IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E51/2000

BETWEEN	MERLE ADASSA MASON	APPLICANT
AND	DELTON RIGG MASON	RESPONDENT

Carol Vassall for the Applicant.

Simone Jarrett instructed by Kingston Legal Aid Clinic for the Respondent.

Heard on 27th February, 13th June, 31st July, 20th August, 11th December 2001 and 4th September 2002

Campbell J.

The parties are husband and wife. They were married in December 1978 but have been living separate and apart since 1999. This claim has been brought by the wife by way of Originating Summons and seeks an Order to determine the respective interest of the parties in premises known as Lot 9 Renfield Terrace in the parish of St. Andrew, registered at Volume 1085 Folio 463 of the Register Book of Titles. Certain consequential Orders are sought to give effect to the application. The applicant in her affidavit in support of the Summons, depones:

> 44. That in 1986 I purchased a lot of land being Lot 9, part of 23 Renfield Terrace, at a cost of $17000.00 by myself out of savings (partner) that I had been able to make and exhibit marked "A" for identity, copy Certificate of Title registered at Volume 1085 Folio 463.

45. That the respondent had no knowledge that I had this money, because he is of the opinion that I am a woman with money, he steals out whatever I put away, so I always have to be careful how I handle any money.

46. That the money with which I bought the land was obtained from two "partner" draws I received.

There was no dispute that the building of the matrimonial home started in 1987. The wife testified that "because they were husband and wife, she thought she had to put her husband's name on the title". She said there was no discussion of the proportion of ownership of the parties. She said her husband made no contribution to the purchase of the lot or the construction of the building. She described her husband as being lazy and unreliable, as a result he was unable to hold a job. She said that during the period from 1986 to 1999, the most substantial employment the respondent maintained was for six weeks as a driver. He has done jobs as a welder. The applicant claims the total welding jobs he obtained numbered about twelve for the period, and floundered because the respondent was late in completing the jobs. He drove his wife's van for about three months. He attempted butchering for about one year, 1984-85. The applicant testified, the respondent went to the United States for five months, but the wife complains that there was no monetary remittances. His only contribution being a dress for his wife. The respondent says he travelled to the USA on four occasions, 1982, 1983,

1985 and 1987. He worked a minimum wage job whilst he was in the USA, but was unable to say how much, if any, he brought home. She denied strenuously that whatever sums he earned he handed over to her to assist in the purchase and construction of the home. She said sums would be passed over from time to time but not to construct the house, but more for purchases at the supermarket.

She gave instructions that the status of ownership of the parties be changed from that of joint-tenants to tenants-in-common. She denied that the conversion to Tenancy in common was a recognition of his entitlement to a share in the property.

The respondent said that in 1978 his occupation was that of a laboratory technician at Jamaica Bureau of Standards. He regarded that post as a junior position. He was paid weekly and would take his cheque to his wife.

It was suggested to the respondent that his wife complained that his cheque was insufficient to cover the light bill. He denied the suggestion.

He listed the other employment he had, professional welder, and driver. Of his venture into butchering, he says it became uneconomic to continue due to the cost of transportation from Westmoreland, where the meat was sourced. His wife contends that it was his tardiness in returning to Kingston that destroyed the business. The respondent said that he was the sole contractor for the construction of the dwelling house, additionally, he would cook for his family and mend his

wife's clothing. The applicant counters this testimony by saying that when he is not at work, he watches television and talks on his CB radio and he has never assisted with the children. Any contribution he made towards purchases at the supermarket would average about three times per year. The applicant contends that the respondent has only worked for a total of three years, for the period of twenty-two years of the marriage. He has admitted that his earnings were quite often insufficient to pay the utilities.

There is no evidence that the respondent was working at the time of the acquisition of the property and his testimony as to the effect that he worked on the construction of the house as a contractor. The applicant contends that a Mr. Markland was being paid to fulfill that role.

The applicant claims the matrimonial home in its entirety, on the basis that the entire purchase-price of the lot and the cost of construction of the matrimonial home was acquired from her savings, and that she had borrowed money from her bank. Miss Carol Vassall, on behalf of the applicant, contends that there was no common intention for the disposition of the equitable interest in the property, and that the court should find that the respondent holds his share on a constructive trust on behalf of the applicant.

I find that the matrimonial home was held firstly in the joint-names of the parties. That the mortgage loan was in the joint names of the parties and had been provided by the financial institution at which the applicant worked. That the mortgage payments were made by way of deduction from the applicant's salary.

The Court has no jurisdiction in this application to vary existing titles nor any power to transfer or create interests in property. The role of the Court is to determine what the respective share of each party is, not what ought to be.

In Pettit v Pettit (1969) 2 All E.R 385 at page 412, Lord Diplock commented on the Court's powers in the determination of property rights as between husband and wife, as follows;

> "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 right 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 propriety rights, on granting a decree of divorce." (Emphasis mine).

It is clear from the evidence that there was no agreement between the parties either expressed or 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.

In Pettit v Pettit (supra), the test for the determination of the parties beneficial interest was elucidated by Lord Upjohn at page 813, thus;

> "In the first place, the beneficial ownership of the property must depend upon the agreement of the parties determined at the time of the acquisition.....if the property is land, there must be some lease or conveyance which shows how it was acquired.
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> If that document declares not merely in whom the legal title is to vest, but in whom the beneficial title is to vest that necessarily concludes the question of title as between spouses for all time, and in the absence of fraud or mistake at the time of the transaction, the parties cannot go behind it at any time thereafter even in death or the breakup of the marriage.
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> First then, in the absence of all other evidence, if the property is conveyed into the name of one spouse, at law that will operate to carry also the beneficial interest."

The property was acquired in the joint names of the parties, firstly as joint tenants, then as tenants-in-common. The respondent did make some monetary

contributions. There is no presumption in a marriage relationship that one spouse will have a beneficial interest in the property registered in the name of the other spouse. Where one spouse, as the applicant does here, claims property registered in the name of another (the respondent), she must prove a trust in her favour.

In Gissing v Gissing [1970] 2 All ER 780 at 789 Lord Diplock expressed the principle in this way;

> "Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestqui qui trust. The legal principles applicable to the claim are those of the English Law of Trusts and in particular, in the kind of dispute between spouses that comes before the Courts, the law relating to the creation and operation of resulting, implied or constructive trusts. Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee, the Court must give effect to it.....if it is not in writing it can only take effect as a resulting, implied or constructive trust.
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> A resulting, implied or constructive trust is unnecessary for the purposes to distinguish between these three classes of trust – three classes – is created by a transaction between the trustee and the cestqui qui trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to cestqui qui trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the

> cestqui qui trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

There is no discernible common intention at the time of acquisition. What then are the presumptions?

In Pettit v Pettit 1970 A.C. 777 at 813, Lord Upjohn said;

> "The property may be conveyed into the names of both spouses jointly in which case evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife such evidence is not forthcoming, the Court maybe able to draw an inference as to their conduct. If there is no such available evidence then what are called the presumptions come into play"

That evidence is the lot on which the property was built was purchased from the savings of the applicant. It is also the clear evidence that all mortgage loans that were used to construct the matrimonial home were paid by the applicant, by way of salary deductions. These amounts, $17,000; $70,000 $120,000; $280,000, were obtained from the financial institution with which the applicant worked.

The law provides that where property is acquired with funds of one spouse and later conveyed into the joint names of both spouses. The presumption is the holder of the legal estate holds the property on a resulting trust for the person who provided the monies.

This is expressed in *Equity and the Law of Trusts 2nd Edition* by Philip H. Petit, at Page 93, Thus;

> "Whenever a man buys either real or personal property and has it conveyed or registered or otherwise put into the name of another or of himself and another jointly, it is presumed that that other holds the property on trust for the person who had paid the purchase money. The classic statement of the law is to be found in the judgement of Eyre C,b, in *Dyer v Dyer* (1788), 2 Cox. Eq. C. 92.
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> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold, whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser, whether in one name or several, whether jointly or successive results to the man who advances the purchase-money."

I have already indicated that the employment history of the respondent, (a prime determinant of his means) indicates that the respondent was at best sporadically employed. He has not rebutted the suggestion that he was at best only employed for three of the twenty two years that the parties remained together. Importantly, he was unemployed at the time of the construction of the house. I find as a fact that he paid himself from the mortgage loan for any service he may have given in the construction of the home. I find that the respondent did obtain jobs periodically and made indirect contributions by the way of provision of welding services, and on one occasion the sum of $78,000. For the entire period

that the respondent was cross-examined, the sum of $78,000 is the only amount he was able to quantify as a contribution. I find that this was the ascertainable contribution of the respondent. The valuation report for the property dated 22nd January, 1991, had the cost of the house as $450,000. The respondent's entitlement would be 20% and the Applicant's entitlement 80%.

As to the payments received by the respondent for rental consequent on the departure of the applicant from the home, the applicant is entitled to 80% of the rental income for that period. In Forrest v Forrest SCCA 78/93 delivered on 7th April 1995. The Court of Appeal treated payment by wife discharging mortgage as a debt due from the husband. Wolfe, J.A. followed the dictum of Nourse, C.J in Turton v Turton [1987] 2 ALL E.R. 641 at 648;

> Once the interests of the parties are defined at the time of acquisition it is my view that the unilateral action of one party cannot defeat or diminish the proportion in which the parties hold the property. The payment to redeem the mortgage cannot, therefor, diminish or increase the proposition in which the parties intend to hold at the time of acquisition.

(1) It is hereby declared that the applicant is entitled to a beneficial interest of 80% and the defendant to an interest of 20% in the property known as Lot 9 on the plan part of Renfield Terrace registered at Vol. 1085 Folio 463.

(2) Order for partition and sale of the said property and distribution of the net proceeds of sale to the parties in shares stated in (1) above.

(3) That there be deducted from the respondent's share and paid to the applicant a sum equivalent to 80% of the rental payments for the property from the date of the applicant's departure.

An account to be taken by the Registrar of the Supreme Court of the rental payments received by the respondent in respect of the property.

That the property be valued by a competent valuator to be appointed by the Registrar of the Supreme Court.