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**JAMAICA**

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 19/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

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| **BETWEEN** | **PATRICIA JONES** | **RESPONDENT/APPELLANT** |
| **AND** | **LAURISTON EDMUND JONES** | **PETITIONER/RESPONDENT** |

Norman Wright and Christopher Dunkley for appellant

Gordon Steer for respondent

February 6 & March 8, 1990

**ROWE, P.:**

The appellant and the respondent are husband and wife. They were married on November 30, 1971 and on the 19th January, 1987 when the husband issued an Originating Summons seeking a declaration that the matrimonial home at No. 5 Cedar Grove, Kingston 8 was beneficially owned by the husband and wife in equal shares, the marriage was still subsisting. The husband is a Quantity Surveyor and the wife, the Asistant Manager of the Premium Department at Life of Jamaica.

In 1976 this couple did not have a great deal of money but they had the desire to acquire a dwelling house in which to live. The appellant said that "in 1976 we saw an advertisement in the Gleaner for premises at 5 Cedar Grove and we went and liked the house after we looked at it." Without a doubt No. 5 Cedar Grove was purchased by the husband and wife and the title was registered in both names as joint tenants. The purchase price was fixed at $61,000.00, the deposit at $6,100.00 of which the husband contributed $3,555.00 and the wife $2,545.00. A mortgage of $45,000.00 was obtained from Life of Jamaica. There was a shortfall of $11,021.59 to complete the purchase money and to pay for the incidental costs and charges. It was a disputed item at the hearing of the summons as to the respective contributions of the parties, which was resolved by the trial judge in favour of the husband, in that, he found on the basis of the evidence that the wife's contribution to that sum could not have been substantial.

From April 1976 to December 1986, the wife paid, either through salary deductions or from her separate bank account, monthly sums totalling $46,178.11 towards the mortgage debt in respect of 5 Cedar Grove. The mortgage had been obtained at a concessionary rate available to an employee of Life of Jamaica. Had the wife been otherwise employed the mortgage would have been at market rate and would have amounted to $72,131.80. Between April 1976 and April 1987, the husband's employers paid to the wife as rent allowance for the husband the sum of $115,000.00.

The wife contended that her direct contribution to the deposit and to the mortgage payments far exceeded the contribution made by her husband which consisted only of his deposit of $3,555.00 and a portion of the shortfall of $11,021.59. In those circumstances, she submitted, the property

should be divided in the proportion of her monetary contribution to that of her husband's. On the other hand the husband contended "that the premises was bought by us as a joint enterprise and for us to enjoy and as far as we could see in the future, and although the mortgage was by salary deductions I subsidised all of the payments of the Defendant and also refunded to her the entire amount expended by her by was of salary deductions." He said too that the $115,000.00 paid to the wife by the respondent's Company "was always understood by ourselves to cover the mortgage payments and also the bills incurred in respect of groceries." The appellant denied that there was ever such an understanding as put forward by the husband and denied that the payments received from the husband's employer, was anything other than house money. In particular, she said, the "house money" was never intended to be re-imbursement for the sum paid on the mortgage. Indeed she bought groceries, paid the helper, bought clothes and shoes for everyone including her husband, and bought furniture. She mixed her money with his to undertake these varied expenditures.

Panton, J., found as a fact that the monthly sums paid by the husband's company to the wife did not include amounts to purchase clothes but that it was for re-imbursement of the mortgage payments and the purchase of groceries. He commented that the husband was generous in offering his wife a half-share in the property. Against this finding and the consequential order for an equal division of the purchase money upon sale of the property, the wife has appealed. The wife optimistically sought an order declaring that she is solely entitled to the beneficial interest in the property or alternatively to a four-fifths interest. Mr. Wright combed

the affidavits and viva voce evidence to find support for his submissions that the husband was an unreliable witness whose testimony ought not to have been accepted by the learned trial judge.

This case is another prime example of the difficulties which are presented to a Court called upon to determine property rights between husband and wife. Two perfectly respectable people, who had had years of marital happiness find themselves charging and counter-charging each other with falsehood born out of venality. Panton, J., had, however, some objective facts upon which he could fashion his findings of fact.

In 1976, the wife's salary was insufficient by itself to support a mortgage of $45,000.00. The husband concurred in the mortgage application so that the joint salaries could move Life of Jamaica to approve the loan. Figures were not produced, but some evidence was led that in 1976 when the mortgage payments were deducted from the wife's salary, very little was left over. The family did not suffer a deprivation as the husband directed his employer to provide him with a house allowance payable direct to the wife which was then about twice the amount of the mortgage payment. The trial judge found that the husband paid the sums due for property taxes, electricity, water, insurance, repairs and telephone, the last of which was paid directly from his office. Rising along with inflation and with increases in the mortgage payments, were the sums being paid to the wife as the monthly rent allowance which allowance stood at $1,600.00 when the parties separated in 1985. Husband and wife had behaved with commendable responsibility in their financial affairs, so far as the evidence goes. Was there then the understanding between the parties of which the

husband spoke, that is to say, that the wife would advance the mortgage payments and he would re-imburse her in full? We think that the inescapable inference to be drawn from the continuous behaviour of the parties from 1976 to 1985 is that this understanding existed. Both parties were employed. Both had an insecure financial base in 1976. Both wished to obtain a house they could call their own. The neat device of a rental allowance might have brought to the husband certain tax benefits directly or indirectly through his company. Then there was another factor, viz., that since the marital-separation the husband has been paying to the wife a sum of $500.00 monthly which he says is intended to cover the monthly mortgage of approximately $410.00. Such inaccuracies as surfaced in the husband's affidavits and his explanations therefor were all brought to the attention of the trial judge and as he had the opportunity to observe the demeanour of the witnesses he was in the best position to determine the credit of the two witnesses.

Mr. Wright submitted that in the process of totalling the contribution of the wife, the trial judge erroneously omitted to give her credit for the amount saved in the mortgage payments due to the preferential rate obtained through the wife's employment. There is indeed no clear indication that Panton, J., addressed his mind to this issue. The difference between $46,176.11 actually paid and $72,131.80 payable at market rate is $25,958.69. This indirect contribution, quantifiable in money, must be credited to the wife as part of her contribution to the purchase of the house. It formed a significant relief to the parties over the years and had the trial judge directed his mind to this contribution he would not have been over-influenced by the generosity of the

husband and gone on to order the wife to pay costs. However, this substantial contribution would not make any difference to the eventual outcome of rival claims. The husband's account would have been credited with the amount actually paid for mortgage while the wife's account would benefit from the forbearance. On this accounting the wife's contributions would not exceed that of her husband.

The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares. See **Cobb v. Cobb** [1955] 2 All E.R. 696. That was exactly the position in the instant case and the order of Panton, J., that the property is to be divided in equal shares is plainly right.

One of the reliefs claimed by the husband in the Originating Summons was an order for costs. Panton, J., made an order for the wife to pay the costs of and incident to the Summons and Order, to be agreed or taxed. Mr. Steer did not seek to defend this order, but it is necessary to say a word or two about it. The old rule referred to by Tolstoy in the Law and Practice of Divorce, 5th Edition at page 204-205, that the wife's costs in matrimonial proceedings must be paid by the husband is not now of automatic application in Jamaica. Section 33 of the Matrimonial Causes Act provides that:

> "1) Each party to proceedings under this Act shall, subject to subsection (2), bear his or her own costs.

> "2) Where the Court is of opinion that the circumstances in any case are such as to justify it in so doing, it may, subject to rules of Court, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise, as it thinks fit."

This major change in the substantive law as to the husband's liability for the wife's costs does not specifically extend to proceedings in equity for division of property between husband and wife. In exceptional cases a wife can be penalized in costs but this would require evidence of the most cogent nature. Panton, J., thought the wife was unreasonable not to have capitulated the moment the husband asked in his summons for an equal division of the property. We differ completely from the learned trial judge in his assessment of the wife's attitude and prefer to think that had he credited her account with the forbearance from Life of Jamaica to the mortgage payments he would not have considered the husband to be so generous. Accordingly, we set aside the order for costs in the Court below and make no order for costs of the appeal.

**WRIGHT, J.A.:**

I agree.

**FORTE, J.A.:**

I concur.