IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. E 416 OF 1998

IN EQUITY

IN THE MATTER of the Married Women's Property Act.

A N D

IN THE MATTER of all that parcel of land known as Saint James registered at Volume 1215 folio 329 of the Register Book of Titles.

A N D

IN THE MATTER of all that parcel of land part of Childermas in the parish of Saint James comprising approximately120 Acres and contained in Indenture of Conveyance dated January 19, 1983, made between Yvonne Elizabeth Addison and Morton Earle Hamilton.

BETWEEN	**MILDRED EVADNEY HAMILTON**	**PLAINTIFF**
AND	**MORTON EARLE HAMILTON**	**DEFENDANT**

Charles Piper, Esq. and David Johnson Esq. and Andrea Lloyd instructed by Piper & Samuda for Plaintiff. Gordon Steer, Esq. And Judith Cooper instructed by Chambers Bunny and Steer for the Defendant.

Heard on May 29, 30 & 31, and June 14, 2001 and September 12, 2002

ANDERSON: J

This is an application by way of Originating Summons filed by the Plaintiff which seeks the following relief:

1. A declaration that the Plaintiff is entitled to a one half interest in all that parcel of land know as Childermas in the Parish of Saint James, registered at Volume 1215 Folio 329 of the Register Book of Titles;
2. A declaration that the Plaintiff is entitled to a one half interest in all that parcel of land known as Childermas in the Parish of Saint James comprising approximately 120 acres and contained in Indenture of Conveyance dated January 19, 1983, made between Yvonne Elizabeth Addison and the Defendant herein;
3. An Order that the Defendant provide and Account in respect of the lands which previously formed part of the lands contained in Certificate of Titles registered at Volume 1215 Folio 329 of the Register Book of Titles as well as the lands contained in the Indenture of Conveyance dated January 19, 1983;
4. An Order that the said lands be appraised by Messrs. C.D. Alexander Company Realty Limited or Alison Pitter and Company and that the costs of such appraisal be borne by the Defendant herein;
5. An Order for the sale of that portion of the said lands which has not been disposed of by the Defendant and that the same be sold by private treaty or by public auction to be conducted by Messrs C.D. Alexander Company Realty Limited or Alison Pitter and Company and that the Plaintiff and the Defendant be at liberty to bid for or purchase the said lands and that the net proceeds of sale be divided between the Plaintiff and the Defendant in accordance with their respective interests as determined by the Court;
6. That the Plaintiff's Attorneys-at-Law have carriage of sale on the said lands;
7. The Defendant deliver up to the Plaintiff's Attorneys-at-Law the duplicate Certificate of Title to the said lands registered at Volume 1215 Folio 329 of the Register Book of Titles to facilitate the necessary transfer of the same;
8. That in the event that the Defendant refuses and/or neglects to execute a registrable Transfer and/or Deed of Conveyance in relation to the lands in

issue, within a reasonable time of being called upon so to do in accordance with the Order of the Court, the Registrar of the Supreme Court be authorized to execute the same;

9. There be such further or other relief as to this Honourable Court may seem just;

10. The Costs of this Application and costs thrown away be the Plaintiff's to be agreed or taxed.

Both the Applicant and the Respondent filed affidavits in respect of the matters, the subject of the application and, pursuant to orders of the court/agreement of the parties, each party was made available to the other for cross-examination on his/her affidavits.

Mr. Piper in a fairly lengthy and detailed opening made a number of observations and submissions. He pointed out that the property in question is held in the sole name of the defendant. However, this a case in which the court is being called upon to examine the facts as revealed by the evidence carefully and to determine whether the applicant had a beneficial interest through the existence of a constructive trust, creating circumstances in which it would be inequitable for the defendant to claim the sole beneficial interest, on the basis that he was the legal owner.

He submitted that there was evidence of "common Intention" that the Applicant should have a beneficial interest, and that the Applicant had acted to her detriment in pursuance of that "common intention". He suggested that the common intention was based on an express agreement to that effect. But even if there was not, there was as abundance of evidence from which the court may infer such intention from the words and conduct of the parties...

In particular, to adduce the facts in support of his submission, he referred to the affidavit of Mildred Evadney Hamilton sworn on May 4, 1998. He submitted that if the averments contained in the affidavit are accepted, it would represent "clear and unequivocal evidence of common intention, expressed at a time when there was no matrimonial dispute".

He also submitted that the affidavit showed clear evidence that the Applicant at all material times, "acted to her detriment" by, for example sacrificing the prospects for career advancement in order to spend time caring for her husband during his illness, as well as taking over the responsibility from early in the marriage for the acquisition of such household items as linen, curtains, washing machine, stove and refrigerator, bedroom and dining room set and a television. Mr. Piper pointed out that the defendant's affidavit in response to the assertions in the plaintiff's affidavit, implicitly acknowledged the contributions of the applicant and submitted this was sufficient to establish common intent.

He further submitted that the evidence contained in the applicant's affidavit concerning the nature of discussions between the parties prior to the acquisition of the Paradise Pen property, had not been contradicted in the defendant's affidavit. There was indeed, a bare denial but the defendant failed to offer any explanations as to those discussions which, in his view, clearly showed evidence of common intention.

Having exhaustively reviewed the averments and purported evidence in the affidavits of the parties, Mr. Piper submitted that there was ample evidence of admission of facts to support the Applicant's claim for an interest in the respective properties, as sought by the Originating Summons.

There is very little of the evidence in this case which is not in dispute, and it may be appropriate at the outset to say what some of these agreed elements are.

It is common ground that the Plaintiff and the Defendant were married on October 14, 1967 at the Webster Memorial Church by Mr. David Lapsley. The union produced two (2) children born November 5, 1969 and November 1, 1973. At the time of the marriage, the plaintiff was a staff nurse attached to the University Hospital of the West Indies and the defendant was a telephone technician employed to the then Jamaica Telephone Company.

It is also agreed that after the marriage, the parties lived in rented accommodations (first at Arlene Gardens and then at 5 Kempton Avenue, Kingston 5, in the premises allegedly owned by the plaintiff's uncle) for a total of about three (3) years. Even with respect to these limited facts, there is disagreement among the parities, as the defendant avers in his affidavit dated February 8, 1999 in respect to the applicant's earlier affidavit, that when they rented at her uncle's home at Kempton Avenue, they only occupied a section of the house, and not the entire premises.

Upon removing from the relative's house at Kempton Avenue, the parties moved to a property 6 Renfield Drive, in Ensom City, St. Catherine with title registered at Volume 1071, Folio 550 of the Register Book of Titles. Title for the property was taken by both parties as "Joint Tennant". The transfer in respect of the said property was registered on March 5, 1971 and gave effect to an Agreement for Sale dated December 16, 1969.

It is also common ground that around 1977 the defendant was transferred by his employers to Montego Bay. The plaintiff sought and secured a transfer from the Spanish Town Hospital to the Cornwall Regional Hospital in Montego Bay. The family lived at first at 14 Park Avenue, Red Hills, Montego Bay, St. James. The Ensom City property was in the meanwhile, rented. It is also agreed that at some point, ("in or around 1978", according to the plaintiff) the defendant became ill with a stomach complaint and for some time was unable to work or work fully. The Ensom City property was later the subject of a transfer registered the 24th September 1981 for consideration of Thirty-Eight Thousand, Five Hundred Dollars ($38,500.00). Subsequent to the sale of Ensom City property in Paradise Pen, St. James, registered at Volume 233 Folio 88 was acquired sometime in or around 1981. In light of the claim being made in the Originating Summons to other property acquired after the sale of this Paradise Pen property, it ought not to be a surprise that the plaintiff claims that acquisition was the result of a consensual decision and effected entirely from the proceeds of the Ensom City Property. The defendant disputes this characterization of this acquisition as being the result of discussions between the parties and premised upon the fact that (as the plaintiff alleges),

they would gain a family home from the proposed development which was to take place and would include the land at Volume 233, Folio 88, (Paradise Pen).

The only other relevant assertion which may be treated as "fact" by both parties is that the property known as Childermas, now the subject of a claim by the plaintiff in her Originating Summons, was acquired in the name of the defendant in the 1980s from Yvonne Elizabeth Addison. Indeed, the Deed of Conveyance in respect of that property is dated January 19, 1983. The acquisition of the Childermas property in 1983 was followed by litigation between the one David Addison, as plaintiff and Morton Hamilton as defendant, at the end of which the defendant's rights to ownership of the property, were vindicated.

In her first affidavit dated May 4, 1998, the plaintiff sought to show the historical basis for her legal claims in the Originating Summons. Shortly, it may be summarized in the following propositions.

A. The original matrimonial home at Ensom City is the genesis of the claim and it was owned by the parties as joint tenants; further and in any event, there was an actual agreement which evidenced a common intention to share the property equally.

B. The Paradise Pen property was acquired by the parties pursuant to discussions between plaintiff and defendant, evincing an intention to acquire another matrimonial home in Montego Bay, and was so acquired pursuant to the sale of the Ensom city property and with the proceeds therefrom.

C. Following upon the failure to affect the housing development of which Paradise Pen was to have been apart, that property was sub-divided and sold, no family home having been derived therefrom.

D. That "in or around 1983", her husband informed her of his desire to purchase Childermas, that she "supported" the defendant in his "venture" to acquire Childermas through her "monthly contribution to our household, as well as through moral support."

In support of the above propositions, she advances in her affidavit in paragraph 5 thereof, an implied agreement, an understanding if you will, that she would be "responsible for household expenses so as to allow the defendant to use his income to meet our monthly rent and to assist in purchasing a home for our family." This would of course supply the "common intention" as to the relevant interests of the parties. Indeed, under cross examination by Mr. Steer for the defendant, the plaintiff referred to specific household items that she purchased and for which she was able to produce receipts.

The plaintiff in her affidavit at paragraphs 12-15 stated that the Paradise Pen purchase was effected pursuant to discussions which included the prospect of their getting a house in the proposed housing development. In cross-examination, she conceded that apart from knowing the price paid for the land at Paradise Pen and of the planned development, she was unaware of the nature or extent of any other expenditure or costs, or whether an overall profit was made from the sale of the lots in Paradise Pen. En Passant, it is noted that according to the exhibit attached to the Plaintiff's affidavit of May 1998, the transfer of the Ensom City Property was registered at the Titles Office on September 24, 1981, while the transfer of the Paradise Pen property to the defendant was registered on August 5, 1981. I shall advert to this fact later.

In seeking to provide the evidence to support her claim of an equitable interest in the properties, the plaintiff alleges certain other factors in her main affidavit of May 1998, which are directed at the issue of "acting to one's determent". Thus, for example, she states that after the defendant developed a stomach problem in or around 1978, she "concentrated my efforts on nursing the defendant back to health, and to facilitate this, I took leave from my job and obtained employment in the quarantine department at the Donald Sangster International Airport". She adds "that in acting aforesaid, I understood and accepted that I would be sacrificing my professional advancement in my chosen profession". She said she also used her personal savings to purchase foreign exchange to satisfy medical expenses which the defendant incurred while undergoing treatment in the

United States of America. She produced an invoice from a Beth Israel Medical Center in the United States at which the defendant had received treatment.

As further evidence of acting either pursuant to common intention or to her detriment, the plaintiff states in paragraph 20 of her May 1998 affidavit, that "in an effort to increase my ability to make contributions to the running of the matrimonial home, I successfully pursued a diploma course in the Public Health Nursing Program offered by the Ministry of Health". Again under cross-examination by Mr. Steer, she accepted that when she started this course, the Childermas purchase was already complete. Finally, the plaintiff speaks of providing the defendant with $80,000.00 to facilitate the extension of electricity to the family home at Childermas which had been commenced in or around 1993/1994. She claimed that of the sum she provided the defendant, she has been re-imbrued with $40,000.00. These averments are particularly relevant in relation to the claim in respect of the present matrimonial home as well as the balance of the Childermas properties.

In his affidavit dated February 8, 1999, the Respondent specifically denied the allegation in paragraph 5 of the Plaintiff's affidavit to the effect that:

> "From the beginning of our marriage it was understood and accepted that I would be responsible for the household expenses so as to allow the defendant to use his income to meet our monthly rent and to assist in purchasing a home for our family. That I therefore applied the proceeds of my salary each month to the running of our household, and the defendant assisted me with the purchase of groceries".

He also denies that the plaintiff made any contributions in monetary terms to the purchase of Ensom City. He accepts that she secured a transfer to the Cornwall Regional Hospital when he was transferred to Montego Bay, "in order to keep the family together". However, he denies that her move to the quarantine department of the Sangster Airport was to "facilitate nursing the defendant back to health". He alleges that this move was a result of her dislike of the hospital work and the shift system applied there. It should also be noted that although the defendant alleges that Ensom City sale proceeds were used to

liquidate the mortgage on that property, in paragraph 19 of his affidavit, he admits the averments in paragraph 13 and 14 of the Plaintiff's earlier affidavit. These specifically state that Paradise Pen was purchased by the parties "for our joint benefit', and that purchase was "wholly financed through the monies which we received from the sale of Lot 1077 (i.e. Ensom City) aforesaid." I only note that I do not need to go behind this admission. In a subsequent affidavit dated May 26. 1999, the plaintiff seemed to contradict somewhat her earlier averment in paragraph 14 of her May 1998 affidavit. In this latter affidavit, she claimed that the mortgage loan from the Jamaica Telephone Company Employees Cooperative Credit Union, registered on the 13th May 1981, was in fact used to purchase the Paradise Pen property, clearly before the Ensom City property had been sold. She states that the sale proceeds of that property were then used to liquidate the loan. While the two versions are distinctly different, the legal effect would seem to be the same; the defendant would be a trustee for the plaintiff's portion of the net proceeds of the Ensom City sale.

The Defendant also contradicted the plaintiff's claim that proceeds from the sale of Paradise Pen were used in defending the legal action over Childermas. He also denies that her pursuing of the course in Public Health had anything to do with "increasing her financial contribution to the house". Rather, he claims that this move was designed to provide greater challenges for the plaintiff. As to the alleged handing over of her $80,000.00 retroactive pay, the defendant says that the plaintiff loaned him $80,000.00 from which he kept $10,000.00 for a cow he had sold her, and repaid a further $40,000.00 leaving a balance owed of some $30,000.00. The inference is clear. If this was a loan from the plaintiff, it cannot be said to be "acting to one's determent", or be evidence in support of such a proposition. I hold that this is a mere loan from the plaintiff to the defendant which she is entitled to have fully repaid.

I am strengthened in my view as to the proper treatment of the loan by the wife to the defendant husband by the judgment of the English Court of Appeal in the case ***Crystal v Crystal 2 AER p. 330.*** The wife's evidence that she has been partially repaid, clearly

takes this sum out of any consideration as involving the wife in acting to her detriment. As a loan, the plaintiff is fully entitled to have it repaid.

As noted above, both parties were made available for cross-examination. Both are seemingly well-educated and intelligent persons, and it should surprise no one that they generally stuck by the averments made in their affidavits.

In paragraph 10 of her further affidavit dated May 26, 1999, the plaintiff averred that shortly after their marriage, the parties had opened a joint account with a bank in Liguanea but that she "subsequently discovered that the defendant had withdrawn all of the monies in the said account, save for a small amount which he used to keep the said account open". The plaintiff also stated that she maintained another account at the Bank of Nova Scotia Jamaica Limited into which her salary was paid, and that her husband's name was also on this account until she discovered that he had been making withdrawals from the said account, and thereafter removed his name therefrom. As far as this latter account is concerned, in cross examination the plaintiff seemed to recant on this allegation saying, that she was "not saying that my husband withdrew money from my account. The Bank took it on his behalf". In this regard I accept the evidence, to the extent it is relevant here at all, that the bank had erroneously debited the plaintiff's account in relation to some credit card payment, but that the money had been subsequently repaid.

One significant piece of evidence emerging from the cross-examination of the plaintiff was her admission that the purchase of the first, approximately fifty (50) acres of the Childermas property, had been effected prior to the sale of the Paradise Pen property. This was reinforced by the defendant's supplemental affidavit of May 2001, to which was exhibited copies of both the sale agreements with respect to the purchase of that property from Yvonne Addison

The exhibits make clear that the first agreement for sale was effected in 1981 and the second in 1983. The plaintiff in her affidavit of May 1998 had indicated that most of the business matters (– my characterization) were dealt with by the defendant. Thus, for

example the sale of the Ensom City home and the paying-off of the mortgage, were looked after by him. There is more than a suggestion here that the plaintiff ought not therefore to be *au fait* with much of those business dealings. However, in my view what emerged from the cross-examination of the plaintiff, at least in respect of the acquisition of Paradise Pen and Childermas, was a lack of any more than cursory knowledge of how these acquisitions came to be made.

Also during the cross-examination the plaintiff admitted that the invoice from Beth Israel Medical Centre, (exhibit MEH 5 of her May 1998 affidavit) was not paid by her but by the defendant. She denied, however, that the inclusion of a reference to having used her own funds to purchase foreign exchange to meet the defendants medical bills and the reference to exhibit MEH5 represented an attempt to mislead the court to a view that she had paid that bill. She agreed that the defendant had in fact paid the bill.

The evidence with respect to the change of jobs by the plaintiff from the Cornwall Regional Hospital to the quarantine department of the Donald Sangster Airport is also instructive. In cross-examination, she agreed that despite the change in her daily hours, she still worked a forty (40) hour week with twelve (12) hour days on alternate days.

She, however, received the same pay as at the Cornwall Regional Hospital. Further while in the transition from the Cornwall Regional Hospital to the Donald Sangster Airport, she had stated that she "went on leave from my job at Cornwall Regional Hospital", she admitted that she went straightaway to work at Donald Sangster Airport. In other words, there was no break in her working. This was an apparent contradiction of the averment in the plaintiff's first affidavit, paragraph 10, that "during this period, I concentrated my efforts on nursing the defendant back to health *and to facilitate this, I took leave from my job* and obtained employment in the quarantine department at the Donald Sangster International Airport where I was only required to work on alternate days." She also conceded that she took her then employment status with her to the job at the Airport. Despite suggestions to the contrary, the plaintiff insisted that the change of job was for the benefit of her sick husband and their children.

Finally in the terms of the plaintiff's evidence under cross-examination, the plaintiff said that the defendant told her he borrowed money from Hugh Cross but in lieu of repaying in cash, he would offer him a portion of the land. She therefore rejected any suggestion that Mr. Cross had a beneficial interest in Childermas or any part of it. She, however, agreed that she had limited knowledge of the terms of the acquisition, except as stated in her affidavit as to what defendant had told her.

Mr. Steer in his brief opening submitted that the law was quite clear in matters of this kind. The applicant/plaintiff must show a common intention in respect of the particular property, the subject matter of the claim. He submitted that a blanket statement was insufficient in and of itself to ground the relief sought. It was his further submission that the plaintiff seemed to be proceeding on the basis that any property acquired after the marriage was in the joint ownership of the parties. I should note, *en passant*, that in certain Common Law Jurisdictions, for example, New York, the jurisprudence now provides for a presumption of equal sharing of property acquired after the marriage and before separation, such property being referred to as "marital property". This is of course, not the law here.

He further submitted that a finding of an agreement or arrangement to share must be based upon express evidence of the nature of the discussion between the parties. That, he urged the court to find, has not happened in this case. Mr. Hamilton was then submitted for cross-examination by Mr. Piper.

I will only briefly refer to highlights of that testimony as they are relevant to the issue which I have to decide.

Mr. Hamilton acknowledged that he did sign an agreement for sale, and pay a deposit when he purchased Paradise Pen. However, he did not know where the receipt for the deposit was now, nor did he know where the Agreement for Sale was. He indicated that the total amounts received for the sale of the three (3) subdivided lots of Paradise Pen were, twenty-four thousand dollars (24,000.00) each for the first two (2) and ninety

thousand dollars ($90,000.00) for the third. He claims he made a loss on the realization of Paradise Pen. He further averred that the development of Childermas was financed, as set out in his further affidavit of September 14, 1999, from the sale of land to Gloria Mellis for sixty-eight Thousand Dollars ($68,000.00) and sale of land to the Jamaica Telephone Company Co-operative Credit Union for two Hundred and Thirty Thousand Dollars ($230,000.00), together with mortgages and loans from the Credit Union.

He also stated that the properties referred to here, and which had been sold, had previously been part of Childermas. He conceded that the cost of the matrimonial home at Childermas is excluded from the total cost of the development there.

The defendant also admitted that he had taken a mortgage of over Thirty-Seven Thousand dollars ($37,000.00) in May of 1981, on the security of the Ensom City property. Some of this money was used to pay off the previous mortgage; ten Thousand ($10,000.00) went towards the purchase of Paradise Pen, and none of this sum taken on the security of the jointly held asset was paid to the plaintiff.

The defendant repeated his averment that Mr. Hugh Cross contributed five thousand Dollars ($5,000.00) of the Ten Thousand ($10,000.00) deposit required to acquire Childermas, and that their agreement requires him to hold title as to 50% of the first 50 acre plot of land, in trust for Mr. Cross. The defendant under cross-examination also restated the history of his acquisition of Childermas explaining that in view of the ultimate gifting of the property by the vendor, Yvonne Addison, he only paid over a total of Eighteen Thousand Five Hundred Dollars ($18,500.00), although the sale price for the two separate pieces he had agreed to purchase, would have been of the order of one hundred and fifteen thousand dollars ($115,000.00)

Two other witnesses who had sworn affidavits were also called for cross-examination. These were Ms. Audrey Wilson, Attorney-at-Law for Mrs. Addison, the vendor of Childermas; and Mr. Hugh Cross the alleged equitable beneficiary of fifty percent (50%) interest in at least some of the Childermas land. Ms. Wilson confirmed that she prepared

the Deed of Conveyance. Mr. Cross confirmed that he previously lent Mr. Hamilton $5,000.00 which was repaid. He subsequently contributed a further $5,000.00 and half cost of stamp duty to participate as a fifty percent owner of a fifty (50) acre plot of land which the defendant was purchasing. I confess that neither of these two witnesses brought any particular elucidation in terms of the issues for consideration.

What then ought this court to find? I have reviewed the evidence to the extent that I find it assists the court to make a determination of the issues.

I start by noting that it is trite that in looking at the evidence, the court accepts that evidence which it believes, on a balance of probabilities. I have already expressed the view that both parties to this action were reasonably intelligent persons, and despite an apparent arrogance on the part of the defendant, I believe that in the main, his evidence is to be preferred where there are conflicts, over that of the plaintiffs'. I have used the term "where there are conflicts" advisedly as I am not to be taken as suggesting that I did not believe the evidence of the plaintiff. Indeed, there are, as I pointed out earlier, some undisputed facts upon which both parties agreed. Further, there are facts which were admitted by the respondent in one or other of his affidavits following upon the affidavit of the plaintiff.

In seeking to fashion evidence of an agreement the plaintiff's initial affidavit states in paragraph 5: "It was understood and accepted that I would be responsible for the household expenses so as to allow the defendant to use his income to meet our monthly rent and to assist to purchase a home for our family". From the evidence which has been presented, it does not appear to me that there was such an agreement. On the other hand the averments set out in paragraph 13 and 14 of the plaintiff's original affidavit were all admitted in the response affidavit of the defendant. Thus the court does not have to make any determination as to whether the proceeds of the sale of the Ensom City property were used either directly or indirectly to finance the purchase of the Paradise Pen property. And it seems to me that it would be irrelevant which of the two versions of the dealings with the Ensom City property, proffered by the plaintiff is accepted. Nor does the court

have difficulty in accepting the statement of the plaintiff that "the defendant and I purchased for our joint benefit, premises known as Paradise Pen in the parish of St. James". This also was part of the statements admitted by the defendant.

In seeking to establish conduct which was "detrimental" to herself, the plaintiff referred to instances such as taking leave from her job at the Cornwall Regional Hospital in order to look after her husband as well as assisting with the purchasing of foreign exchange to allow him to settle medical expenses incurred during the course of his illness. I take the view and I so hold that while these are being put forward as being conduct that may be treated as to the "detriment" of the plaintiff, it is also equally explainable on the basis of normal spousal response in relation to difficulties being experienced by the other spouse. I do not put in any higher than that and certainly in the context of the evidence I do not believe that this can be placed any more highly than I have suggested.

Another aspect of the evidence of the plaintiff which seeks to establish conduct detrimental to her is to be found in paragraph 10 of her original affidavit where it talks about moving from the Cornwall Regional Hospital to the quarantine department at the Donald Sangster International Airport. She states "that in acting aforesaid I understood and accepted that I would be sacrificing my professional advancement in my chosen profession". Regrettably, all the other evidence which has been produced indicates that the plaintiff had made steady progress both in professional and financial-reward terms to her present situation as a senior public health practitioner in the Parish of St. James.

There is another aspect of the plaintiff's evidence to which I must avert. In paragraph 20 of her original affidavit she states "that in an effort to increase my ability to make contributions to the running of the matrimonial home, I successfully pursued a diploma course in the Public Health Nursing Program offered by the Ministry of Health which said program commenced in the year 1985". It will be recalled that Paradise Pen had already been purchased and indeed both parts of the property at Childermas had already been purchased. At neither of those places in 1985 was there a matrimonial home which was owned by either or both parties and in respect of which, conduct purportedly to the

detriment of the plaintiff, would have been able to assist her in demonstrating an equitable interest in such property.

What then are the principles which should be applied to the claim in the instant case and where does it leave us in terms of a result? I have already indicated that I do not find any evidence of an express agreement between the parties as to the sharing of the property which is the subject of this claim. Certainly even on the plaintiff's evidence her first acknowledgement of the purchase of Childermas was in 1983 and the evidence was clear that at least the first 50-acre lot had already been purchased from 1981. Does this dispose of the claim? I think not.

It is undoubtedly necessary in the instant case to look at the history of the developments between the plaintiff and the defendant in terms of properties acquired from time to time. For these purposes we may begin with the acquisition of the Ensom City property. Notwithstanding efforts by the defendant to deny that the plaintiff had made any real contribution in direct financial terms or otherwise to the acquisition of the Ensom City property, I hold that the fact that on the Registered Title they are characterized as joint tenants raises the presumption, which has not been rebutted by any evidence to the contrary, that the wife has a 50% interest in the said property.

I am emboldened in that view by the views expressed by Langrin JA in ***Paul Wayne Barnes v Marjorie Richards-Barnes, Supreme Court Civil Appeal No. 77 of 2001 and at page 7 thereof.*** There, Langrin JA states: "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 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 AER 780*** and ***Cobb v Cobb [1955] 2 AER 696".***

So that while I accept Mr. Steer's submission that there must be evidence of a common intention to hold the property together, and that this common intention must be in respect of each individual property at least in the absence of an agreement, and even while there

is no express agreement here, I am comfortable in the view that the Ensom City property was owned as to 50% each by the plaintiff and the defendant.

In the instant case of Barnes v Richards-Barnes referred to above, Langrin JA also quoted from ***Pettitt v Pettitt [1969] 2 AER 385 at page 412.*** He cited Lord Diplock, who in setting out the powers of the court in determining the property rights as between husband and wife 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 an 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 recognized 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.."

Having come to form the view as I have indicated that I did, that the interests in the Ensom City property were at 50% each as between the plaintiff and the defendant. It will therefore be clear that the net proceeds, if any, which arise consequent on a disposal of that property, ought to be shared in the same proportions as the parties held in the property. In this regard, there are two pieces of evidence which are of critical relevance. Firstly, is the sequence of mortgages and discharges which are noted on the copy duplicate Certificate of Title of the Ensom City property. The discharge of the original mortgage by Ensom City Mortgage Society Limited was effected on the 13th May 1981. On the same day, a new mortgage to the J.T.C. Employers Cooperative Credit Union was registered (Mortgage # 367188) to secure a loan of Thirty Seven Thousand One Hundred and Ninety-Three Dollars Ninety Five Cents ($37,193.95). This mortgage was discharged, and the discharge (#258800) was registered on the 24th of September 1981, the same day that Transfer # 3934819 was registered to Carmen Porter, the purchaser of Ensom City.

The second piece of evidence which has emerged, and which I consider important, is the defendant's admission that none of the proceeds of the mortgage loan of Thirty Seven

Thousand Dollars ($37,000.00) was ever given to the plaintiff, although he does say that some of it was used to pay off the balance of the original mortgage of some Seven Thousand Dollars ($7,000.00).

There is another piece of evidence which is material and relevant. The defendant as noted previously, admits the averment of the plaintiff that the Paradise Pen property was acquired from the proceeds of the Ensom City sale. Moreover, as noted above, he also admitted that Paradise Pen was purchased in order to provide a home for the family. The defendant, however, states that he sought in conjunction with an American friend, a Mr. Julian Maddison, to effect a housing development which never materialized. There are two inferences which I believe can be drawn from the foregoing. Firstly, that the defendant was a trustee of the plaintiff's share of the net proceeds of sale of Ensom city, and secondly, that the net proceeds having been used to acquire the Paradise Pen property, the plaintiff had an interest therein, once that property was acquired. The extent of that interest may very well be determined upon the basis of the cost of the Paradise Pen property. So for example, if the cost of acquisition was say one hundred thousand dollars ($100,000.00) and the contribution from the plaintiff's share of net proceeds was fifteen thousand dollars ($15,000.00), it may be possible to argue that her entitlement was to be regarded as being in those proportions.

At this point the divergence in the evidence of the two parties becomes critical. The plaintiff says that she gave the defendant permission to use the Paradise Pen property in the proposed housing development, and for these purposes, allowed him to take the conveyance in his sole name. The defendant denies that he ever sought or obtained such approval. The defendant also says, and this is not contradicted by the plaintiff, that he lost substantial amounts of money on the efforts to develop Paradise Pen. Using crude figures at my disposal, the sale of Ensom City yielded Thirty Eight Thousand Five Hundred Dollars ($38,500.00). The pay-off of the original mortgage was about Seven Thousand Dollars ($7,000.00) leaving a net sum of Thirty One Thousand five Hundred Dollars ($31,500.00). The cost of Paradise Pen was Twenty Thousand Dollars ($20, 000.00).

I accept the submissions of Mr. Steer for the defendant that the common intention must exist at the time of the acquisition of the property which is the subject of the dispute in support of this proposition, see ***Forrest v Forrest SCCA 78/93 per Rattray P at page 7*** of the report.

> "Where therefore there has been an expressed agreement between the parties, the court has no power to alter their respective rights in the property. Where there is no expresses agreement, the court is entitled to determine from the conduct and contribution of the parties, what was their common intention at the time of the acquisition of the property".

Wolfe J.A. (as he then was) by way of a question in dealing with the issue of common intention in the same case at page 16 asks: "What was the common intention of the parties when the purchase was made?"

I adopt the reasoning set out in the judgment of Lord Bridge of Harwich in ***Lloyds Bank PLC v Rosset 1990 1 A.E.R. p. 1111 at p 1118 – 1119,*** this reasoning adopted by Mr. Steer for the defendant, with good reason, since it was also approved in ***Stoeckert v Geddes*** in both the Court of Appeal and the Privy Council decision (SCCA No. 98 v 1995 and Privy Council Appeal No. 66 of 1998).

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the housing as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding off an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will be only necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to

> show that he or she has acted to his or her detriment or significantly altered his or her position on reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.
>
> In sharp contrast with this situation is the very different on where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such as arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties, both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

Mr. Steer's submission that in the absence of express agreement, the common intention (of which evidence is to be given), must be that of the parties at the time of the acquisition of the property in question, would appear o be a correct one. Indeed in the ***Barnes v Richards-Barnes*** appeal referred to above, Langrin J.A. cited as a "correct observation", the following section of the judgment of Campbell J (Ag) (as he then was):

> "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."

While I accept Mr. Steer's submission on the issue of common intention, it is also trite law that where a person holds property on trusts, express or implied, for another, he must carry out his trustee duties with utmost fidelity. I find nothing in the evidence led before me to lead me to a conclusion that there was conduct on the part of both parties which indicated that there was a common intention that the parties should each hold an interest in properties which are presently in the name of the defendant alone, and which are the subject of the claim.

Having said that, it will be recalled that the defendant having admitted that the Paradise Pen property was purchased for their joint use, also averred that he took the transfer in his own name and neither sought nor obtained the plaintiff's approval as to what was ultimately done with the property. The plaintiff, for her part, said she gave the defendant permission to take the transfer in his sole name and to use the property for the purposes of the development in order to secure a family home.

I accept the defendant's evidence that he acted without any permission or approval from the plaintiff. In those circumstances, it seems to me that the failure to provide a family home at Paradise Pen, in which the plaintiff could have established an interest by virtue of her contribution from the Ensom property, merely suspends but does not determine her interest in such a property later acquired; a sort of deferred common intention. In effect, I am prepared to hold that the common intention which was agreed with respect to Paradise Pen, is deferred and may be applied to the property where the matrimonial home is now located at Childermas.

I am of the view that the equitable principle of "tracing," may be called in aid to support a finding that some proceeds of the Ensom City property which, on all accounts went entirely to the defendant after paying off the mortgage, found its way into the construction of the matrimonial home. So that while the constructive trust does not arise by virtue of agreement or common intention plus acting to one's detriment, it is still possible to arise using the principle of tracing. This is especially so as the evidence is that the wife was not aware of the initial purchase of the 50 acres of the Childermas

property. Nor is there any evidence to support the view that the initial fifty (50) acre purchase or, *a fortiori,* the entire property comprising over one hundred and twelve (112) acres, was bought with the intention of it being *the* matrimonial home. It was, it seems, an investment, and in order to establish an interest in the entire property, the plaintiff would have to satisfy the normal principles of trust law. Indeed, it is worth noting that the construction of the matrimonial home was only commenced in 1993, fully ten (10) years after the signing of the conveyance for the property.

I must respectfully disagree with the submissions of counsel for the plaintiff in his submissions in reply to the defendant's submission, when he says, "The sale of the Ensom City was to facilitate the acquisition of a family home at Paradise Pen, which did not materialize. Both Ensom City and Paradise Pen were used to acquire Childermas which is now the family home." I do not agree that the evidence supports any conclusion in those bald terms. Indeed, the assertion that "Childermas is *now* the family home", may be taken as an acknowledgement that at the time of the acquisition it was not contemplated to be such, a conclusion which I believe is not unreasonable, given the state of the evidence. Nevertheless, I am prepared to hold, on the basis of the joint names being on the title of the Ensom City property, and if necessary supported by the presumption of advancement, that they were joint owners equally entitled to the fee simple interest in that property.

Given my views on the effect of tracing set out above, and my consequential holding that the plaintiff has an interest in the home at Childermas, the question still remains: what is the effect of that holding? There is no calculation of slide rule accuracy, which a court may use, but clearly the court must exercise its discretion. In the instant case, I would hold that given the plaintiff's putative share of the net proceeds from Ensom City of some fifteen thousand seven hundred and fifty dollars ($15,750.00) (see my crude calculation above), that figure is to be taken as her contribution to the acquisition of matrimonial home at Childermas. In determining her share, I would propose to use as a denominator, the alleged putative cost of Childermas as revealed by the Agreements for Sale. This was a sum of one hundred and fifteen thousand dollars ($115,000.00). Given the time between

the sale from Ensom City and the acquisition of Childermas, I believe that it would be reasonable to award the plaintiff a 20% interest in the property on which sits the matrimonial home.

I so Order.

Further Ordered that the said property is to be the subject of a survey and valuation by a surveyor and valuator agreed between the plaintiff and the defendant; Once the valuation has been ascertained, the defendant shall be obliged to purchase the plaintiff's 20% interest in the family home or to convey to the plaintiff, at plaintiff's option, such other land part of the Childermas property, as may be worth not less than the equivalent of the value of the 20% interest aforesaid, such payment or conveyance to be made no later than three months after the valuation has been ascertained.
Costs to the plaintiff to be agreed or taxed.