IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E69 OF 1996

BETWEEN	ELIZABETH ANDERSON	APPLICANT
A N D	MAHON ANDERSON	RESPONDENT

Miss Dundeen Ferguson for the Applicant
Miss Judith Clarke for the Respondent

Heard on the 24th and 25th days of September 1997, and the 17th day of September 1998.

J U D G M E N T

COURTENAY ORR J

This is an amended Summons by the wife/applicant under the provisions of Section 16 of the Married Womens Property Act, and is concerned with premises known as Lot 354, East Chedwin, Greater Portmore in the parish of Saint Catherine (hereafter called the property) and a bank account operated by the husband/respondent in which moneys from the rental of the said premises were deposited from time to time.

The wife seeks the following relief:

"1. An order that the Applicant is the beneficial owner of premises known as Lot 354, East Chedwin, Greater Portmore in the parish of Saint Catherine, being the land registered at Volume 1263 Folio 66 of the Register Book of Titles.

2. A Declaration as to the respective interests of the parties.

3. In the event that the Respondent has an interest an order that the said premises ..... be valued by a valuator to be agreed upon between the parties hereto and failing agreement, by C.D. Alexander Realty Company Limited and that the Applicant be at liberty to purchase the Respondents' share and interest, if any, in the said premises at the market value therefor as determined by the said valuator.

4. An order that the costs of obtaining the said valuation and the costs of these proceedings be paid by the Respondent.....

5. An order that the Respondent accounts for all the monies collected or due as rent in respect of the premises known as Lot 354, East Chedwin, Greater Portmore, in the parish of Saint Catherine since January 1993, and for the use of the said sums or any part there of."

THE BACKGROUND

The parties were married on the 12th day of June 1993, in the United States. At that time the wife was resident in Canada to which she had emigrated in December 1991.

Prior to this they had begun an intimate relationship in 1989. And as a result the wife became pregnant. She went to Canada in early 1990 to be with relatives. A daughter, Zoe, was born in Canada in November 1990.

During her stay in Canada she applied for resident status, but she returned to Jamaica later in 1990 and resumed employment at Grace Kennedy and Company Limited.

She obtained a loan from her pension scheme and in March 1991 paid a deposit of $21,713.63 on the property. Both parties signed the mortgage agreement, and the duplicate certificate of title is in both their names, as joint tenants. At the time of the purchase of the property the parties were engaged to be married. The wife returned to Canada in early December 1991.

On 22nd December 1991, the husband received the keys to the property. He paid the closing costs of $10,000.00 which he borrowed from his mother. By December 1992 the wife had completed the repayment of the loan for the deposit. This was done out of pension funds due to her. The first mortgage payment was due on 3rd January 1993. When the agreement to purchase the property was made the parties were living at different addresses.

The funds from the rental of the property have been placed in a joint account in the names of the husband and his mother. The husband joined the wife in Canada in 1994, leaving his sister Carella Graham in charge of the property.

No where in his affidavit has the husband stated the sum of money remaining in the account.

In June 1995, the parties separated.

THE RELEVANT LAW

It is convenient at this stage to state certain legal principles which govern matters of this nature. One of the basic rulings of the Courts is that the relevant section is procedural in nature. The Court has no power to vary or create proprietary rights. Lord Diplock described the situation well in Pettitt v Pettitt [1970] AC 777 at 830 C-E. He said:

> "The first question therefore is whether Section 17 of the Married Women's Property Act 1882 does give to the Court any power to create or vary proprietary rights of husband or wife, in family assets as distinct from ascertaining and declaring their respective proprietary rights which already exist at the time of the Court's determination.
>
> I agree with your Lordships that the section confers no such power upon the Court. It is in my view a procedural section.... It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between husband and wife as to title to or possession of any property - not limited to family assets as I have defined them.... The power conferred upon the judge.... gives him a wide descretion as to the enforcement of the proprietary or possessory rights of one spouse in any property against the other, but confers upon him no jurisdiction to transfer any proprietary interest in property from one spouse to the other or to create new proprietary rights in either spouse"

In using the phrase "family assets" Lord Diplock was not seeking to create a special category of law governing property between husbands and wives. The common law knows of no communio bonorum - per Lord Reid in Pettitt v Pettitt (Supra) at p. 795C.

The task of the court is to ascertain and declare what the rights of each party in the property are and not what they ought to be; and once those rights have been ascertained the court cannot vary them merely because it thinks that in the light of subsequent events the original agreement between the parties is unfair - per Romer LJ in Cobb v Cobb [1955] 2 All ER 696 at 700.

Lord Upjohn explained the position in these words in Pettit v Pettit (Supra) at p. 813:

> "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.

> 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 the question of title as between the 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 on death or the break up of the marriage...."

> But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or, into the names of both spouses jointly in which case parol 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 may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then what are called presumptions come into play...."

> 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 convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, that is, with benefit of survivorship, but it is seldom that this will be determinative."

Carey J.A. in Josephs v Josephs RMCA 13/84 unreported, delivered October 30, 1985, spoke of an important presumption which may operate where spouses contribute jointly. He said at page 22:

> "In the absence of express agreement on the part of the spouses, the Court will presume or impute that having jointly contributed, they intended to share equally. That proportion will be altered only where either share can be precisely ascertained or the contribution is trifling".

Lord Denning in Cobb v Cobb [1955] 2 All ER 696 at p. 698, described the Courts in this way:

> ".... in the case of family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them 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 though the conveyance is taken in the name of one of them only and their contributions are unequal...."

In Pettitt v Pettitt (Supra) most of their Lordships deprecated the use of the phrase "family assets" but the principle of Lord Denning's dictum still holds good.

THE ISSUE OF THE BENEFICIAL OWNERSHIP OF THE PROPERTY

Although the title is in the joint names of the parties the document is silent concerning the beneficial interest. The wife contends that the intention was that she should be the sole beneficial owner and that her husband's name was placed on the title as a mere matter of convenience, and further that any contribution he may have made is negligible.

The husband's position is that shortly after they formed an intimate relationship, they "became engaged to be married and began to make plans to purchase a house jointly as our own family asset," hence they should take the beneficial interest in equal shares. He says also that he made a substantial contribution to the acquisition of the property by paying the closing cost of $10,000.00 which he borrowed from his mother and had to repay from his own resources, and by making improvements - adding a washtub, a step and grill work. Further he alleges that at first the premises were not rented for some months and when rented there was a shortfall of $32.00. He had to pay the mortgage during the months the property was vacant and made good the shortfall.

The wife explains the presence of the husband's name on the title as having been done so that he could manage the property in her absence and as a means of ensuring that their daughter would get the property "should anything happen" to her. In her affidavit in reply she gives both these reasons at paragraph 3. She puts the first reason in these words:

> "...for the reason that I was emigrating to join my family and there was no one else to manage the property for me in my absence."

But in a letter Ex MA1 written from Canada she speaks about their getting married in New York and then going on to Canada and adds:

> "So I think you should make plan (sic) who you going to leave the house with if it is your mother or brother."

In her affidavit in reply she asserts that this statement represents the time that arrangements were made regarding the management of the property. But it does show that there was someone else who could do so. I reject her explanations as to why the husband's name

was on the title as improbable.

She would have achieved her stated purposes by simply giving her husband a power of attorney and by putting the daughter's name on the title.

In an effort to show that any contribution by the husband was negligible she makes five assertions:

1. There was an agreement that the property should be rented and the rental used to pay the mortgage.

2. It was agreed that the husband should recoup the $10,000.00 he paid for closing costs, from the rental.

3. There were no substantial repairs or maintenance to the property.

4. All Mortgage payments since January 1993 were paid from the rental.

5. She transferred funds from Canada for the initial mortgage payment.

The husband does not deny that it was agreed that the rental should be used to pay the mortgage, but says that at first there was a prohibition against renting the property, and that it was not rented until November 1993. He also states that initially the rental was $800.00 monthly, that is, $32.00 less than the mortgage instalments.

I accept the husband's evidence that the property was not rented immediately, and that for sometime he paid the mortgage from his own funds, and that later he made good the shortfall when the property was rented. I therefore reject the wife's assertion that all mortgage payments since January 1993 were paid out of the rental.

But this situation could not have lasted beyond March 1995, for by then according to the husband's own affidavit the rental had been increased to $2,300.00 although the mortgage payment had moved to $1,500.00. This means that at worst there was no more shortfall by that date.

Further in the same affidavit dated 1st March 1997, he states that the monthly rental "is in fact $2,800.00." Apart from these two instances there are no details as to when and how many changes took place in the rental and the mortgage instalments. In particular there is no indication whether the rental jumped from

$800.00 in 1993 to $2,300.00 in 1995 or whether ther was an increase between these two dates.

As regards the wife's assertion that it was agreed that the husband should recoup the sum of $10,000.00 from the rental, it seems to me to have been highly improbable that there could have been such an agreement when at first the rental was insufficient to pay the mortgage, let alone stand this additional burden. I therefore find that the husband's story that he repaid his mother from his own funds is more probable.

On the matter of repairs and maintenance of the property, I accept that the husband paid for the installation of a washtub, grills and a step.

I therefore find that the husband made a significant contributior to the property, a contribution which cannot be stated precisely. I therefore find that the parties intended to share the beneficial interest equally.

Apropos the wife's statement that she sent money for the initial mortgage payment I accept this, but find that it is of no significant importance.

THE PRAYER THAT THE HUSBAND BE ORDERED TO ACCOUNT

This was not resisted by the husband's attorney, and I make the order as prayed. I feel constrained to comment on the husband's handling of the monies from the rental.

In paragraph 18 of her first affidavit (dated 6th February 1996) the wife says:

> "... since the rental of the said premises I have not obtained any sums of money personally from the collection of rent from the premises...."

The husband's response at paragraph 18 of his affidavit reads:

> "As to paragraph 18 of the applicant's affidavit I state that I myself have never derived any personal benefits from the rents collected from the said property..."

He does not deny the wife's allegation. I accept her as truthful at this point. In paragraph 12 of her first affidavit the wife states:

> "...he was always evasive about the rent collected on the premises"

He denies this, But the wife has sworn that in 1995 she discovered that the rent has been increased when she visited Jamaica and spoke to the tenant. I find that the husband has been less than frank with the wife in giving information about the state of the joint account in which the rental was lodged.

The Prayer for a Valuation

As regards the prayer for a valuation, I think that the wife's request is too one sided. I therefore order that the property be valued by a valuator to be agreed upon between the parties, and failing agreement that a valuator be appointed by the Court; that each party be at liberty to purchase the share and interest of the other in the property at the market value as determined by the valuator the costs of the valuation shall be borne by both parties equally, and if one party fails to pay his portion, the other may do so and recover it from that party as a judgement of the Court.

The Question of Costs

Miss Clarke for the husband had asked that no order for costs be made against the husband for he had been willing to agree that the wife take a half of the value of the house. However, her submission overlooks the prayer for an account. I have already pointed out that I find that the husband has not been frank and therefore behaved unfairly. In those circumstances it is fit and proper that he should bear the costs of these proceedings.

The Order of the Court is as follows:

(1) There is a declaration that the respective interest of the parties in the property known as Lot 354 East Chedwin, Greater Portmore, Saint Catherine, being the land registered at Volume 1263 Folio 66 of the Register Book of Titles is 50% each.

(2) That the said premises be valued by a valuator to be agreed upon between the parties hereto, and failing agreement that a valuator be appointed by the Court; that each party be at liberty to purchase the share and interest of the other in the said property

at the market value as determined by the valuator. The costs of the valuation shall be borne by both parties equally, and if either party fails to pay his portion the other may do so and recover it from that party as a judgment of the Court.

(3) That the respondent/husband account for all the monies collected or due for rental in respect of the premises known as Lot 354, East Chedwin, Greater Portmore, in the parish of Saint catherine since January 1993, and for the use of the said sums or any part thereof.

(4) Costs to the wife/applicant to be taxed if not agreed.

(5) Liberty to apply.