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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCV 02487/2003

BETWEEN BEVERLY BARBARA KERR CLAIMANT
AND CLYDE MAXWELL FLETCHER DEFENDANT

Mr. Gordon Steer and Ms. Debra Dowding instructed by Chambers Bunny & Steer for claimant

Miss Jacqueline Cummings instructed by Archer Cummings & Company for defendant

Heard: 6th October and 7th December 2005

Sinclair-Haynes J (Ag.)

Mr. Fletcher and Mrs. Kerr met whilst they were teachers at Wolmer's Preparatory School. They were both married to other persons. In fact, those marriages still subsists. This fact was no bar to them entering into an intimate relationship.

In 1985, Mr. Fletcher moved in with Mrs. Kerr, her five year old daughter and her brother whilst she resided at Lyndale Avenue. They removed from Lyndale Avenue at the instigation of Mr. Fletcher to Vineyard Town. They were not accompanied by her brother. Soon after they commenced cohabitation, they opened a joint savings account

Whilst they were living in Vineyard Town, Mrs. Kerr changed her occupation from teacher to insurance agent with Life of Jamaica (LOJ). Whilst at LOJ she learnt through her immediate boss Mr. Ken Sterling that Gore Tuca was making properties at Newton, Braeton available to LOJ employees. He encouraged her to purchase one of the units. The property at Newton, Braeton was purchased in the names of the parties for the sum of \$450,000.00.

In or about 1999 – 2000, Mrs. Kerr again changed her occupation. She became the proprietor of Creative Minds Nursery. A bus was purchased in her name which was used to transport children to and from school.

The relationship soured and in May 2003, Mrs. Kerr removed from the house. In December 2003 she removed certain items of furniture.

She is now asking the court to declare that she is the sole beneficial owner of the property. Mr. Fletcher has trenchantly resisted this claim and asserts that he is also entitled to a half share in the bus and the nursery.

Mrs. Kerr's case

Mrs. Kerr contends that when she discovered the property was available for sale, she informed the defendant and he told her he was not interested and he had no money to contribute.

She was able to purchase the property by:

- a borrowing the sum of \$393,350.00 from LOJ;
- b. withdrawing the sum of \$30,000.00 from their joint account.

The deposit and further payments required was \$114,119.50.

However, an Escalation Clause was invoked by Gore Tuca and they required interest on the balance which was unpaid. Consequently, instead of the original mortgage loan of \$393,350.00 she was forced to apply to LOJ for further mortgage of \$166,250.00 to cover the escalation costs and interest. In spite of both mortgages which were obtained the sum was short of \$21,780.13 to complete the purchase price. She received the sum of \$20,000.00 from her brother and Gore Tuca waived the balance of \$1,780.13.

Life of Jamaica was slow in completing the registration of the mortgage so the balance which was due by them attracted interest. An additional sum of \$34,000.00 became due and payable to Gore Tuca. She received a salary advance to make that payment.

She was unable to qualify for the mortgage solely as she was informed that her salary was not sufficient. She, however, asserts that it was able to meet the payment. She was therefore forced to ask Mr. Fletcher to agree to

join her to qualify for the mortgage. He understood that the purchase money would be from her funds and that she alone would be responsible for servicing the mortgage. He agreed. That, she contends, is the sole reason his name appears on the Certificate of Title.

Since obtaining the mortgage, all payments have been made by her. Whilst she was employed to LOJ, the payments were by salary deductions and since she has left LOJ, she has been paying directly from her sole resources.

The furniture she removed from the house she had acquired before the defendant moved in with her and the others she acquired from her sole funds.

Mr. Fletcher's case

Mr. Fletcher contends that immediately Mrs. Kerr told him about the availability of the property he agreed and encouraged her to apply. They pooled their resources towards acquiring the property. Mrs. Kerr was the person who was employed to LOJ so he depended on her to update him as to the progress of the sale.

They withdrew money from their joint account to fund the deposit. They both went to the National Housing Trust (NHT) and to LOJ Property Management to sign papers. They did not have the money for the escalation

cost. She suggested that they borrow money from her father and repay him overtime. This they did. Mrs. Kerr sold him an insurance policy which was assigned to LOJ as part of the stipulation for home ownership by the insurance company.

They have always referred to the house as theirs, never hers alone. After the acquisition of the house and after they moved in, his rent cheques (part of his salary) which were paid directly to her by Wolmer's Preparatory, were used to pay the mortgage. They agreed that she would make the loan payments to LOJ and the cheques would take care of the household expenses.

At all material times, she was the 'financial controller' in the relationship. In the earlier years of the relationship, i.e. before she started working at LOJ, he gave her his salary. They made a budget, lodged a part of their income to the joint account, and kept a sum in a drawer at their home for miscellaneous expenses. After she began working at LOJ, they discontinued the joint account but continued to pool their resources in order to take care of the home.

His rent cheques which were paid directly to her had risen to \$13,000.00 per month by 2003. Whilst she was at LOJ, she earned more than

he but there were times she did not earn and his salary took care of the household expenses and her daughter.

He is claiming that he is entitled to a half of the property. He has also counterclaimed for half share in the nursery, the Hiace bus, and certain items of furniture.

Submissions by Ms. Jacqueline Cummings

Ms. Cummings submits that the court must look to the common intention of the parties at the time of the acquisition of the property. The court must look to see:

- a. how the property was financially acquired;
- b. who funded the purchase;
- c. whether the funds used to acquire the property came from a common fund or pool.

She relies on **Cook & Head** (1972) All ER 38 and **Grant v Edwards** 1982 2 ALL ER 426.

She further submits that the initial payment was from their joint account. There is no allegation that the majority of the money was hers. She is not to be believed when she stated that the defendant was not interested in the purchase of the property and that he told her he had no money.

The claimant claims that she only approached the defendant for assistance when she discovered she required an additional mortgage for the purchase of the property cannot be true in light of the fact that both their names appear on both the first and second mortgage documents.

She further submits that in light of Mrs. Kerr's assertion that Mr. Fletcher had no interest or money to buy the property it cannot be believed that he would submit and subject himself to a mortgage or help her obtain a mortgage for a property that he had no interest in but would have an obligation to repay. It is unlikely that Mr. Fletcher who had no money to buy a home would consent to put himself in debt for her.

Further, it is not believable that Mrs. Kerr would have joined with Mr. Fletcher who was married and earning far less than she. Especially since they were to hold as tenants in common and she knew his wife was likely to inherit his share in the event he predeceased her.

The claimant, she submits, has failed to provide the court with evidence of her salary whilst she was employed to LOJ. Her evidence and that of Mr. Sterling, her immediate supervisor that she made the Million Dollar Round Table is not credible. That feat is achieved by about 3% to 5% of the entire insurance population of Life of Jamaica's agents and indeed the entire world. Such persons are high income earners. Mrs. Kerr's

achievements would have coincided with the acquisition of the property. Someone of that high income bracket would have been able to qualify for a home in upper St. Andrew. Yet she was unable to qualify for a humble dwelling in Braeton.

It is her submission that Mr. Kenneth Sterling failed to support the claimant. In fact, his testimony is at variance with hers. She submits that her relation with Mr. Sterling was rather unusual and she has invited the court to infer that he may have an interest to serve. The claimant ought not to be believed when she told the court she received a loan from her brother as the cheque produced was made out to her brother's wife and intended for his wife.

She further submits that the claimant continued collecting the rent cheques after they ceased cohabitating together. This refutes the claimant's contention that the cheques were for food and clothes for the defendant.

She submits that the defendant's actions were and are consistent with that of a proprietor. He pays taxes and water rates which are two items of expenditure for real estate. He submitted himself to being the subject of the mortgage and even purchased a life insurance policy from the claimant to enable him to qualify for the mortgage.

Ms. Cummings' Submissions Re Nursery and Hiace Bus

The defendant worked in the nursery and received no pay. He helped in its setting up and advertising. He did paper work and made lodgements. The money earned from the nursery paid for the deposit on the purchase of the bus and the balance was made way of a loan. The loan for the bus was in their both names even though it was purchased in the claimant's name. The claimant drove the Hiace bus on Fridays and never received payment.

This is not unusual, as their first car, which was jointly acquired was purchased in his name alone.

The defendant she submits was not obliged to pay the loan for the bus because for two years after their break-up the claimant had the sole benefit of their money ventures. It was therefore not an indication that he had no interest in the property but a realization that his other investments with the claimant were paying the loan.

Submission by Miss Debra Dowding

Miss Dowding submits that Mr. Fletcher cannot be accepted as a witness of truth for the following reasons:

1. He has produced no documentary evidence to support his case.
2. He lacks consistency on critical issues.

The court ought to accept Mrs. Kerr's evidence that:

- a. The defendant's sole contribution to the property was to sign the document and to declare his earnings.
- b. Mrs. Kerr was a successful life insurance agent who earned far more than the defendant's salary as a teacher.

She further submits that the court should look at the state of the parties' relationship at the time of the acquisition of the property. The fact that the defendant admitted he stopped giving the claimant all his money after she went into insurance indicates that the parties were having difficulties.

It is also her submission that Mrs. Kerr paid the mortgage and all major utility bills and was responsible for the majority of the household expenses including repairs and maintenance. The defendant has put little into the maintenance and repairs of the house. This is indicative of his knowledge that he had no share in the property.

She submits that the defendant's rent cheques which were paid to her client were infinitesimal in comparison to their expenses.

Re the Nursery

The nursery has been closed since 2003. The defendant's lack of knowledge that the nursery has been closed is an indication that he has no interest. The nursery is now defunct and he had no share in it.

Re the Hiace Mini Bus

The defendant has no share in the bus. It was purchased by way of loan. The home was used as collateral therefore both parties had to sign the documents. The defendant's sole contribution was to sign the document. He has not contributed to the repayment for the bus. Mrs. Kerr was responsible for its acquisition and maintenance.

There was therefore no common intention that the defendant should have a share in any of the assets.

There is no evidence of the defendant's contribution to the property except his signature and the disclosing of his income.

There is no documentary evidence that he was to share in the nursery nor is there any evidence of common intention. There is no evidence that the defendant contributed to the acquisition of the bus or its maintenance except for providing his signature for the bank's document.

She submits that the defendant's contribution towards the acquisition of the house and the mortgage payments was so small that it could not be regarded as contribution which would entitle him to a share.

She relied on **Young v Young** (1984) SLR 375 **Greczkowski v Jedynska and another** February 12, 1971 SLJ 126, **Stephenson v Anderson** SCCA No. 55/00 delivered June 12, 2003.

The Law

Mr. Fletcher and Mrs. Kerr cohabitated together for approximately 18 years. They are not related by affinity or consanguinity. Technically, they are now strangers because of the legal impediment of their subsisting marriages.

In **Petitt v Petitt** (1970) AC 777 at page 814, Lord Upjohn remarked:

“In the absence of evidence to the contrary if the property be conveyed in the name of stranger he will hold it as a trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held by those persons in proportion to the purchase money that they have provided.”

The question is whether there is a resulting trust of the moiety in the fee simple vested in Mr. Fletcher for Mrs. Kerr, his co-tenant.

It is Mrs. Kerr’s contention that she was solely responsible for the purchase of the home and whatever contribution he might have made was infinitesimal. Mr. Fletcher is however, adamant that his contributions were substantial.

The critical question is what the intention of the parties was at the time they acquired the disputed properties.

The next question is what was Mr. Fletcher’s contribution? Scrutiny of the evidence adduced is vital.

Assessment of Evidence

Mrs. Kerr admitted that whilst they resided at Vineyard Town they shared expenses, they shopped together, and they discussed most things. They discussed the purchase of a mini motor car. Mr. Fletcher taught her to drive.

In 1985 they opened a joint savings account. Mrs. Kerr admitted that money from the joint account was used as part of the down payment on the property. There is no evidence that that was done clandestinely or that Mr. Fletcher made any protest at her utilizing their joint account in that way. It is unchallenged that before she went to LOJ i.e. from 1985 to 1992 he earned more than she. His contribution to the joint fund would have been substantial. It is her evidence that they stopped putting their money to the joint account after she began working at LOJ because there were plans by LOJ to have her lodge her salary to an account and she needed an account to facilitate this. This contradicts Miss Dowding's submission that the admission by Mr. Fletcher that he stopped giving Mrs. Kerr all his salary indicates that they were having difficulties. There is no evidence that the parties were experiencing difficulties at the time.

His evidence, however, is that after the down payment on the property was made, the funds in the account were depleted. Her evidence is that funds

remained. Her attorney's suggestion to the defendant was that \$5,000.00 remained in December when the account was closed. The fact that he was unaware that funds remained in the joint account confirms that Mrs. Kerr was the "financial controller" in the relationship.

What has emerged from the evidence is that up 1993 when the account was closed the parties operated as a unit. They pooled their resources and operated out of a common fund. From the common fund, a part of the down payment came.

What was the intention of the parties at the time the house was purchased?

Mrs. Kerr contends that Mr. Fletcher was not interested. He told her he had no money and asked her where she intended to get the money. This, he disputes.

Her evidence is that she alone selected the lot. After she selected the lot, she went to LOJ and got a loan. When cross-examined as to whether she was the only person who signed the application there was a long pause before she accepted that he too signed the application for the loan. She admitted that the sales agreement was signed by them before they applied for the loan.

Under cross-examination, she told the court that he agreed to join his salary with hers. He never agreed to be part of the mortgage or to sign the two mortgages she obtained from LOJ.

When confronted by Mr. Fletcher's signature on the two mortgage documents she retreated from that position. However, she remained adamant that he never joined with her in the entire transaction. The understanding was that she would repay the mortgage. She admitted that in purchasing the house it was explained to her that tenancy in common meant that in the event of Mr. Fletcher's death 50% of the property would go to his wife.

She agreed that it took two years for the process whereby they acquired the property to complete. During those two years, she admitted that she was in receipt of his cheques. It is her evidence that since she began collecting his rent cheques they increased from \$7,000.00 to \$13,000.00. The mortgage was \$11,000.00. She denied, however, that the rent cheques were to pay the mortgage and look after the house. Instead, she said it was to buy food, his clothes and deal with small expenses. Her evidence is that she received his rent cheques up to a few months after she left. The sum of \$13,000.00 is more than the sum \$11,000.00. In terms of the mortgage payments, it cannot be regarded as infinitesimal (even the sum of \$7,000.00 was more than half the mortgage payments).

She accepted that her father was approached for money but she can't recall the reason. It is Mr. Fletcher's evidence that they discussed her entry into insurance. She, however, denies this. Her testimony is that Mr. Ken Sterling came to the house after she had already begun working at LOJ. She called Mr. Sterling to testify on her behalf. In this regard he, however, failed to corroborate her evidence.

His testimony is that before she began working at LOJ, he went to their home and discussed the job. According to her, he discussed with them what the job entailed e.g. the fact that she would be away from home for protracted periods. The fact that Mr. Sterling discussed the job with both of them is indicative of the closeness the parties shared and that they discussed most important things.

I have had the opportunity of hearing Mrs. Kerr and observing her demeanour as she testified. She was vacillatory and less than forthright in her answers. On the other hand, I was far more impressed with Mr. Fletcher.

On a balance of probabilities, wherever there is a conflict in the evidence, I prefer Mr. Fletcher's. I accept his evidence that he went with her to select the lot and was integrally involved in the acquisition of the property and I accept his evidence that they borrowed money from her father and he gave her money to repay him.

I find that at all material times they pooled their income. I, find no merit in Ms. Dowding's submission that the defendant's evidence lacked consistency. It is Mr. Fletcher's evidence that after he discontinued giving her his salary he gave cash and she collected his rent cheques. In his defence, he stated that his rent cheques were used to pay the mortgage. He also stated that his rent cheques would take care of 'home matters'. The mortgage was deducted from Mrs. Kerr's salary while she was employed to LOJ. It was therefore not practical for him to pay directly. The evidence of both parties is that she was in receipt of his rent cheques. I also accept his evidence that he gave her cash. After she left LOJ, she continued paying the mortgage. I accept Mr. Fletcher's evidence that she was always the 'financial controller' and was responsible for using their joint funds to make the necessary payments. After she removed from their home, she continued receiving his rent cheques for some months until she eventually refused to accept them. She was no longer residing with him. It is not an unreasonable inference that she utilised those cheques to assist in paying the mortgage in the absence of other evidence. I accept his evidence that after she left he spoke to her concerning how they would share the responsibilities and she told him she would continue to pay the mortgage only.

Mr. Ken Sterling's knowledge about the purchase of the property was quite limited, indeed to what she told him. He was ignorant of a number of facts:

1. He never knew that part of the down payment came from a joint account. He thought all came from LOJ.
2. He never knew that the property was purchased in their names.
3. He never knew that the developers wrote to both parties with regard to the escalation.

I therefore cannot regard him as a helpful witness.

It is useful to quote Harrison J A in **Robert Stephenson v Carmelita**

Anderson SCCA No. 55/00:

“The ascertainment of the shares in the beneficial interest in property held in their joint names by an unmarried couple who contributed to its acquisition, is based on the same principles applicable to married couples (**Bernard v Josephs** (1982) 3 All E R 162). In the latter case, the factors to be taken into consideration in determining the respective shares were noted. Lord Denning, M. R., at page 166, said:

“As between husband and wife, when the house is in joint names and there is no declaration of trust, the shares are usually to be ascertained by reference to their respective contributions, just as when it is in the name of one or other only. The share of each depends on all the circumstances of the case, taking into account their contributions at the time of acquisition of the house, and, in addition, their contributions in cash, or in kind, or in services, up to the time of separation. In most cases the shares should be ascertained as at that time. But there may be some cases where later events can be considered. The departing party may only be entitled to one-half, one-quarter of

even one-fifth, depending on the contributions made by each and, I would add, all the circumstances of the case.”

A mere recital that the legal estate is held by the parties as tenants in common is not determinate of the proportionate share of each party in the beneficial interest. A presumption arises that it is held in equal shares but the particular circumstances of the case must be considered.”

Mrs. Kerr has failed to rebut the presumption that they both hold in equal shares. In the circumstances of the instant case I am satisfied that the maxim ‘equality is equity’ is applicable.

Re the Furniture

The accepted evidence is that when Mr. Fletcher began cohabiting with Mrs. Kerr at Lyndale Avenue he brought with him a TV and component set. Mrs. Kerr contends that whilst they were together Mr. Fletcher only brought a TV, stereo and day-bed.

Mrs. Kerr, in her reply to his Defence and Counterclaim stated that before she became involved with Mr. Fletcher she owned the following:

- a. two beds
- b. dresser
- c. refrigerator
- d. living room set
- e. dining room set
- f. gas stove
- g. sewing machine.

During the relationship, she used her own resources to acquire other items of furniture.

She was asked by Counsel if while they were living together they purchased a bed, centre table, stove and VCR. There was an inordinately long pause and she finally said it would be difficult to answer. She agreed that during that time they pooled their resources and purchased certain items of furniture. She admitted that the fridge and stove which she possessed prior to Mr. Fletcher moving in with her were replaced during the union.

In her witness statement, she avers that before her involvement with Mr. Fletcher she owned the following:

- a bed,
- a stove,
- a refrigerator, and
- a dining table.

Under cross-examination, she told the court that she was not certain whether she had owned the dining table. She admitted that the fridge and stove which she possessed prior to Mr. Fletcher joining her were replaced during their union.

Her daughter Shoshana Kerr testified on her behalf. She told the court

that before Mr. Fletcher joined them her mother owned the following:

- a. bed
- b. coffee table
- c. what-not

Shoshana was only about age five or six at that time.

It is Mrs. Kerr's evidence that a second dining table was purchased during her union with Mr. Fletcher.

Mr. Fletcher, however, contends that the items were bought from their pooled resources. Even after they stopped putting money in the account, he gave her cash and she continued receiving his rent cheques. They conferred whenever there was a need to purchase furniture. Some items were physically purchased by her and some by him. Whilst they cohabited together at Braeton they changed the refrigerator and purchased one from her cousin. This was purchased from their pooled resources. He went to May Pen to collect the refrigerator from her cousin. They also purchased a washing machine whilst they lived at Braeton.

I accept Mr. Fletcher as being more credible in this regard. I therefore find that the furniture acquired during their union were acquired from the joint resources. I reject her evidence that he only purchased a TV, stereo and day-bed. I accept the evidence contained in her witness statement in so far as she stated that she owned a bed, a stove and a refrigerator. I cannot accept

her evidence that she owned a dining table as she herself was unsure as to whether she did.

I find that Mr. Fletcher has an equal interest in all items of the furniture except a bed.

Re the Nursery and the School Bus

Mrs. Kerr contends she was the sole owner of the nursery. The setting up of the nursery was discussed with Mr. Fletcher. His brother did flyers to advertise the school. They pasted these flyers at the Children's Expo. The money from the nursery was deposited to an account which was in her name.

She received the equipment to run the nursery from the Food for the Poor e.g. chairs. Mr. Fletcher did not provide the chairs from Wolmers. She admitted that he provided sponges which he brought from Wolmers. She said she took the VCR and TV from their home.

It is her evidence that Mr. Fletcher did some book-keeping, some handiwork and he did some lodgements.

She admitted that on Fridays after school he was at the nursery. However, during the week he was only there to pick-up the children.

Mr. Fletcher on the other hand contends that the nursery was a joint venture. He took chairs and sponges from Wolmers. He did all the handi-

work, e.g. fix pipes, take up garbage, and change bulbs. He also did the paper work and book-keeping.

He was also responsible for making the lodgements. He went there in the mornings to open the place while she drove the bus. He remained there until the workers came. Most afternoons he remained there until the last child left.

On Saturdays, they went there to clean the place, wash the linens and he did the books there. During the summer, he was the sports coordinator. He also taught the children how to use computer.

It is my finding that the nursery was a joint venture and he is entitled to an interest. Even on her account, he played a very active role with the setting up and the operation of the nursery. She admitted she took furniture from the home. According to her evidence, the VCR and TV would have been his.

I accept his version of the facts that he was responsible for opening the nursery in the mornings. I accept that he did all he testified he did.

I accept his evidence that she sought to exclude him from participating in the nursery when she decided to leave him e.g. she did not wish him to do the accounts.

I cannot accept Miss Dowding's submission that his ignorance as to when the nursery closed proves that he had no interest. It is her evidence that the nursery closed in December 2003. That was about the period the relationship ended and I accept his evidence that she sought to exclude him during that period.

Mrs. Kerr worked full time in the nursery while Mr. Fletcher's input was limited to a few hours each day. He had a full-time job otherwise. In the circumstances with regard to the nursery I find that Mr. Fletcher is entitled to a 1/3 share in the nursery.

Re School bus - Mrs. Kerr's claim

Again, she is insistent that the bus was hers solely. It is registered in her name alone. Mr. Fletcher insists he is joint owner. He testified that they purchased it for \$500,000.00 from someone who migrated to England.

What is the evidence?

Under cross-examination, Mrs. Kerr accepted that Mr. Fletcher joined with her to borrow the money to purchase the bus. She accepted that he drove it on Fridays whilst she drove it during the week. The money earned from the bus went to a bus account. He was not paid to drive the bus.

It is my finding that the acquisition of the bus was again a joint venture. The fact that he has not been making payments does not negate this

fact as the money earned for the bus went to the 'bus account'. This account therefore paid for the bus. Since the break-up of the relationship, Mrs. Kerr has been benefiting solely from this account. Mrs. Kerr dedicated more of her time to driving the bus. In the circumstances I find that Mr. Fletcher is entitled to 1/3 shares in the bus.

I, therefore find that:

1. Mr. Fletcher and Mrs. Kerr hold the legal and beneficial interest in equal shares in property situated at Lot 465 Newtown, Braeton in the parish of St. Catherine registered at folio 442 in the register book of titles. I order that an accounting be conducted from January 2004 to December 2005 with regards to the mortgage and insurance payments, taxes and major repairs;
2. that Mr. Fletcher is entitled to 1/3 share interest in both the nursery and the Hiace bus and is therefore entitled to an accounting from Mrs. Kerr of the income and expenditure associated with that enterprise. I therefore direct that the Registrar of the Supreme Court take an account in relation thereto.

3. I find that all the furniture except a bed should be equally divided between Mr. Fletcher and Mrs. Kerr or alternatively each party is entitled to buy the other party's half share in the furniture.