Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 12 of 1994

IN CHAMBERS

BETWEEN	**YVONNE McFARLANE**	**APPLICANT**
A N D	**EUVIN McFARLANE**	**RESPONDENT**

Miss Sandra Johnson for applicant

Gordon Steer and Miss S. Chambers for respondent.

Heard: **4th December, 11th, 12th and 18th December, 1995, 20th, 26th November, 1996, 25th February, 17th and 18th July, 1997. 6th November, 1997.**

HARRISON P, J.

JUDGMENT

By an amended originating summons, under section 16 of the Married Women's Property Act the wife/applicant claims an interest in the undermentioned properties and seeks the declarations of the court as to her entitlement, as stated.

1. Premises at 31A Fort George Crescent Stony Hill, St. Andrew - 50%
2. Premises at 20 Melody Drive, Kingston - 50%
3. Land at Princessfield, St. Catherine - 50%
4. Land at Cedar Grove, Manchester - 50%
5. Assets in accounts, as to 50% in each at
   (a) Victoria Mutual Building Society
   (b) Eagle Permanent Building Society
   (c) Citizen's Bank
   (d) Eagle Commercial Bank
   (e) Mutual Security Bank
6. Furniture purchased for the matrimonial home.
7. Isuzu Trooper motor vehicle - 50%

The parties were married on the 19th day of April 1986. They had met in 1979 and commenced living together in 1983 in the respondent's apartment at Constant Spring Mews, which he had bought in 1980.

The applicant in her earlier affidavit said that they started living together in 1980 and later she said that it was in 1982. I prefer the evidence of the respondent in this regard, that it was in 1983.

In 1982 the applicant was employed as a dental nurse at Duke Street, Kingston. In 1991 she earned approximately $904 per month.

The applicant said, in cross-examination,

> "In 1982..... salary roughly $1,000 per month gross take home about $900.00. In 1990 my salary was about $4,000 (per month). In 1983 (it was) about ($2,000) per month. Most of the $2,000 to buy food, helper, telephone help with maintenance and I would give towards savings - it varies. I not remember. He would give me money and I would give him - we working on a mutual understanding."

The applicant probably also worked on Saturday up to 1985 at the dental school earning $150.00 for the day's work.

The household expenses in 1984 - 1985 was approximately $1,500 per month.

Although the applicant said also, in cross-examination,

> "When I paid household expenses I gave money to respondent to save it - it varied, not recall how much ....."

in answer to the suggestion, that she did not give the respondent any money to save, she also said,

> "After spending my income on household, after paying mortgage whatever left he saved. I had an account for myself. I save in it. It was for both of us.
>
> His income could pay all the bills with my help - that is why he could save so much."

It is unlikely that the applicant gave or had any money based on her earnings to give or did in fact give to the respondent any money to save. I did not find her evidence in this respect worthy of belief. The applicant stated that she "did an antique furniture business" from she was 16 years old.

> "Sometimes I made a $40,000 over the year".

She did not remember how much she made from the antique business in 1982, 1983 or 1984, did mostly buying for the household in 1989, 1990 and 1991, did not remember if she made a profit in 1987 or 1988 because as she was "working with the government" and admitted,

> ".... A great part of the business was done by barter system exchanging items- near value."

The applicant probably had no profitable trade in the antique business; having stated that she called "antique" old furniture "18th century early 19th century", was unaware that the year "1832" was in the 19th century.

The respondent paid the electricity and the mortgage on the premises on which the parties lived- the applicant admitted this in cross-examination; she probably at times assisted in paying for food.

The respondent was employed to Jamaica Public Service from 1979 as an electrical engineer, and in 1988 when he left- he was assistant superintendent in charge of transmission line islandwide. His salary in 1985 was $80,000 per annum net income increasing to $120,000 in 1988. In addition, he had earnings from private contracts that he performed while employed at the Jamaica Public Service.

The premises of 31A Fort George Drive was bought by the respondent; the deposit was paid on 18th November, 1986 by the respondent and the title was issued in his name only when the transfer was registered on 22nd December, 1986. This was the matrimonial home.

The applicant stated, in her affidavit filed 11th January 1994,

> "...in December 1986.....31A Fort George Crescent ..... was erroneously transferred into the Respondent's name alone and .... when the mistake was discovered the Respondent transferred the premises into both our names holding as joint tenants."

The title to the said property was transferred "by way of gift", into the name of "Euvin Matthew McFarlane" and "Yvonne Margaret McFarlane his wife; the transfer was registered on 24th June, 1987.

There is no evidence to support the applicant's contention that the property was bought from joint funds into which both had pooled their resources, or that it was transferred into the respondent's sole name, by mistake.

At the time of purchase of the said property, the respondent paid to the vendor Mrs. Sheila Finlayson a further sum of $140,000 for "appliances, equipment and other household articles." The respondent received money from his mother Miss Joyce Richards, who then lived and worked in the United States of America as an office cleaner. She also sent out to Jamaica items for sale, which assisted him in the purchase.

The property at Cedar Grove, Manchester was bought on 7th November, 1986 not from "joint resources" of the applicant and respondent but from money of the respondent's mother, the said Joyce Richards. She was called by the applicant as a witness and she confirmed the purchase. She placed respondent's name on the title, see receipt for deposit $30,000 and dated 7th November, 1986 exhibited to affidavit of Euvin McFarlane dated 18th October 1995.

The property at Princessfield, St. Catherine was bought by the respondent in 1984 with funds provided by himself and his mother. No interest arises therein in favour of the applicant; the property was not bought, as the applicant contends,

"... with help of our resources..."

The premises at 20 Melody Drive, Kingston was bought by the respondent in December 1988 with his sole funds. A subsequent transfer into the names of "Euvin and Yvonne McFarlane" was registered on 16th December 1988. There is no evidence in the affidavits relied on by the applicant to show that the purchase was from a "joint fund" or from "pooled resources". At these premises the applicant opened and operated

a garage but later closed it as a failed venture in August 1992. He also operated there an entertainment centre. There he held among other forms of entertainment, dances on Sundays and Fridays. The applicant provided food for sale to patrons on the dance occasions; it is unlikely that with her regular employment , the applicant had any opportunity to operate as she claims, a restaurant business on these premises. The respondent rented out some of the shops on the premises. It was a quite simplistic reply the applicant gave when asked in cross examination, what is the business in which she claimed she was involved with the respondent? She said "the business of saving!"

There were several accounts in which the applicant claims a half interest.

(1) Citizens Bank -

(a) Two deposit accounts in the names of Joyce Richards and Euvin McFarlane closed on 11th May, 1991 and 5th June 1991, respectively

(b) Deposit account in the names of Euvin and Joyce McFarlane - closed on 5th June, 1991

(2) Eagle Permanent Building Society

(a) Savings account in the names of Euvin and Joyce McFarlane - opened November 1990 - Joyce McFarlane's name was removed by instructions by Euvin McFarlane.

(b) Two certificates of deposit in the names of Euvin and Joyce McFarlane, opened in October and November, 1990 respectively, encashed and re-deposited in the name of Euvin McFarlane only and encashed finally on 23rd August, 1991.

(3) Eagle Commercial Bank

(a) Foreign currency savings account in in the names of Euvin McFarlane and Joyce Richards - opened on 13th October, 1993.

(b) a safety deposit box.

(4) Mutual Security Bank

A deposit account - the respondent placed the name of the applicant on this account and subsequently removed it.

(5) Victoria Mutual Building Society

A savings account in the names of Euvin and Joyce McFarlane - the applicant had added the name of the respondent to this account.

The respondent said, of these accounts,

(a) "I opened the accounts mentioned and caused her name (applicant's) to be placed on them. I alone funded these accounts and as far as I can remember my wife has never withdrawn any funds from these accounts. I only put her name on the accounts in case of emergency.

(b) I had an account at Royal Bank now.. Mutual Security Bank from I was about 18 years old. The safety deposit boxes are empty of any valuables. I have the keys to the ....boxes. My wife has never been in any of them as they are mine..... I kept my papers and my jewellery in the safety deposit boxes .... my wife has never contributed to the acquisition of any of the assets that I have acquired over the years.

I used my accounts from time to time to lodge money given to me by my clients when I was doing electrical engineering work and as such funds were lodged and withdrawn from time to time." - affidavit of Euvin McFarlane dated 19th July, 1994

(c) .....I added to her name to my accounts and safety deposit boxes but categorically state that she has never put any money or anything in these accounts or in the boxes."

The applicant stated,

(a) "... the key to the vaults (safety deposit boxes) .... are held by the Respondent and I have no access to them." - affidavit of Joyce McFarlane filed 11th January, 1994.

(b) ..After we got married in 1986 we established joint accounts, and generally pooled our resources ... we established joint accounts at the Mutual Security Bank ... the Victoria Mutual Building Society.... the Eagle Commercial Bank.. ... the Eagle Building Society ... and the Citizens Bank ... there were two

safety deposit boxes in our joint names at Eagle Commercial and Mutual Security ... and foreign exchange accounts at Eagle Commercial Bank and Citizens Bank"

(c) ".... I say that the respondent did handle the transactions with regard to the said accounts but some of the amounts deposited did originate from me....."; affidavit of Yvonne McFarlane file 16th June, 1995.

However, in answer to counsel for the respondent the applicant said in cross examination,

a) "I have not lodged any money in the accounts. I gave him money and he said he put it - I always with him - I always went with him - he always saying - he does transaction - putting in and drawing out.....

I have never lodged money in the accounts. Never did transaction myself."

b) "When I paid household expenses I gave money to respondent to save - it varied, not recall how much. He told me I to look about the household and he would pay the mortgage and light bill and he would save the rest for us."

In answer to a further suggestion that she did not give the respondent any money to save, the applicant said,

"After spending my income on household, after paying mortgage whatever left he saved! I had an account for myself. I save in it. It was for both of us.

I doing my part helping him - he saved. I not remember if I gave him $1,000 or $2,000 or $3,000 per month to save."

On the evidence, I am satisfied that the applicant never deposited nor contributed any moneys to the accounts, joint or otherwise in the names of the parties. On her own admission she did not. On her earnings she did not and could not pay for the household expenses and so relieve the respondent to pay other expenses, such as the mortgage or to save. The funds in the accounts and the safety deposit boxes were provided solely by the respondent and in some instances by his mother Joyce Richards.

The applicant probably did occasionally contribute somewhat to the household expenses, but it was primarily provided for by the respondent. The applicant's contribution was minimal and merely incidental to both parties living together, in a matrimonial unit.

An application under section 16 of the Married Women's Property Act empowers a court to make a simple declaration of the existing rights of the parties; there is no power to vary those existing rights.

Where one spouse buys property it remains his. There is no specific law governing property between spouses and a different law for others. A determination as to the rights of such spouses must be determined by the general legal principles; community of property is unknown to English law- **Pettitt vs. Pettitt [1970] A.C. 777.**

In the case where a wife wishes to establish a right to property that is in the name of her husband only - she has to resort to the law of trusts. She may do so by proof that she contributed directly to the initial acquisition of the property, or that she didnot indirectly and there was a common intention that she should share in the beneficial ownership of the property **Gissing vs. Gissing [1970] 2 All E.R. 780 (H.L.).** The law of trust will regard the husband in whose name the property is, to be holding it in trust for the contributing wife, as to a share. The respective shares of the parties in the beneficial interest would still have to be determined.

However where a husband provides the money and purchases property in the name of his wife or transfers it into the name of his wife or into their joint names, he is deemed to have made a gift to her. There is no need to resort to the concept of the presumption of advancement, a concept now regarded as less applicable to modern times, in order to deem it a gift - to the wife. The fact that the property is transferred

into the joint names of the husband and wife means that they own jointly as to the legal estate, but that does not necessary determine the proportion in which they hold as to the beneficial interest; one has to look at the evidence to ascertain the intention of the parties, as to the proportionate ownership of the beneficial interest.

Of the beneficial interest, in circumstances of a transfer of property, Lord Upjohn in Pettitt vs Pettitt, supra, said at page 813,

> **".... the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its 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 question of title as between the spouses for all time.....**
>
> **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 one called presumptions come into play. They have been criticised as being out of touch with the realities of today but when properly understood and properly applied to the circumstances of today I remain of opinion that they remain as useful as ever in solving questions of title. ..... in the absence of all other evidence if property is conveyed into the name of one spouse at law it will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest in the spouses jointly, i.e. with benefit of survivorship, but it is seldom that this will be determinative."**

The resulting trust that arises when one purchases property and conveys it into the name of another or into joint names and that other does not contribute to its purchase, may be rebutted by evidence to the contrary. Where the

evidence exists that that other to whom the property was conveyed, is a wife or a child, the presumption of the resulting trust is regarded as rebutted, and a gift is presumed. See the dicta of Lord Upjohn in Pettitt vs Pettitt, supra,(at page 814), in respect of the resulting trust which arises in favour of the person who advances the purchase money for property where the nominee is the wife or a child, at page 814,

> **"The remarks of Eyre C.B. (in Dyer v Dyer (1788) 2 Cox Ex. Cas 92) in relation to a child being a nominee are equally applicable to the case where a wife is the nominee. Though normally referred to as a presumption of advancement, it is no more than a circumstance of evidence which may rebut the presumption of resulting trust,"**
>
> **and at page, 815,**
>
> **"...in the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her, but if he puts it into joint names, then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy."**

However, as a general rule, a conveyance of a house into joint names does not necessarily mean equal shares - **Bernard vs. Josephs [1982] 3 All ER 162 per Lord Denning at page 168.**

This principe applies also to money in a joint account in the joint names of husband and wife. If the husband is the sole contributor to the joint account the money belongs to him, but the wife has a joint beneficial interest and may draw money from the said account. Whatever money each party draws for personal use belongs to him. However, the beneficial interest that arises in favour of the wife, is rebutted if the evidence shows that the wife's name was placed on the account for a limited purpose.

If both husband and wife contribute to the joint account, each has the right for his personal use to withdraw money from the said account which is regarded as jointly owned by them. If, the intention of the parties was to "pool their resources" for investment or for their savings, and money is withdrawn and invested or used for the purchase of property

such investment or property resulting would generally be regarded as joint investment or joint property.

In **National Provincial Bank Ltd. v Bishop et al [1965] 1 All ER 249, Stamp J** held that where money is placed in a joint account in the names of husband and wife, each may withdraw therefrom for his own benefit or for the benefit of both and any investment made with money so drawn from the account belongs to the person in whose name it is placed. This does not apply where the account is intended or kept for a specific purpose.

However in **Jones v Maynard [1951] 1 All ER 802**, the incomes of both husband and wife were paid into the husband's account, by their agreement; they both drew from the said account for their personal use and for investments as "our savings." It was held that their intention was to create a pool of their resources in the joint account. Therefore the wife was entitled to one half of the investments and one half of the balance in the account.

Lord Denning in **Heseltine vs. Heseltine [1971] 1 All ER 952,** said, at page 956,

> **"... there are .... cases where one party provides all the money in the joint account and it is only opened and used as a matter of convenience of administration. In such cases, if the marriage breaks down, the monies belong to the one who provided them. So do any investments made with that money.**

It was held that the money in the joint account was the wife's. It had been used to purchase houses, which were therefore to be held by the husband in trust for the wife.

In **Azan v. Azan SCCA No. 53/87 dated 22nd July 1988,** the Court of Appeal, relying on Re: **Bishop, supra, and Heseltine vs. Heseltine supra;** found that the shares purchased in the name of the husband/applicant, with money drawn from a joint account containing funds provided by the husband/applicant solely, and from which the wife respondent drew by permission, belonged to the husband solely.

In the instant case, the applicant lodged no money, on her own admission, to any of the said accounts. She said in evidence "He (husband) said he was saving for both of us." This was however denied. She had no access to and so had no right. or permission to withdraw funds from the accounts. When the respondent placed the applicant's name on his accounts, he did so as a mere convenience, and for a limited purpose and not with any intention to allow her any access to the said funds, which were provided solely by him. Removing her name was the manifestation of his conduct that he never intended that the applicant have any interest in the said accounts. The applicant is not entitled to any interest in the said accounts nor in the contents of the safety deposit boxes, see **Azan vs. Azan,** supra.

The respondent bought premises at Constant Spring Mews in 1980; no interest arises therein in favour of the applicant, who quite misleadingly, sought to establish a claim to its proceeds of sale. She said in her affidavit filed on 16th June, 1995,

> "I do not know what the respondent did with the proceeds of sale of **our** apartment." (Emphasis added.)

The applicant's name was placed on the title of premises at Fort George Crescent and Melody Drive, by the respondent "by way of gift". She thereby became entitled as a joint tenant of the legal estate and a joint tenant, as to the beneficial interest. However, the transfer is silent as to the extent of her beneficial interest in the said properties. One therefore has to look at the conduct of the parties as borne out by the evidence to see if there is any inference that can be drawn to determine the extent of the share of the applicant. The respondent's claim that he was coerced and in order to avoid further "nagging" by the applicant, he placed her name on the respective titles, is insufficient, in law, to amount to duress or unlawful pressure to the degree to vitiate the transfer. He chose to transfer the said properties into the names of the applicant and himself, voluntarily, to

appease his importuning wife - see **Barton vs. Armstrong et al [1976] A.C. 104.** It was a valid voluntary gift.

There was no contribution by the applicant towards the purchases, nor were the said two premises purchased from a common fund or from "pooled resources." The latter term was used by the applicant in her affidavits and oral evidence with an uncommon regularity. It was unjustified on the evidence tendered.

Where there is an agreement or from the evidence the intention of the parties as to the respective shares is manifest, the court will pay due regard to it. The court has a duty, in the absence of a clear intention, to ascertain if any inference can be drawn from the evidence, of such intention. Difficulty in evaluation the share, does not inevitably oblige a court to resort to the maxim "equality is equity", and declare the entitlement to be equal - **Gissing vs. Gissing, supra.**

Conveyance into joint names does not necessarily mean equal shares in the beneficial interest - **Bernard vs. Josephs [1982] 3 All ER 162.**

As to the approach of the court in determining the share in the beneficial interest of a contributing spouse, whose name was not on the title of the matrimonial home, Lord Diplock, in **Gissing vs. Gissing, supra, at page 792,** said;

> **"... if the court is satisfied that it was the common intention of both spouses that the contributing wife should have a share in the beneficial interest ... the court in the exercise of its equitable interest would not permit the husband in whom the legal estate was vested.... to take the whole beneficial interest merely because ... there had been no express agreement as to how her share in it was to be quantified... the court must first do its best to discover from the conduct of the spouses, whether any inference can reasonably be drawn ... about the amount of the share of the contributing spouse.... even though that understanding was never expressly stated by one spouse to the other or even conciously formulated in words by either of them independently. It is only if no such inference can be drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim "equality is equity" and to hold that the beneficial interest belongs to the spouses in equal shares".**

In the instant case, although the applicant's name is on the title there was no express agreement between the parties nor any document declaring the applicant's share in the beneficial interest in the properties. The applicant was not a contributing spouse to, either the acquisition of the properties, or the accounts or the mortgage payments. However her name was on the title as a joint tenant. The conduct of the respondent towards the applicant in respect of the said accounts was that, despite her name being jointly included, she should have no access, nor interest in them. By placing the applicant's name on the titles to 31A Fort George Crescent and 20 Melody Drive, the respondent cannot maintain that she had no interest in them. But inferentially, as with the accounts, she has an interest in each, albeit, no clear indication of the quantum of her share. Although joint names in the legal estate does not necesarrily mean equal shares in the beneficial interest, the instant case is based on an outright gift by the respondent to the applicant. There is no element of contribution to provide evidence of the qualification of the respective share. Nor is there any reservation or limiting factor pertaining to the said gift. In the circumstances of this case the reasonable inference is that the respondent intended that the applicant have an equal share in the beneficial interest.

There is some evidence that the household expenses in 1984 to 1985 was $1,000 - $1,500. The applicant stated in cross examination, of this expenditure,

> "In 1984 - 1985 I not know that the expenses for household not cost more than $1,000 - $1,500 - that I now know as I not know what I spent."

The applicant stated earlier, that,

> "Expenses he and I used to pay in 1984 on food - I cannot remember - about $400.00."

Her contribution therefore to food, even assuming it was one half of $400, would be decidely less than one

of the overall household expenses. I hold that a fair and reasonable share in each of the said properties to the applicant is one-half; the beneficial interest of the applicant is declared to be a one-half interest. The applicant admitted that the respondent gave her money from time to time for household expenses. She did not by any means relieve the respondent of such expenses. She cannot be seen as facilitating his payment of the mortgage expenses.

The respondent alone paid the mortgage on the properties.

In respect of 20 Melody Drive, the respondent paid off a mortgage of $414,873.07 on 7th July, 1993.

In September of 1988, the premises at 31A Fort George Drive was damaged by hurricane Gilbert. The respondent obtained a loan of $620,000 from his sister for repairs, see document dated 2nd January, 1989. In addition, the respondent paid off on 31st December, 1993 a sum of $806,198.36, being the mortgage outstanding on the said property.

The applicant made no payment towards the reduction of the mortgage debts.

In order to achieve an equitable sharing of the said properties, the applicant's share in each property must be reduced by one-half of all mortgage moneys including interest and charges paid by the respondent, in respect of the respective property. In respect of the property at Fort George Crescent, her share must be further reduced by one-half of $620,000 being the amount of the loan to be repaid, to the respondent's sister.

Accordingly, it is hereby declared that,

(1) the applicant and the respondent is each entitled, 50% in each of the properties, 31A Fort George Drive and 20 Melody Drive- subject to the equitable accounting as to deductions from the applicant's share, that is deductions of 50% of all mortgage payments and on the Fort George property 50% of the said loan from the respondent's sister.

(2) the applicant is not entitled to any interest in the several bank and building society accounts, as claimed.

(3) the motor vehicle, the Isuzu Trooper, is the property of the respondent.

(4) the furniture purchased from Mrs. Finlayson, by the respondent must be shared in the said proportion of fifty percent (50%) each to the applicant and the respondent. Any other item of furniture is the property of the party who acquired it, particularly the "antique" items.

There shall be half costs to the applicant to be agreed or taxed.