereunder are uncontraverted. They are:

(1) In 1981 premises at Lot 874, Fourth Barracuta Way, Braeton, Phase 3 St Catherine was bought solely by the respondent for the sum of ($19,000.00). This was a two-bedroom house with a living room and kitchen.

(2) No direct contribution, whether for the deposit, or to the payment of mortgage installments was made by the applicant towards the purchase of the premises at all? No independent funds from private income, or loan or any funds from a joint bank account or savings was used by the applicant at any time towards the purchase of this premises

(3) The legal Title was conveyed in the sole name of the Respondent

(4) Both parties who previously lived together as man and wife from 1975 moved into the said premises as their home in 1981 after it was acquired.

(5) At the time of removal to this premises in 1981 both parties had two children, Tracy Ann born December 21, 1976 and Althea Gay, born February 27, 1980. A third child Tris Ann was born 1st July, 1988.

(6) That in 1981 when the respondent bought the premises he told the applicant that "he bought a house for $19,000 and we are going to move one day".

(7) On the 18th October, 1986 the applicant and the respondent got married. This marriage lasted for 15 years until it was finally dissolved on the 18th May, 2001.

(8) Before the marriage was dissolved the respondent moved from the matrimonial home in June, 1995 with his three children and lived separate and apart from his wife.

(9) Between 1986 to 1993, a period of 7 years, the applicant went to the United States to work. She again went to the United States to work between 1993 – 1994.

(10) While in the U.S.A. she bought items of furniture for the house from her personal income.

(11) Between 1988 – 1992 the two bed-rooms of the premises was renovated and improved to a five-bedroom house.

> Applicant contends that when the improvement to the house was completed she resided in Jamaica and directed the workmen about some of the final improvements. In my view this is not indirect contribution that is attributable to the matrimonial home. This is inconsequential.

The parties took issue on several areas of allegations contained in each other's affidavits. However, the main areas of conflicts are whether:

(a) there was an arrangement at the time this home was acquired in 1981, that the applicant should stay at home and take care of the children and the respondent would work and pay the mortgage and

(b) the respondent went to the U.S.A. in 1990 and asked the applicant to return to Jamaica, which she did, to take care and look after the children and the respondent. (i.e. that is to do household work and duties).

The answers to these questions are relevant to the claim of the applicant that she indirectly contributed to the matrimonial home by virtue of the financial value of her household duties to the home. She is also claiming that by reason of a common intention of the parties that she would have a share in the matrimonial home, she did, and continued to perform household duties for the family and even gave up her job in the U.S.A to do those duties.

Issue was taken between the parties as to whether the respondent gave the applicant money to buy commercial goods as opposed to consumer goods in order to commence a business and whether the

applicant got money to attend sewing classes so that she could develop a marketable skill. The applicant agreed she started to attend sewing classes but stopped later. She disagreed however; that the purpose of attending sewing classes was to develop a marketable skill because all the respondent wanted was for her to stay at home as a housewife.

I draw the inference that the applicant started to attend sewing classes and it was the respondent who provided the money for this. The applicant does not really challenge this. I accept that the respondent wanted the applicant to develop a marketable skill and that is the reason he paid for the sewing classes. I also draw the inference that the respondent gave the applicant money, at some point when she went to the U.S.A., to buy goods in order to sell them and start a small retail business.

However, I hold the ultimate reason for this action and conduct on the respondent's part was to equip the applicant to contribute a greater share to their joint expenses so that he could more comfortably service the mortgage. In other words he was seeking to get her to assist him so he would be better able to pay for the house. His effort in this regard does not negate the indirect contribution the applicant

had made then and continued to make after. It does not take away any share to the matrimonial home that she would be entitled to.

In the instant application the applicant former wife is claiming a beneficial interest in the matrimonial home, now 5 bedrooms, at lot 874, Fourth Barracuda Way, Braeton, Phase 3, St. Catherine in which the legal estate is in her former husband's name. The party in whom the legal estate is not vested must resort to the law of trust to establish such a beneficial interest opined Forte, J.A in Azan v. Azan S.C.C.A 53/87. In this judgment he accepted and applied the dicta of Lord Diplock to this effect in Gissing v. Gissing (1970) 2 ALL E.R. 780 as follows:

> "Any claim to a beneficial interest in land by a person whether a spouse, or stranger in whom the legal estate in the land is not vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust . . . .[a resulting trust] is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be equitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.

And he will be held to have conducted himself if by his

> words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in lands".

Forte J.A. pointed out in Azan v. Azan (supra) that Sir Nicholas Browne-Wilkinson V.C., in the case of Grant v. Edwards (1986) 2 ALL E.R. 426 of 437 outlined the test to determine whether or not a trust has been created. This was what Sir Nicholas Browne-Wilkinson V.C. said:

> "If the legal estate in the joint home is vested in only one of the parties (legal owner) the other party (the claimant) in order to establish the beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial membership. This require two matters to be demonstrated:
>
> (a) that there was a common intention that both should have a beneficial interest and
> (b) that the claimant has acted to his or her detriment on the basis of that common intention.

Again, Forte J.A. in Azan v. Azan (supra) accepted the following further principles:

1. "In determining whether there was a common intention to share the beneficial interest or

express agreement to that effect would be sufficient. However, as in most cases, there is no such agreement, the common of the parties may be inferred from their words or conduct" (page 4 supra).

2. "Substantial contributions to the acquisition of the property, made the party not vested with the legal estate is evidence upon which an inference may be drawn that the parties had a common intention to share in the beneficial interest is the property". (page 5 supra.)

3. "An inference of a common intention may also be founded on the basis of indirect contribution made by the claimant to the acquisition of the property" (supra page 6). Examples of this was taken (from Lord Diplock's Judgment in Gissing v. Gissing, that is, where a wife goes out to work and devotes part of her earnings or use her private income to meet joint expense of the household, which would otherwise be met by the husband to enable him to pay the mortgage installments".

4. "Where there is no direct evidence of or intention of the parties to share in the beneficial interest of the property, the claimant must establish that intention by means of the words and conduct from which the common intention may be inferred".

The principles extracted from the cases of Gissing v. Gissing (supra), and Grant v. Edwards (supra), by Forte J.A. in Azan v. Azan were followed and applied by Harrison J.A. in Pinnock v. Pinnock (supra at page 11). Harrison J.A. emphasized that if the party in, whom the legal estate is conveyed at the time of acquisition deceived the claimant then that act was evidence of common intention that the claimant should share in the beneficial interest. There is no suggestion, and I do not find that the respondent deceived the applicant of the time of acquisition of the premises in this instant application.

On the affidavit evidence in this application there is no express agreement between the parties about any common intention that the former wife should have a beneficial interest. The wife seeks to rely on the words used by her partner/spouse in 1981 that he has bought a house for $19,000.00 and we are going to move in it one day (para.4 of affidavit of Fredrika Ewen). I find these words were used by the respondent. Further I draw the inference that in 1981 when these words were used the parties were in rented premises and the house was bought with an intention that it was to be the matrimonial home for the parties. At the time, the parties had two children and the

respondent was preparing accommodation for his wife to be and family.

Apart from the words of the respondent his conduct subsequently of marrying the claimant in 1986 is confirmatory that he wanted her to be his wife and the house purchased in 1981 was done so with an intention that she should have beneficial interest. With two relatively young children in 1981 it is reasonable to expect that the respondent who demonstrated a high level of family responsibility, up to then, would have made arrangements with his wife to take care of the home, children and himself. I find that this arrangement was to allow the respondent to pay the mortgage. I therefore, accept paragraph 6 of the applicant's affidavit to this effect. This is further evidence of a common intention that the applicant should have a beneficial interest in the matrimonial home. The performance of household duties by the applicant saved the respondent the expense of having to pay a helper weekly to take care of the children, the home and himself. This savings increased his disposable income to enable him to better service the mortgage payments.

Lord Denning M. R. said:

"It is sufficient if the contribution made by the wife

> are such as to relieve the husband" from expenditure which he would have otherwise had to bear. By so doing the wife helped him indirectly with the mortgage installment". (see Hazell v. Hazell (1972) 1 ALL 923 of 926 para 9 of relied on Counsel for applicant).

In reliance on this common intention the applicant acted to her detriment by withdrawing from the job market between 1981 to 1986 and by returning to Jamaica from the U.S.A. in 1994. This is an indirect contribution by the applicant that entitles her to a beneficial share in the matrimonial home.

I accept that the applicant purchased furniture from the income she earned while working in the U.S.A. between 1986 – 1994. She also provided some supervision of the improvement of the house near to its completion. These actions by the applicant do not amount to indirect contribution of a nature that would be sufficient to gain a beneficial interest in her favour in the matrimonial home: In Pinnock v. Pinnock (supra). Harrison J.A. at pages 13 -14 pointed at that:

> "In Lloyds Bank v. Rosset [1990] 1 ALL E.R. 1111, it was held, without an agreement between the parties at the time the property was transferred into the name of the husband or any common intention inferred, the reliance by the female spouse on her assistance and

> encouragement of the renovations, the fetching of material and general help in making the house fit for habitation was insufficient to establish a claim in the beneficial interest. In Gissing v Gissing (supra), relying only on (a) purchasing some material (b) spending money on her sons and her clothes and (c) laying a lawn were insufficient acts to base the female spouse's claim to a beneficial claim to the matrimonial property in the male spouse's name only".

These actions by the applicant in the instant case do not amount to an indirect contribution of a nature that would support a finding that she has a beneficial interest in the matrimonial home. It is my view that applicant's indirect contribution rests solely on the performance of her household duties at the respondent's request.

The issue now remains to be determined is the share, which she ought to receive in that five (5) apartment, improved house.

Rattray P. in Pinnock v. Pinnock (supra) said, in dealing with the issue of quantifying the wife's share, which was found to be both direct and indirect contribution, that all the cases disclose that taking all factors into account the "evaluation is at best a rough and ready one". In Joseph v. Joseph R.M.C.A. 13/84 Carey J.A has this to say of a wife's indirect contribution:

"The evaluation of a spouse's equity in property when the contribution is indirect is invariably beset with difficulties and at best, the court is constrained to resort to "rough and ready method to achieve a just result".

Mr. Justice Carey J.A. adopted this method of evaluation, which Lord Reid enunciated in Gissing v. Gissing (supra). There, Lord Reid said at p. 782:

"It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payment is direct she gets a share proportionate to what she paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule gets half a share. I think that the high sounding brocard 'Equality is Equity' has been misused. There will of course be cases where half a share is a reasonable estimation but there will be many others where a fair estimation might be a fourth or a quarter or sometimes even more than a half".

In Pinnock's case the wife's spouse share was estimated at one third in the land and house for her indirect and direct contribution. In Hezell's case the wife's spouse share was estimated at one fifth for her substantial indirect contribution. In the instant application I take into account the following factors in estimating this wife's share. I note that:

(a) The parties were married for 15 years and live together as man and wife for a total 20 years since the premises was acquired.

(b) The wife performed household duties for the husband and children for 5 years between 1981, i.e. date of acquisition of property until 1986.

(c) The wife performed approximately another 1 year, not necessarily unbroken, household duties from 1987 – 1988 when the third child was born.

(d) For 8 years between 1986 – 1992 the wife resided in the U.S.A. she did not perform household duties.

(e) For a period of 6 years, i.e. November 1985 to 2001 when the marriage was

dissolved, the respondent lived separate from the applicant with the three children of the marriage. I find this to be so on the affidavit evidence.

(f) That during those years the applicant did Not perform the household duties she previously performed because they were separated. In any event the children were no longer that dependent on the applicant.

(g) When the matrimonial home was improved from a two bedroom house to a five bedroom house the applicant was in the U.S.A. For the years 1988 – 1992 she made no contribution to this improvement directly or indirectly

It is my view that in all the circumstances it is fair and reasonable to quantify the applicant's share at one-fourth. Accordingly, in my judgment, the following Declarations are made.

(1) The applicant is entitled to one-fourth share or (25%) per cent) of premises at Lot 874 Fourth Barracuda Way, Braeton, Phase 3 in the parish of St. Catherine,

(2) The respondent holds the legal interest in the said premises upon trust for the

applicant's one-fourth share.

(3) Cost to the applicant to be agreed or taxed.

(4) Liberty to Appeal.