NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E – 283 of 2000

BETWEEN	HILDA MING	APPLICANT
A N D	DONALD MING	RESPONDENT

Mrs. Janet Taylor and Miss Stacy-Ann Brown for the applicant instructed by Taylor Deacon and James.

Debayo A. Adedipe for Respondent.

Heard: June 13 and 21; July 29; August 26 and September 20, 2002

MCDONALD J (Ag)

By an amended originating summons dated 22nd August 2000, brought under section 16 of the Married Women's Property Act, the applicant seeks the following relief :-

"(1) A Declaration that the Applicant is entitled to one-half (1/2) interest and the Respondent to one-half interest in property known as ALL THAT parcel of land part of "Weston Park" situated at May Pen in the parish of Clarendon being the lot numbered THIRTY-NINE and registered at Volume 1114 Folio 729 of the Register Book of Titles.

(2) An Order that the joint tenancy be severed

and the parties be registered AS TENNANTS IN COMMON as to one-half (1/2) interest to the Applicant and one-half to the Respondent on the Certificate of Title for the property known as ALL THAT parcel of land part of "Weston Park" situate at May Pen in the Parish of Clarendon being the lot numbered THIRTY- NINE and registered at volume 1114 Folio 729 of the Registered Book of Titles.

(1) An Order that the property be sold and that the net proceeds of sale be divided equally between the Applicant and the Respondent or alternatively that the Respondent purchase the Applicant's respective interest in the property or otherwise as may be just.

(2) An Order that in the event the parties fail to agree to a valuation that the Registrar of the Supreme Court be empowered to appoint a valuator to determine the value of the said premises.

(3) An Order that in the event either or both fail and/or refuse to sign a transfer pursuant to an Agreement for sale of the said premises the Registrar of the Supreme Court be empowered to sign such transfer on behalf of both parties.

(4) An Order that the Applicant be entitled to one- half (1/2) interest and the Respondent to one-half (1/2) interest in funds previously held jointly in Account No. 721991 at the Bank of Nova Scotia Jamaica Limited, May Pen in the parish of Clarendon, later transferred to Account No. 723358 at the said bank in the name of the Respondent and Dwaine Ming and presently in a Scotia Mint Account numbered 020-000-0272 – A.

(5) That the costs of this application be borne by the Respondent.

(6) That there be such further or other relief as this Honourable Court deems just".

The parties Hilda Ming (hereinafter referred to as the applicant) and Donald Ming (hereinafter referred to as the respondent) are husband and wife and were married on the 17th day of February, 1977. The marriage has broken down and they have separated.

At the time of the marriage the applicant was a telegraph clerk and the respondent a Public Health Inspector.

In or around August 1978, land registered at Volume 1114 Folio 729 was purchased in their joint names in the sum of $5,500.

In 1982 the applicant was selected as the recipient of a "build on own land" loan from the National Housing Trust. The respondent consented to join in the application. Both parties jointly acquired a loan in the sum of $35,000 at 8% for 23 years from the National Housing Trust for the purpose of constructing a three bedroom dwelling house on the land which became the matrimonial home.

An endorsement on the Certificate of Title shows that the mortgage was discharged on the 28th day of July, 1997.

In August, 1996 account numbered 72199 was opened up at the May Pen branch of the Bank of Nova Scotia in the joint names of the parties.

In 1999 the Respondent removed the funds from that account and opened another account numbered 723358 in the name of himself and

their son Dwaine Ming. The funds in this account were subsequently transferred by the Respondent to Scotia Mint Account 020-001-0272 A.

On July 25, 2000 the Applicant obtained a Mareva injunction which was varied in August 16, 2000 by order:

> "enjoining the Defendant from operating the Scotia Mint Account in his name at the May Pen Branch of the Bank of Nova Scotia be limited to one-half of the funds presently standing in the account".

The applicant's case was set out in 3 affidavits sworn by her on July 21, 2000, November 23, 2001 and May 13, 2002 and she was cross-examined by attorney for the Respondent Mr. Adedipe.

The Respondent's case was set out in his affidavit sworn to on August 3, 2000 and he was cross-examined by attorney for the applicant Mrs. Taylor.

Applicant's Case

The applicant in her affidavit dated July 21, 2000 contends that she contributed $2,000 towards the price of the land, the source of which was a loan from her mother and the Clarendon Co-op Credit Union. In her affidavit dated November 23, 2001 she states that she obtained a loan of $3,000 from the Clarendon Co-operative Credit Union which went towards the purchase price.

In cross-examination she asserts that she contributed $2,000 towards the purchase price and $1,000 towards stamp duty and lawyer's fee; It was true that she received a loan from the Clarendon Co-op Credit

Union and also true that she received money from her mother and the Clarendon Co-op Credit Union.

In relation to the financing of the construction of the house, the Applicant's evidence is that Respondent and herself jointly acquired a loan from the National Housing Trust. This loan along with funds jointly saved financed the building of the house.

She states that the Respondent paid an additional $3,000 to have the apartments made a bit bigger.

The Applicant in her affidavit dated July 21, 2000 deposes that they jointly repaid the mortgage secured from the National Housing Trust. However, in her affidavit of November 23, 2001 she deposes that "the mortgage payments were made by me on all occasions and from my personal resources". In cross-examination she maintains the same position.

The Applicant's evidence is that when the mortgage was paid off prematurely, it was a joint decision and the money came from their joint resources, the sum of $30,000 being her contribution when she received a partner draw. In cross-examination she stated that the last payment to clear the mortgage was made by the Respondent. When asked in cross-examination if she knew that this money came from the Respondent's National Commercial Bank account in May Pen she replied "I gave him my money in cash – this money was from my selling not from partner draw".

In respect to the expansion of the house, the Applicant's evidence is that this cost about $600,000. Both of them financed the construction and during the construction she gave the Respondent $22,000 which she withdrew from her Jamaica National Building Society account in addition to giving him $10,000 sourced from a partner draw.

The Applicant's evidence is that the additional construction started in 1992 through to 1993.

The applicant contends that in 1996 she gave the Respondent $17,000 to extend the car porte to accommodate her motorcar; which he has failed to extend.

The Applicant's evidence is that she contributed to the improvement of the house. That her purchase of household furniture and appliances and items for the improvement of the house continued after the Respondent and herself moved into the matrimonial home. In an attempt to substantiate her claim she exhibited three documents "HM3 – HM5" attached to her supplemental affidavit dated May 13, 2002. Exhibit ' HM3' is evidence of payment of duty on a microwave oven. Another Exhibit 'HM4' is a pro-forma invoice for a proposed purchase of a refrigerator from Stanley Motta, - the Clarendon Co-op Credit Union, May Pen being named as the proposed lending institution. The third document 'HM5 ' is an invoice from Appliance Traders Ltd in respect of a panasonic air-condition unit costing $67,611.75 bearing installation date June 25, 1998 COD.

In respect to Exhibit 'HM3' there is no evidence that the Applicant's money purchased same. Re Exhibit 'HM'4 there is nothing to indicate that this transaction was finalized re Exhibit "HM5" – there is evidence of only one actual purchase of an air-condition unit for the house. The applicant in cross-examination stated that she had given the Respondent money - $50,000 in respect of the air-condition unit and asked him to write her a cheque. She said the Respondent made the cheque payable to her, as to her knowledge salesmen do not travel with money, they use cheques. She stated that she endorsed and cashed in cheque at May Pen. Later in her evidence she states that the cheque was for over $50,000. I do not find on this evidence that she financed the purchase of any air-condition unit for the house.

The Applicant in paragraph 24 of her affidavit dated November 23, 2001 deposes that she refurbished the house with new fixtures including ceramic tiles at a cost of over $100,000 and that this money was sourced from her retroactive pay from the Jamaica Telephone Company and her partner draw. This evidence is unchallenged.

In respect to the monetary claim, the applicant's evidence is that on or about 26th August, 1996 the Respondent and herself opened a joint account number 721991 at the Bank of Nova Scotia, May Pen in which they both deposited money.

Further that it was understood and agreed that the money in the said account would be used for their joint benefit when they became pensioners.

The Applicant's evidence is that when the Respondent called her at work to come to the bank and sign the papers adding her name to the account she gave him $32,000 derived from a partner draw to lodge to the account. In cross-examination the Applicant says that she gave him $32,000 odd. She denies that the Respondent called her and told her that he wanted to put her name on the account if anything happened to him.

In regard to the Applicant's source of income her evidence is that she derived income from her job, firstly as a telephone clerk until 1986 and thereafter at Cable and Wireless from 1986 to May 2001 when she was made redundant. She also derived income from the partner, one at work and one with a teacher. One was for $10,000 and the other for $5,000.

She tells the Court that while working at Cable and Wireless she did buying and selling on the side of clothes, household articles, bedspreads, curtains, shoes and microwave. This continued until early 1998.

She would give the Respondent between $30,00 - $60,000 every other month depending on how the business goes. In the course of a year she would give him about $200,000 odd. The first year she gave

him so much, was in the 90's 1992 – 1993. She stopped giving him those amounts in 1998 when she stopped doing the business as the Respondent told her he did not marry a higgler.

The Applicant's evidence is that whatever money she had to save was given to the Respondent who controlled the bulk of the money. She says she would give him the bulk of the money to lodge in their account and the remainder she would use to purchase things for the house, furniture and she helped to refurbish the house.

The Applicant asserts that she had no savings accounts but had passbooks for Jamaica National, Bank of Nova Scotia and National Commercial Bank, May Pen. Later in cross-examination she admitted to having a savings account at the Clarendon Co-op Credit Union. The Applicant gave evidence of the marriage being badly broken down in August, 1999 when she discovered for the second time that Respondent was sleeping with the helper. The first occasion being in 1985.

She tells the court that straight through the marriage they were having problems. She denied the suggestion that the marriage broke down when the Respondent discovered bottles with substances in the house; she denied ever owning them or placing them in any cupboard.

Respondent's Case

The Respondents contends that he alone financed the purchase price for the land which was registered in their joint names. Likewise he alone funded the mortgage payments and the funds to discharge the

mortgage. [In support he exhibited photocopy of manager's cheque "DM1]".

He denies that any joint funds were used to construct the house. The reason he proffers for discharging the mortgage was because he discovered that the Applicant was not paying the mortgage instalments as directed and from time to time the account was in arrears. The mortgage vouchers exhibit 'HM3' do not all bear the same amounts and the Applicant has offered no explanation as to why these figures differ. This therefore gives some credence to the Respondent's explanation as to why he discharged the mortgage prematurely.

He tells the court that both parties agreed to the type of house National Housing Trust had to offer and both agreed to make the master bedroom a little bigger, as a result of which he paid $5,000 extra. Both parties signed the loan agreement, and it was these funds which were used to construct the house. He denies that any joint funds were used to construct the house.

The Respondent's evidence is that the extension of the house commenced in 1991 and was completed in 1992, and this construction was financed by him alone.

He denies that the Applicant gave him $17,000 for the extension of the car porte in 1996.

His evidence is that he personally bought a great deal of the furniture in the matrimonial home, that the Applicant has always asked for

money which he has given her whenever she bought furniture or other articles for use in the home.

In cross-examination he said that if the money he gave the Applicant for furniture was enough he would not know, if she added money to it, he did not know – as he never questioned her on that aspect of it. He allowed her to handle that aspect of life.

The Respondent asserts that he provided all the house money. He gave the Applicant $20,000 per month. She bought the food, paid the bills and the mortgage from money he gave her. He would pay the helper separately. He states that if his wife had to spend some of her money, he does not know and he does not know how much she spends.

The Respondent's evidence is that as a result of the collapse of Century National Bank in July, 1996, he became nervous about having his money in a local bank and decided to move most of it to the Bank of Nova Scotia. Hence he opened savings account numbered 72199 at the Bank of Nova Scotia branch in May Pen in August, 1996. He withdrew $1,000,000 from his savings account at National Commercial Bank as well as encashed a Certificate of Deposit. He used these sums to purchase a manager's cheque from National Commercial Bank. In the sum of $2,007,397.25 and he deposed that this was the majority of the money with which he opened account numbered 721991.

In cross-examination when asked about the opening of the said account, he stated that he took one cheque for $2,007,397.25 and some cash to the bank.

It is unclear as to whether the account was opened in the sum of $2,040,142.84 or $2,020,142.84.

It is to be noted that the applicant's evidence is that she gave him $32,000 to lodge in the account on the day it was opened, she also says it was $32,000 odd.

There is no dispute that Bank of Nova Scotia account numbered 721991 was in the joint names of the parties. The reason proferred by the Respondent for putting the Applicant's name in the account was:

> "So that a close, trustworthy family member would have access to the account in the event that I was incapacitated or otherwise unable to access the account myself".

The Respondent resolutely maintains that the funds in the account were at the beginning and at all material times thereafter solely his. He said "my savings account was my personal account, my wife works and she saves by herself".

He denies that there was any understanding and agreement between himself and the Respondent that the money in the account would be used for their joint benefit when they became pensioners or at any time.

I have carefully considered the evidence presented and the submissions made by the Attorneys-at-Law for the parties. The parties

were cross-examined and I had the opportunity to assess their demeanour.

It is a settled principle of law that in the absence of evidence to the contrary, the conveyance of property in the joint names of husband and wife vests the legal estate in both parties and gives rise to the presumption of a creation of a joint beneficial interest in such property.

In Pettit vs. Petitt (1970) AC 777 at 818 Lord Upjohn described the test to be applied in determining where the beneficial interest in property lies as follows:

> "In the first place the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of the acquisition ....."
> If the property in question is land there must be some lease or conveyance which shows how it was acquired".

The following dicta in Edmondson vs. Edmondson SCCA 87/91at page 7 enunciated by Rowe J correctly states the law in respect to common intention. It reads:-

> ".....where there is no express agreement the Court needs to address itself to whether there is evidence of a common intention at the time of acquisition that the property is to be owned jointly ".

and in Forrest vs. Forrest SCCA 78/93 February 7,8 and April 7, 1995 at page 7, Rattray P. said:-

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

time of acquisition of the property."

I accept the applicant's evidence that she was selected as a recipient of a "build on own land loan" from the National Housing Trust. That the Respondent was brought in as a party to her application and that both parties jointly obtained a mortgage loan for the purpose of building their matrimonial home.

I accept the Respondents' evidence that his plan when he went to sign the documents at the National Housing Trust was to get a home to live in, and that the plan included his immediate family i.e. his wife and son.

I accept his evidence that both parties looked at the plan, agreed the type of house and both agreed that the master bedroom should be bigger.

I find that these are all factors indicating the common intention of the parties.

I find that this common intention is further evidenced by the fact that both parties contributed to the purchase price of the property and the title was registered in both names as joint tenants. The intention being at the time of acquisition that it should be a continuing provision for them during their joint lives.

There is no evidence before the Court that a party's name was placed on the title as a matter of convenience only and not in pursuance of a common intention that the property be jointly owned.

As stated by Lord Denning MR in Cobb vs Cobb (1955) 2 ALL ER 696 at page 698

> ".....when both husband and wife contribute to the cost and the property is intended to be a continuing provision during their joint lives, the Court leans towards the view that the property belongs to them both jointly in equal shares."

This is so even if contributions are unequal.

Although I find that the applicant did not contribute towards the mortgage payments - this does not affect the parties beneficial interest in the property where the common intention of the parties at the at the acquisition of the property establishes that it was intended to be a continuing provision for them during their joint lives.

In respect to the extension of the house, I accept the Respondent's evidence that the extension cost $1.8 million, and I find that the Applicant contributed $32,000 of this amount.

In regard to whether or not this affects the parties beneficial interests, I am guided by the decision in Muetzel vs Muetzel (1970) 1 ALL ER per Lord Edmund Davies at page 445 where he stated:

> " If one postulates that the matrimonial home has been acquired by joint efforts ....., the fact that one spouse spends money on extension of that house does not mean that the other can claim no part of the increased value of the property resulting from the extension. On the contrary, in the absence of a specific agreement, the extension should be regarded as accretions to the respective shares of each and not as affecting the distribution of the beneficial interests."

In the instant case there is no evidence of any agreement between the parties at the time of the extension and at a time when the marriage was

subsisting, as to whether or not the extension of the house affected their beneficial interests in the property.

Counsel for the Respondent cited Nicholdson (deceased) Nicholdson vs Perks (1974) 2 ALL E R 386 in support of his contention that the applicant is not beneficially entitled to an interest in the accretion to the value of the property.

I do not find this case applicable as I am of the opinion that it was decided in light of section 37 of the Matrimonial Proceedings Act 1970 UK and there is no comparable provision in our Married Women's Property Act.

I find that the Applicant purchased furniture and other articles for the home from her personal resources, (inspite of my finding that Exhibit "HM3" – "ITM 5" did not assist her in this regard).

I say this in light of the fact that the parties were married for 25 years and the Respondent's response when challenged that it was untrue that when the Applicant brought furniture and other articles she always asked him for money and he always provided it was, "if what I give her is enough I don't know. If she put money unto it, I don't know. I never question her to that aspect of it".

This clearly shows that he cannot refute her claim that she brought articles for the improvement of the home.

I also find that she brought new furniture including ceramic tiles for the home.

THE MONEY CLAIM:

The fact that Bank of Nova Scotia account numbered 721991 was in the joint names of the parties could give rise to the presumption of the establishment of a common pool in which they both acquire a joint interest in the whole fund in the absence of evidence to the contrary.

Where an intention can be ascertained on the available evidence, the Court will give effect to it.

I find the following passage from Bromley's Family Law 4th Edition at page 316 instructive. It reads:

> ".....where however the fund is derived from the income of one spouse alone, it is a question of fact whether this is to remain his or her exclusive property or whether there is an intention to establish a common fund. If the husband is the sole contributor to a joint account, the presumption of advancement will operate so as to give the wife a prima facie interest in it; on the other hand the presumption will be rebutted if, for example, it can be shown that the power to draw on the account was given for the husband's convenience by enabling the wife to draw cheques for the payment of housekeeping expenses."

I reject the Applicant's evidence that the parties jointly pooled their savings, at first inferentially in the National Commercial Bank account and then in the Bank of Nova Scotia account.

Specifically I do not find that the Applicant gave the Respondent the bulk of her money from her business to save. Apart from the

Applicant's oral evidence there is nothing to show that these accounts constituted a common pool.

The evidence revealed is that the Applicant never operated these accounts. I do not find that she did in fact make deposits in these accounts or supply the Respondent with funds to make such deposits.

I accept the Respondent's evidence which is uncontraverted that the Bank of Nova Scotia account was used to finance his business transactions from time to time and for the purpose of meeting his living expenses and the general expenses of his home.

I also find that the account was not operated as one intended for the purpose of establishing a pension fund. If infact the account was intended to be a pension fund I would have expected the Respondent to have put the money on fixed deposit to earn a higher rate of interest and not in a saving account where from time to time withdrawals and additions were made.

Having found that the Applicant made no contribution to the joint account and there was no common pool the Court must now consider whether the presumption of advancement which I find arises in the circumstances has been rebutted.

This presumption is to quote from the judgment of Campbell J A in Harris vs Harris (1982) 19 JLR 319 at page 327

> " .....is raised by implication of law as being consistent with an intention by a husband to satisfy an equitable obligation to support or make provision for a wife."

The Respondent's evidence is that Bank of Nova Scotia account numbered 721991 was funded and operated solely by him. He decided to add the Applicant's name to the account so that a "close trustworthy family` member could have access to it should he become incapacitated or otherwise unable to access the account".

I accept the Respondents evidence that there was no understanding and agreement between the parties that the account would be used for their joint benefit when they became pensioners.

The evidence of the Respondent is that in 1992 he ceased working as a public health inspector but continued to carry on his work as a building contractor which he had commenced in 1978. He stated that in 1996 he was working on the third form block at Clarendon College. He had a lot of work in 1996 and could have earned $500, 000 or more.

As a building contractor and operator of a bar he would no doubt require access to ready money at all times e.g. to pay workmen, meet debts as well as to support family.

I accept the Respondents evidence that in 1996 he removed most of his money to this Bank of Nova Scotia account. I also accept his evidence that in 1999 he withdrew 2.8 million dollars from his National Commercial Bank account and lodged it along with 100,000 dollars to the said Bank of Nova Scotia account.

There is no evidence before the Court that he financed his business transactions from any account other than the Bank of Nova Scotia account.

I find that the Respondent has given a reasonable explanation for adding the Applicants name to the account, in fact all he did was to make provision in case anything happened to him i.e. he became incapacitated or was unable to access it, that his obligations could be met.

On the evidence I find on a balance of probabilities that the Respondent has rebutted the presumption of advancement.

I am cognizant of the dicta of Lord Denning MR in Falconer vs Falconer (1970) 3 ALL ER 449 at page 452 which states:

> "……..If this case has come up for decision 20 years ago, there would undoubtedly have been a presumption of advancement; because at that time whenever a husband made financial contributions towards a house in his wife's name, there was a presumption that he was making a gift to her. That presumption found its place in the law in Victorian days when a wife was utterly subordinate to her husband. It has no place, or at any rate, very little place in our law today……."

It is declared:

that the Applicant is entitled to one-half (½) interest and the Respondent to one-half (½) interest in the property known as ALL THAT parcel of land part of "Weston Park" situate at May Pen in the parish of Clarendon, being the lot numbered THIRTY-NINE and registered at Volume 1114 Folio 729 of the Register Book of Titles.

It is ordered:

1) that the said property be sold and that the net proceeds of sale be divided equally between the Applicant and the Respondent.
2) That the Respondent be given first option to purchase the said premises failing which the said premises be sold on the open market by private treaty or public auction.
3) In the event that the parties fail to agree to a valuator, that the Registrar of the Supreme Court be empowered to appoint a valuator, and that the costs of the valuation report be borne equally between the parties
4) That in the event either or both parties fail and/or refuse to sign any documents of transfer pursuant to an Agreement for Sale of the said premises the Registrar of the Supreme Court be empowered to sign same on behalf of such persons.
5) That the Respondent is solely entitled to the beneficial interest in funds previously held jointly in account numbered 721991 at the Bank of Nova Scotia Jamaica Limited, May Pen in the parish of Clarendon, later transferred to account numbered 723358 at the said bank in the name of the Respondent and Dwaine Ming and presently in the Scotia Mint account numbered 020-000-0272-A

(6) Each party to bear his or her own costs.