

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

SUIT NO. E45 OF 1989

IN THE MATTER OF SECTION 16 OF
THE MARRIED WOMEN'S PROPERTY ACT.

BETWEEN MILLICENT GRANT APPLICANT
A N D IVAN GEORGE GRANT RESPONDENT

Garth McBean instructed by Dunn Cox & Orrett for the Applicant
Bert S. Samuels for the Respondent.

26th October 1989, 6th November, 1989
& 23rd February, 1990.

PATTERSON, J.

The applicant ("the wife") and the respondent ("the husband") were married on the 2nd February, 1974, and since 1980, they have been living at 169 Border Avenue, Kingston 19 in the parish of St. Andrew. The wife claims to be beneficially interested in the property at 169 Border Avenue aforesaid and to furniture therein, and seeks for a determination of all questions between her husband and herself with respect to the ownership of the said property and the furniture.

In particular, the applicant seeks:-

- "(1) A declaration as to and the extent of the respective rights and interest of the Applicant and Respondent in the said premises.
- (2) A declaration that the Applicant is the sole beneficial owner of furniture at the said premises which were purchased by her and referred to in paragraphs 12 and 17 of the Applicant's Affidavit.
- (3) An Order that the Registrar be empowered to sign a Transfer in the event that the Respondent fails to do so.
- (4) An Order that the Respondent do pay costs of and incidental to this application.

In 1980, the house at 169 Border Avenue was purchased and transferred in the name of the husband as the sole proprietor in fee simple. The purchase price was \$50,000.00, \$30,000.00 of which was provided by funds from a mortgage, and the balance of \$20,000 by cash payment. The closing costs of \$5,000.00 were paid by the husband. The mortgage was obtained in the name of the husband with the wife as guarantor, and the husband paid all the instalments to finally discharge the mortgage on the 1st February, 1984.

Substantial repairs and improvements, costing \$25,000.00, were done to the house in 1980 after it was purchased. Further improvements were made in 1985, and the wife purchased furniture for a section of the house which was subsequently let at a rental of \$800.00 per month.

In 1984, the husband obtained a new mortgage of \$30,000.00 on the premises. He repaid \$10,000.00 and the wife has been repaying the balance by instalments of \$834.00 per month. The amount obtained on this mortgage was used for the purpose of financing and repairing a mini-bus purchased jointly by the husband and wife.

The husband and wife agree that the wife alone purchased all the furniture in the section of the house that they occupy, (with the exception of the breakfront and the living room set) and all the furniture in the part of the house that has been let. As to the breakfront and the living room set, the husband says it was he who purchased them, but the wife contends that they were purchased by them both.

The wife contends that her husband and herself agreed to purchase the house at 169 Border Avenue in their joint names, and she has explained why her name was omitted from the transfer. In an affidavit executed 15th February, 1989, she states at paragraphs 4 and 5:-

4. "That in 1980, the Respondent and I orally agreed to purchase premises at 169 Border Avenue, Kingston 19 in the parish of Saint Andrew for a price of

\$50,000.00 and it was agreed that this property would be purchased in our joint names.

5. Shortly after this agreement, there was a dispute between the respondent and myself and he influenced me to sign a letter addressed to a firm of Attorneys agreeing not to have my name on the title. I did not sign this document freely and voluntarily."

The husband, in an affidavit executed 12th June, 1989 denied that there was an agreement between his wife and himself to purchase the property, and denied the dispute as alleged by the wife. His evidence is that his wife signed the letter "voluntarily and on her own free will following on discussions we had that she was not entitled to, and would never seek a beneficial interest in the house ..." (see paragraph 6).

The wife's further explanation is contained in an affidavit executed 3rd October, 1989, paragraph 4 of which reads as follows:-

- "(a) The agreement for sale for premises 169 Border Avenue was prepared in the names of the Respondent and myself and then signed by the both of us.
- (b) Subsequent to our signing the said agreement for sale, we tried to obtain a mortgage for the balance of purchase price but were unsuccessful as the mortgage Institution, Jamaica National Building Society, required a Guarantor in view of the Respondent's age of 57 years at the time.
- (c) The Respondent thereafter suggested that the agreement for sale and transfer be in his name only and that I act as Guarantor for the mortgage. This, he said, would facilitate him obtaining a mortgage and he promised to transfer the property into our joint names at a later date.

(c) I agreed with the Respondent's suggestion above and thereafter he prepared a letter in his own handwriting addressed to the Law Firm of Judah Desnoes, Lake, Nunes, Scholefield and Company to that effect. I exhibit herewith marked "MG 1", a copy of the said letter."

The uncontroverted evidence is that the letter, which was addressed to Judah, Desnoes, Lake, Nunes, Scholefield and Company, Attorneys-at-Law, was drafted by the husband on the 25th January, 1980 and typed on the 28th January, 1980. The wife signed the typed letter, and it reads as follows:-

"
Lot 606 Quarrie Drive,
Bridgeport,
Bridgeport P.O.,
St. Catherine.
28th January, 1980.

Judah, Desnoes, Lake, Nunes, Scholefield and
Company,
Attorneys-at-Law,
4 Duke Street,
KINGSTON.

Dear Sirs,

Re: Purchase of Premises - 169 Border Avenue,
St. Andrew

This is to advise that I do not wish to be a party to this transaction, and I now irrevocably authorise and instruct you to prepare the transfer and have the title issued in the name of Ivan George Grant solely.

Signed: Thurmatus Grant
.....
THURMATUS GRANT (MRS.)"

Both attorneys realised the importance of the transactions between the parties prior to the purchase of the property. The wife filed a supplemental affidavit executed on the 3rd November, 1989, in which she re-iterated that in December, 1979 the husband and herself signed an agreement for sale in their joint names for the purchase of

the premises at 169 Border Avenue. Mr. McBean argued that that evidence was uncontroverted and it proved the initial intention of the parties. He submitted that the wife's evidence proved that the husband, in whom the legal estate vested, held the property on trust and that the wife has a beneficial interest in the property which the husband must give effect to. He further submitted that a constructive trust arises from the common intention or agreement that both parties should have a beneficial interest in the property. He said that this was a rebuttable presumption, and the wife must go further and show that she acted to her detriment in pursuance of the common agreement, and this she had done. This agreement, he said, may be expressed or implied from acts or words.

He referred to the wife's affidavits sworn on 15th February, 1989 (para.4 (Supra)), and sworn 3rd October, 1989 (para. 4(f) (Supra) as proof of an express agreement between the parties. Alternatively, the implied agreement may be inferred from the substantial contributions made by the wife, viz,

- (a) direct cash deposit of \$5,000.00
- (b) payment of household and other expenses which relieved the husband of that obligation and enabled him to pay the mortgage
- (c) mortgage payments since 1986.

He submitted further that the evidence showing the wife's contribution of the \$10,000.00 towards the improvements to the house in 1980, gives rise to the inference of a common intention that each should have a beneficial interest, or alternatively, it could be considered as corroborative evidence of a common intention.

Mr. Samuels did not agree. He referred to the different explanations of the wife as to how the letter

to the firm of Attorneys came to be signed by her, resulting in the omission of her name from the title, and argued that the wife's credit had been impeached on a material particular and therefore her evidence should be rejected. He submitted that the husband's evidence was credible and that on a balance of probabilities, it ought to be accepted. The husband's evidence on this issue reads as follows:-

6. "That paragraph 5 of the said Affidavit is denied as the applicant signed the document instructing the Attorneys that she should not be a joint registered owner of 169 Border Avenue, Kingston 19, voluntarily and on her own free will following on discussions we had that she was not entitled to, and would never seek a beneficial interest in the house situated at 169 Border Avenue, Kingston 19, and I exhibit hereto marked "A" for identification a copy of a letter dated the 28th January, 1980, written by the Applicant to the firm of Attorneys, Messrs Judah, Denoes, Lake, Nunes, Scholefield and Company".

He further submitted that all that took place between the parties after 1984, is irrelevant to these proceedings. In particular, the second mortgage and any contributions made by the wife after 1984 could not have been made with a view of her acquiring any beneficial interest in the property. He said that any contributions that the wife may have made towards the household expenses could not have been made to facilitate the husband in his payments of the mortgage instalments. The evidence, he said, clearly proved that the husband was a man of means. With reference to the improvements to the property he asked the Court to find that the costs of the improvements were paid by the husband. He relied on his original argument that the credit of the wife had been impeached, and so she ought not to be believed on this score either.

His final submission was that "the express declaration dated 28th January, 1980 against the applicant's interest made in writing, in whose name the legal estate does not vest, obviates the need for showing that the conduct of the spouse in whose name the land was conveyed, i.e. the respondent, was intended to induce the applicant to act to her detriment".

He asked the Court to find that the husband is the sole owner of the property, and as regards the furniture, that the husband is the sole owner of the living room set and the breadfront, and that no resulting trust whatsoever ensued to the benefit of the wife.

It is never an easy task for a Court to determine the beneficial interest of one spouse in property acquired in the name of the other spouse during marriage. It is seldom that the Court will be assisted by any written document in deciding this usually vexed question, and the spouse who claims such a beneficial interest must pray in aid the law of trust. In this regard, Lord Diplock had this to say in the case of Gissing v. Gissing [1970] 2 ALL ER 780 (at p. 789).

"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of resulting, implied or constructive trusts."

The registered proprietor of property is the owner of the legal estate in fee simple and prima facie of the entire beneficial interest therein. Anyone who claims a

beneficial interest in such property must prove that a trust was created in his favour by showing that it would be inequitable for the legal owner to claim sole beneficial interest. The principles by which the Court should be guided in deciding whether or not a trust had been created were laid down by Lord Diplock in Gissing v. Gissing (Supra), and clearly summarised by Sir Nicolas Browne - Wilkinson V-C., in his judgment in Grant v. Edwards [1986] 2 ALL ER 426 (at p. 437):-

"The nature of the substantive right (....)

If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires 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".

2. The proof of the common intention

(a) Direct evidence:

It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention.

(b) Inferred common intention:

Lord Diplock points out that, even where parties have not used expressed words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house".

3. The quantification of the rights

"Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant has acted to his detriment, the question may still remain: what is the extent of the claimant's beneficial interest?

This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important.

If this analysis is correct, contributions made by the claimant may be relevant for four different purposes, viz: (1) in the absence of direct evidence of intention, as evidence from which the parties' intentions can be inferred; (2) as corroboration of direct evidence of intention; (3) to show that the claimant has acted to his or her detriment in reliance on the common intention (Lord Diplock's speech does not deal directly with the nature of the detriment to be shown); (4) to quantify the extent of the beneficial interest".

What then is the evidence that I accept in this case. I find that both the wife and husband agreed in 1979 to purchase the premises at 169 Border Avenue, Kingston 19, and accordingly, they both signed an agreement for sale in their joint names. This is supported by the inference to be drawn from the letter of the wife to the attorneys.. There would not have been the necessity for the letter to be written if both parties had not signed the agreement for sale as the wife contends. So there is the clear evidence of the common intention of the parties at that time that they both should be the legal ^{and} beneficial owners of the property. Why then was the property conveyed in the sole name of the husband? It is plain that something must have prompted this turn of events, and I find that it was the wife's instructions as contained in her letter dated 28th January, 1980. This letter is admissible in evidence not as a declaration against interest, but as an adverse statement to the wife's case, and therefore as evidence of the truth of its contents. The fact that the letter was drafted by the husband supports the wife's explanation as to how it came to be written and thus why her name was omitted from the title. I reject

the husband's evidence that they both had discussions "that she was not entitled to, and would never seek a beneficial interest in the house situated at 169 Border Avenue, Kingston 19". I accept that they had discussions which the wife seems to term a "dispute" in her original affidavit, with the result that the wife was prompted to have her name omitted from the title on its transfer, and to act as guarantor for the mortgage to facilitate the husband. It is for that reason that the letter was written. Both parties agree that in 1980, the husband obtained a mortgage amounting to \$30,000.00 towards the purchase price of the property, and that the wife was the guarantor for the loan. This, in my judgment, further supports the wife's evidence as to why her name was not placed on the title. On a true construction of the letter, it is fair to say that the wife was only giving instructions as to the preparation of the transfer and the issuance of the title. She was not thereby saying that she had no beneficial interest in the property, nor was she relinquishing any beneficial interest she would have on its acquisition. It does not destroy, in my view, her evidence as to the common intention of them both to share the beneficial interest in the property being purchased.

I turn now to the question of contributions which the wife says she made. Lord Pearson, in his opinion in Gissing v. Gissing (Supra) (at p. 787) had this to say:-

"If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a

rebuttable presumption; it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury".

The wife's evidence is that she provided \$5,000.00 of the purchase price, and contributed a further \$10,000.00 towards the repairs and improvements undertaken shortly after the acquisition of the property and another \$5,000.00 in 1985. She admits that the husband paid \$20,000.00 initially, but it is her evidence that only \$15,000.00 thereof was towards the purchase price of the premises. The other \$5,000.00 represented the closing costs. The husband denies that his wife made any such contributions, either towards the purchase price of the property or towards the repair and improvements after its acquisition.

The evidence does not disclose the total means of the wife at the time the property was purchased, but it is admitted that she was then in receipt of a salary of \$7,000.00 per annum, and the uncontroverted evidence is that she earned on the average a further \$1,000.00 per month from sales. Her annual income would therefore be in the region of \$19,000. The husband, on the other hand, was in receipt of a salary of \$20,000.00 per annum, but he sold property acquired prior to the marriage, and in 1979, he had received a large lump sum as pension benefits.

I am of the view that it was not beyond the means of the wife to have made the financial contributions that she said she made before and after the acquisition of the property, and I accept her evidence in that regard.

The inference, if any, that may be drawn from such payments must now be determined, as it may be possible to infer the common intention of the parties from such conduct.

I am mindful of the opinion expressed by Lord Diplock in

Gissing v. Gissing (Supra) at p. 791 when he said:

"In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some subsequent fresh agreement, acted on by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only on the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held. But it would in my view be unreasonably legalistic to treat the relevant transaction involved in the acquisition of a matrimonial home as restricted to the actual conveyance of the fee simple into the name of one or other spouse. Their common intention is more likely to have been concerned with the economic realities of the transaction than with the unfamiliar technicalities of the English law of legal and equitable interests in land".

Further on he said: (P.791 - 792)

"Similarly when a matrimonial home is not purchased outright but partly out of moneys advanced on mortgage repayable by instalments, and the land is conveyed into the name of the husband alone, the fact that the wife made a cash contribution to the deposit and legal charges not borrowed on mortgage gives rise, in the absence of evidence which makes some other explanation more probable, to the inference that their common intention was that she should share in the beneficial interest in the land conveyed. But it would not be reasonable to infer a common intention as to what her share should be without taking account also of the sources from which the mortgage instalments were provided.

Where there has been an initial contribution by the wife to the cash deposit and legal charges which points to a common intention at the time of conveyance that she should have a beneficial interest in the land conveyed to her husband, it would however be unrealistic to attach significance to the wife's subsequent contributions to the mortgage instalments only where she pays them directly herself. It may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable him to pay the mortgage instalments out of his money, this would be consistent with and might be corroborative of the original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home".

Applying the principles enunciated above, I draw the inference that the wife's cash contributions (a) for the purpose of the deposit, and (b) to effect improvements and repairs to the house, shortly after purchase, are referable to a common intention that the wife should be entitled to some beneficial interest in the property.

I do not accept the wife's evidence that "since our marriage I have been paying all household expenses and outgoings with no contribution from the respondent." Having regard to the fact that they were married since 1974, it seems incredible that the wife would be paying all household expenses since then, to the exclusion of the husband, unless it be by some special arrangements arrived at then. But, even if I had accepted her evidence in that respect such contributions could not be regarded as proof of a common

intention since they commenced long before the agreement was arrived at to purchase the property and there is no evidence that they were made to assist the husband in paying the mortgage instalments. Consequently, I do not draw any inference from such contributions.

The evidence as to the improvements in 1985 is extremely vague. The wife alleges that she paid the costs of the improvements and the furniture which she said amounted to \$5,000.00. The husband denies the payment by the wife of any sum for improvement. I am unable to say what sum, if any, was paid by the wife towards improvements in 1985. The wife has failed to satisfy me in that respect, and consequently, I will not take it into account when assessing her beneficial interest in the property.

Thus, to summarise, the fact that both parties agreed that the property would be purchased in their joint names and actually signed the agreement for sale, is clear direct evidence of a common intention that the wife would have a beneficial interest in the property. The reason why the wife's name was omitted from the title has been satisfactorily explained. The fact that she contributed towards the purchase price is further evidence from which the common intention can be presumed at the time of acquisition. Alternatively, it can be considered as corroborative of the direct evidence of the common intention of the parties.

The wife's subsequent contribution to the repairs and improvements to the house, which were done shortly after its purchase, can reasonably be considered as part of the price paid for the acquisition of the property in its completed state, and is referable to the common intention of the parties. Alternatively, such payments can be considered as corroborative of the direct evidence of the common intention of the parties.

The wife's evidence of the payments (a) towards

the cash deposit and (b) towards the repairs and improvements, prove that she has acted to her detriment in reliance on the common intention that she should share in the beneficial interest of the property. Mr. Samuels submitted that the wife's evidence of the repayment of the new mortgage instalments ought to be disregarded. But, I ask myself why should the wife be making these payments on a mortgage that was not obtained in her name? The answer must be that she is paying the instalments to ensure that the property is not foreclosed. If that is so, a reasonable inference is that by so doing, she is protecting her interest in the property, and that would be conduct in support of her claim to be beneficially interested in the property. The acquiescence of the husband in such payments being made by her, is his tacit acknowledgement of her said interest.

This brings me to the quantification of the wife's beneficial interest in the property. As Lord Diplock pointed out in Gissing v. Gissing (Supra) at p. 792.

".... The Court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probably common understanding about the amount of the share of the contributing spouse on which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. It is only if no such inference can be drawn that the Court is driven to apply as a rule of law, and not as an inference of fact; the maxim "equality is equity", and to hold that the beneficial interest belongs to the spouses in equal shares".

What then is the evidence in this regard? The purchase price of the property is \$50,000.00, and closing costs \$5,000.00, a total of \$55,000.00. Of this amount, the wife contributed \$5,000.00 towards the cash deposit. The husband paid the rest of the deposit,

amounting to \$15,000.00 and the closing costs of \$5,000.00. The balance of the purchase price was secured by a mortgage which the husband paid solely. It is fair to say that the wife contributed only 1/11 of the purchase price. But the repairs and improvements which followed shortly after the purchase, must be taken into account, and here the wife paid \$10,000.00 out of a total of \$25,000.00. It follows then, that of the initial amount of \$80,000.00 representing purchase price and repairs, the wife paid \$15,000.00 or 3/16. As I have said before, the wife's contributions towards the household expenses is not referable to the common intention of the parties that the wife should have a beneficial interest in the property, nor is it evidence to support her contention that she acted to her detriment. It cannot assist me in arriving at a quantification of the wife's beneficial interest. The fact that she did not assist in the mortgage payments although it seems as if her means could so allow her to do, drives me to the conclusion that her contributions to the purchase price and to the repairs and improvements, were the only amounts that she was prepared to spend on the venture. It may well be that her earnings were utilized in purchasing the furniture which it is admitted is hers solely, except for a breakfront and a living room set. It seems to me that a reasonable inference to be drawn when all the facts are taken into account, is that the wife did not intend to contribute more than 3/16 to the purchase price of the property. Accordingly, I will quantify her beneficial interest in the property as being 3/16.

There remains the question as to the wife's beneficial interest in the furniture. It is admitted by both spouses that all the furniture, with the exception of a breakfront and the living room set, were purchased by the wife. The wife's evidence seems to suggest that the husband

purchased the breakfront and that they both purchased the living room set; the husband's evidence is that he purchased them both. The wife's evidence was rather vague in this regard, and I accept the evidence of the husband and find that the breakfront and the living room set belong to him solely, and that the wife has no beneficial interest in these items.

In answer to the questions that fall to be determined in this matter, I declare:

- (1) That the wife and husband are both entitled to share in the beneficial interest of the property known as 169 Border Avenue, Kingston 19 in the parish of St. Andrew, and that the wife's interest amounts to $\frac{3}{16}$ of the whole.
- (2) That the wife is the sole beneficial owner of all the furniture referred to as being in the house, with the exception of a breakfront and a living room set which belong solely to the husband.
- (3) In order to give effect to the wife's beneficial interest in the property, I order that the property be valued by a reputable valuator, (to be agreed on by the parties or their respective Attorney-at-law in this case) and that the husband be at liberty to pay to the wife a sum equal to $\frac{3}{16}$ of the value of the said property in full discharge of the wife's beneficial interest in the property. If the husband does not within three months, (or such further time as the Court may allow) after the date of the valuator's report, pay the amount aforesaid, then the property shall be sold by public auction or private treaty and the

the net proceeds of sale shall be divided among the parties in the proportion as to the wife 3/16 and as to the husband 13/16.

All costs and expenses incurred in the execution of this order shall be borne by the husband and wife equally. Liberty to apply.

- (4) The costs of and incidental to this application shall be borne by the husband, such costs to be agreed or taxed.