

KINGSTON
JAMAICA

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 006 OF 1985

BETWEEN

HYACINTH KINKEAD

APPLICANT

A N D

JOSEPH KINKEAD

RESPONDENT

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

A N D

IN THE MATTER of Questions between HYACINTH KINKEAD
and JOSEPH KINKEAD concerning ownership of property.

Dr. Barnett, Q.C. instructed by Franklin Beckford & Company for Plaintiff.

Thomas O. Ramsay for Defendant.

HEARD: 8th and 9th January, 1990.

THEOBALDS, J.

By an amended Originating Summons dated 30th July, 1987, the Applicant one Mrs. Hyacinth Kinkead (hereinafter called the Applicant) sought orders of the Court under the Married Women's Property Act declaring what are the respective interests of herself and the Respondent one Joseph Kinkead (hereinafter called the Respondent) in respect of several parcels of real property situate in the parish of St. Elizabeth. Similar orders declaratory of the interests of the parties were sought in respect of six motor vehicles and in respect of, in certain instances, miniscule items of personal property listed in a six page long schedule under the heading "Household items contained in the Matrimonial House." These items included inter alia items such as figurines, towels and wash rags, bedspreads, pillows and bed linen and various shells and chemicals for pool.

With all deference to the wishes of the wife/applicant, I do not think that the provisions of the Married Women's Property Act were intended to be wide enough to encompass the need for an order by a Judge in Chambers to cover such personal items. On the other hand the items of real property are substantial. It might be useful to list the several parcels of real estate which the wife/applicant sought to have the Court adjudicate upon.

"1. It be declared what are the respective interests of the applicant and the respondent in real property situate at and known as the matrimonial home at Potsdam in the parish of St. Elizabeth comprised in Certificate of Title registered at Volume 1113 Folio 183 of the Register Book of Titles.

2. It be declared what are the respective interests of the applicant and the respondent in real property situate at and known as Kinhead's Appliance Centre at Top Hill in the parish of St. Elizabeth comprised in Certificate of title registered at Volume 1160 Folio 784 of the Register Book of Titles.

3. It be declared what are the respective interests of the applicant and the respondent in real property situate and known as Coyaba Beach Cottage at Billy's Bay in the parish of St. Elizabeth comprised in Certificate of Title registered at Volume 968 Folio 633 of the Register Book of Titles.

4. It be declared what are the respective interests of the applicant and the respondent in land comprising of approximately one quarter of an acre of land situate at Wellington Town, Southfield in the parish of St. Elizabeth with dwelling house thereon butting and binding as follows:-

On the North by lands belonging to Cyril Wellington
On the South by lands belonging to Val Wellington
On the East by the main road leading from Southfield to Malvern
West on lands belonging to Cyril Wellington.

5. It be declared what are the respective interests of the applicant and the respondent in land comprising of approximately 15 perches of land butting and binding as follows:-

North on the main road leading from Southfield to Top Hill
South on land belonging to the Church of God
East on lands belonging to Vernal Rowe
West on lands belonging to Mervin Mantaque and a dirt track.

6. It be declared what are the respective interests of the applicant and the respondent in land comprising of approximately 4 acres and 22 perches of land part of Billy's Bay in the parish of St. Elizabeth butting and binding as follows:-

East on lands belonging to Oscar Lyn
West on lands belonging to Joseph Kinkead
North on parochial road leading from Treasure Beach to Fort Charles
South on the Caribben Sea.

7. It be declared what are the respective interests of the applicant and the respondent in land comprising of more than half an acre and situate at Top Hill in the parish of St. Elizabeth and butting and binding as follows:-

East on lands belonging to Mrs. Alma Gayle
West on lands belonging to Mrs. Alma Smith
North on lands belonging to Mrs. Alma Gayle
South on the main road leading from Top Hill to Southfield.

8. It be declared what are the respective interests of the applicant and the respondent in land comprising of approximately quarter acre of land at Southfield butting and binding as follows:-

North on lands belonging to Cyril Wellington
South on lands belonging to Val Wellington
East on the main road leading from Southfield to Malvern
West on lands belonging to Cyril Wellington."

By paragraphs 9 and 10 of the said Originating Summons the wife also sought:-

"9. That the properties aforesaid be sold and that the net proceeds of sale after deduction of the costs of sale, secured debts and expenses incidental thereto be divided between the applicant and the respondent in such proportions as the Court deems fit.

10. It be declared what are the respective interests of the applicant and the respondent in the motor vehicles:-

(a) One 1975 Ford Granada Motor Car -- registered

No. W 5539

(b) One 1983 Lada Motor Car registered No. 3901 AJ

- (c) One 1982 Toyota red Pick-up registered No. CC 7744
- (d) One 1986 Toyota yellow Pick-up registered No. CC 7745
- (e) One 1981 Toyota Corolla brown Motor Car registered No. AG 0355
- (f) Two Lada Pick-ups registered Nos."

The primary facts established from the Affidavits of the respective parties and from the oral evidence elicited by cross examination of the parties disclosed that the applicant and the respondent had been intimate friends from their teenage years. By 1967 the relationship had produced two children and the parties eventually became man and wife on the 27th September, 1969. The applicant was then a pre-trained teacher at the Epping Forest Primary School in St. Elizabeth. The respondent was for some time prior to the marriage, engaged in the trucking business, he having been given his first truck by his mother from as far back as 1958. This was some eleven years before the marriage. It appears that his business was not only profitable but remarkably successful and by 1965 he had acquired a much larger truck and by 1967 a Volks Waggon Minibus. By 1969 he acquired a 20 ton Leyland Truck now bringing his fleet of vehicles to three. The wife/applicant in her evidence would seek to minimize or reduce the extent of her husband's business acumen and success, but the property acquired and the diversity of his business interests would give the lie to this.

The affidavit evidence put forward by the parties is singularly, but perhaps not unusually, unhelpful. On issues of fact, whatever is put forward by the wife/applicant is diametrically countered by the affidavit evidence of the husband/respondent. The Court was for these reasons grateful that the respective parties were each cross examined at some length and one could fall back on the basic principles as to the assessment of credibility of the parties based on their demeanour under cross examination. Again too the fundamental principles of the burden and standard of proof have to be invoked. Even on issues such as the payment of wages to the wife's sister by the respondent there is sharp conflict.

Likewise on the issue of the family means and status of the wife's relatives and of the husband's parent there is conflict. Whether or not this predisposition towards a conflict in anyway contributed to the breakdown of this union which had the stamp of being remarkably successful in terms of acquisition of worldly goods is not for this Tribunal to determine. But these apparently trivial issues and my resolving of them by a finding that the husband's evidence in relation thereto is more probably true does do irreparable damage to the wife's case; for example, under cross examination the wife had stated "one of my brothers is an employee of the defendant - used to work on the truck up to when the trucks were sold." In those circumstances one asks oneself what could justify the rejection of the husband's testimony that the wife's sister was paid by him to assist in the home while the children were young. The wife's contention that this service by her sister was free gratis and for nothing is rejected. Indeed a knowledge of the cultural norms of society, particularly in the rural parts, would support my finding that the husband/respondent did assist the less fortunate in his wife's family by providing employment for them and paying for these services.

Assisting one's "poor relations" has always been part and parcel of our way of life and all the credit to the husband for so doing. But as has been earlier indicated, the importance of such a finding of fact is that great damage has been done to the credibility of the wife/applicant. Her demeanour has failed to impress. One forms the impression of a spouse who is seeking to benefit more by invoking sympathy from the Court than by presenting true and accurate facts from which she invites the Court to make appropriate orders in terms of her Originating Summons. Clearly she is unable by documentary evidence to show any legal right to the numerous parcels of real estate which have been acquired during the course of this marriage. Her name does not appear on any of the Title Deeds.

The summons being brought under the Married Women's Property Act evidence ought to be adduced of some legal right, usually in the form of documents of title in joint names, based on which a Court can be asked to find that an order for a division of property or declaratory of the rights of the respective parties to the suit can properly be made. Evidence of this nature, is conspicuous by its absence from these proceedings. All the title deeds are in the name of the husband/respondent only. The wife offers an explanation as to why this is so. It is her evidence that in most instances she made an enquiry of her husband as to why her name did not appear on the title deeds. She claims to have accepted his explanation given at the time of her enquiry on the basis of her "love for him, trust in him and his being the head of the family." It has been submitted that these are fair and reasonable explanations for her failure to protect her interest if indeed she had any. Now the authorities are legion that failure by one spouse to take steps to protect his or her interests in joint property, title for which has been issued in the name of one party only, is not by any means fatal to a subsequent claim for an order declaratory of such interests.

One is mindful of the axiom that in times of marital bliss and happiness it is not unusual for such legal or technical niceties to be overlooked; but when the matrimonial boat founders and rocks on the no longer placid and calm sea of life it is by then too late to take effective steps to protect one's interest. Beyond any question this is so. But such interests will none the less be protected by these Courts if it can be shown that it was the intention of the parties that property acquired in the name of one spouse only was for their joint benefit. Such interests will also be protected if it can be shown that the spouse whose name does not appear on the documents of title made a substantial contribution towards the acquisition of the property.

The difficulty facing the applicant is that she must be able to convince a tribunal of fact that at the time of the acquisition of the property there was a common intention or agreement, if you like, that the beneficial interest in that property should be shared between the parties. She could discharge this burden in a number of ways. She could produce documentary evidence pointing to the existence of such an intention. This she has been quite unable to do so she falls back on providing an explanation as to why her name does not appear on any of the title deeds. She speaks repeatedly of love and trust for the husband as the head of the household and of his assurance that everything would be alright but there is nothing in his words or conduct from which any common intention on their part or intention on his part to confer any beneficial interest on the wife can be inferred.

No Court would be entitled to infer a common intention to confer a beneficial interest in a working spouse whose name does not appear on the title simply because such a working spouse paid for and acquired chattels for joint use in the matrimonial home. A more reasonable inference to be drawn from a working wife's contribution is a desire on her part to share in the day to day household expenses without any expectation that such expenditure would create any beneficial interests in any property acquired in the husband's name alone.

The applicant, both by her pleadings and in her evidence, is contending that during their marriage and until she left the matrimonial home she and her husband pooled their incomes in a common fund which they kept in a joint account at National Commercial Bank in Mandeville. Her contribution to this fund was by handing over her monthly salary cheques to him. She brought evidence in the person of one Lois Naraysingh, Assistant Manager of the Canadian Imperial Bank of Commerce in Mandeville who produced the bank's record of a joint savings account No. H. 7377. The record was admitted by consent as Exhibit (2). The Court's attention was

not drawn to any entry on that record which it was contended was or may have been the amount of any of her salary cheques.

Indeed, the Affidavit of Harrington Crawford, Justice of the Peace and retired Principal of Pedro Plains Primary School, dated 23rd March, 1989, and filed by the applicant proved that she was employed as a pre-trained teacher at that institution from June, 1969, at a monthly salary of £80. A similar Affidavit of one Kathleen Lodge proved that the applicant was employed at the Epping Forest School in St. Elizabeth from January to June, 1968, at a monthly salary of £80. Presumably these are in response to the husband's Affidavit of 10th March, 1989, in which he had stated that she earned no more than \$80.00 per month if as much, "her income was extremely small and when she became qualified she started to earn about \$300.00 a month." It is noted that there has been no attempt to challenge this last figure but in relation to the £80 it is also noted that the exchange rate at the time was \$2.00 to the £1 so that the discrepancy would be of considerably less significance than at current rates of exchange. What is most significant is that in spite of the husband's denial that her cheques were ever collected and cashed by him, save at times for her convenience, and as a result of an emergency, no attempt is made by the applicant to prove what she asserts other than by her mere say so. There would, if it were so, have been no difficulty in producing the relevant portion of the banks' records to prove the lodgment of at least some of her salary cheques during the time of her employment to the Ministry of Education. The bald assertion that "shortly after our marriage we started a joint savings account at Canadian Imperial Bank of Commerce, Mandeville, in the parish of Manchester, the number of the account being 7377" is not per se sufficient ground to seek an order of this Court for a division of the funds therein upon a break up of the marriage. In Marshall v. Crutwell [1875] L.R. 20 E.Q. 328 it was held that if the joint account

was established merely as a convenient arrangement for conducting the husband's affairs and that it was not intended to be a provision for the wife then there was no presumption of a gift to the wife; and the Court accordingly held that she was not entitled. In that case the facts were:-

"The husband of the plaintiff being in failing health transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife. He afterwards paid considerable sums into this account. All cheques were afterwards drawn by the plaintiff on the direction of her husband and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account but it was stated by the bank manager that the husband had remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the plaintiff claimed to be entitled to the balance.

It was held that the transfer of the account was not intended to be a provision for the plaintiff, but merely a mode of conveniently managing her husband's affairs, and consequently that she was not entitled."

I accepted the husband's evidence that no contribution had been made by the wife to this account; indeed she had failed to prove any.

The presumption of advancement has been wholly rebutted and her claim in that regard fails.

The respondent's answer to the applicant's claim is as simple as it is straight-forward. He admits early friendship with the applicant, but his contention is that he had a successful trucking business for some years prior to the marriage. He acquired land and built and furnished the matrimonial home without any form of financial assistance from the applicant. Her leisure time activity in the business would not in my

view entitle her to any claim for a share in the respondent's assets whether real or personal. It was interesting to observe the surprise and consternation on the applicant's face when it appeared that she was hearing for the first time of the respondent's business activity in rearing of goats and sending of fishing boats to sea. It was interesting to note that there was no denial by the applicant that she was not in favour of the acquisition of the Coyaba Beach Cottage property. The respondent, in spite of her disagreement, went ahead on his own and acquired same through the assistance of his bankers, and there is every evidence that this property turned out to be just another of the respondent's wise investments. There can be absolutely no hesitancy in declaring unequivocally that the interest of the applicant in that property is nil. A similar finding in respect of the matrimonial home at Potsdam in the parish of St. Elizabeth is inescapable. The applicant's part in the building of the business went no further than in arranging the acquisition of a piece of her "family" land on which the building was eventually sited. But the uncontradicted evidence is that the respondent paid for the land. If it were a gift then different considerations would have applied. See Smith & Another v. Baker [1970] 2 A.E.R. p. 826. In that case most of the £95 for the purchase of a lot of land was contributed by the wife, but the lot was transferred in the husband's name alone. The parties built the house themselves and the wife gave up her own employment to help with the building. In determining the rights of the husband and wife it was held, inter alia, that the wife's abandonment of her own work to work on the building was an important contribution to the parties' joint efforts and was not mere leisure activity so that although the legal ownership was in the husband the beneficial ownership was in the husband and wife jointly in equal shares in the absence of any other clear division.

Comparing the facts of Smith & Another v. Baker above it is obvious that the applicant herein never abandoned her own employment at any stage nor did she make any financial contribution to the purchase of any of the plots in respect to which she now seeks a declaration.

In this case there is an issue as to whether or not the wife was paid for her work in the business. I believe her husband's evidence in relation to that, namely that she was paid. Her own evidence is that she "took money from the business to purchase personal effects - furniture, clothes ... etc." It seemed to me to be inconsistent that the applicant who claimed that she made regular and periodic enquiries as to her name being included on titles would be content to work in the business without remuneration. On the other hand I was impressed by the respondent's candid statement that "she took a very active part in the business - she writes up orders on my instructions, orders for goods. She also sell, work as cashier, sign receipts." (the underlining is mine.) He has made no attempt to scale down her contribution. But he says "she save her teacher salary and spend out of Kinkead's Appliance Centre." Although "she worked in the business at her convenience she got a salary like the rest of the workers. If she leave school and don't want to come to work she don't come." Contrast this with the applicants sworn Affidavit evidence that she worked in the business full time on Saturdays and Public Holidays. The respondent's answer was that the business never opened on Public Holidays and I believe him. The applicant's statement that she "travelled to Kingston on a fortnightly basis to purchase goods for the business" is met by the respondent's answer "she would accompany me to Kingston now and then when I went to pick up goods. She came just to enjoy the drive." Again I believe him, for there is no attempt to explain how a qualified full time teacher could absent herself from her school on a fortnightly basis. These could be classified as subsidiary issues extracted at random

from the respective affidavits but in my view a multiplicity of findings unfavourable to the applicant tend to disparage her as a witness of truth on whom any reliance could be placed. I have already made certain comments earlier in this judgment on the cumulative effect of a finding that the applicant's evidence is unreliable.

In closing, there are three types of proprietary interests in relation to which orders declaratory of the interests of the parties are sought, viz bank accounts, land/matrimonial home and other properties, and motor vehicles and furniture. The applicant has failed to make out a case even to the extent of the 10% contribution to the business so characteristically and generously offered by the respondent. I believe him when he says she removed "everything from the house save and except for a washing machine and one bed in the bedroom of one of the children." She may retain these items along with the 1982 Toyota Corolla gift from her husband which she now drives for her comfort, convenience and solace. She has no beneficial interest in the remaining property in respect of which she seeks declarations.

Notwithstanding my refusal to grant the orders sought in the originating summons, I will make no order as to costs.