IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2007 HCV 3493

BETWEEN	CARROLL NELSON	CLAIMANT
AND	LEONARDO BROWN	DEFENDANT

Angela Cousins-Robinson for the claimant
Linda Wright for the defendant

January 7, 15, 20, 22, July 20, 27 and August 14, 2009

BENEFICIAL INTEREST IN PROPERTY - SECTIONS 2, 6, 11, 13 OF PROPERTY (RIGHTS OF SPOUSES) ACT - APPLICABILITY OF EQUITABLE PRINCIPLES

SYKES J.

1. This is an application under section 13 of the Property (Rights of Spouses) Act ("the Act") by Miss Carroll Nelson. She is claiming a 50% interest in property bearing the civic address of Lot 115B Guango Street, Hellshire in the parish of St. Catherine and registered at volume 1150 folio 843 of the Register Book of Titles ("the disputed property"). I delivered oral reasons for judgment on July 27, 2009. These are my written reasons.

2. The claim was precipitated by a breakdown in the relationship between the parties and the subsequent attempts by Mr. Brown to secure an order of possession against Miss Nelson in the Resident Magistrate's Court for the parish of St. Catherine. Miss Nelson struck back with telling effect. She claimed that she had a beneficial interest in the property even though she is not named as a legal title holder. The proceedings in St. Catherine have been adjourned pending the outcome of this matter.

3. As is common in these kinds of cases, the only witnesses are the parties themselves. The court is usually called upon to resolve these matters years after the particular conduct has occurred. There is not usually contemporaneous documentary evidence setting out what the

parties agreed because at the time various statements, promises and assurances were made or given, the minds of the parties are not usually directed at the division of property in the event that the relationship ends. In these circumstances, the court has to be ever mindful that there is a strong tendency for each litigant to view their conduct in the best possible light, and the words and conduct of the other in a malignant manner. With this cautionary note in mind I go to the factual matrix of this particular case.

The meeting and the union

4. Miss Nelson has been and always was a single woman when she met Mr. Brown in 1993. At the time they met Mr. Brown was a married man. The couple started living together in 1995. When this living together began, Mr. Brown was still legally married. He only became a single man, for the purposes of the Act, on September 9, 1998 when the decree absolute was granted by the Supreme Court.

5. The legal significance of what has been stated is this: until September 9, 1998, Mr. Brown was not a single man within the meaning of the Act and so any claim based on the Act cannot include the period between 1995 and September 9, 1998. The reason is that "spouse" in the Act is defined in the following manner

> *Spouse includes -*
>
> *(a) a single woman who has cohabited with a single man if she were in law his wife for a period of not less than five years;*
>
> *(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,*
>
> *immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.*

6. Before referring to the other definitions, I pause to comment on this definition. Spouse in this definition has two aspects to it. It clearly includes persons lawfully married under the Matrimonial Causes Act as well as persons who though not lawfully married are cohabiting as if they were in law (law here could only be referring to a marriage within the meaning of the Matrimonial Causes Act) husband and wife.

7. Section 2 (2) adds these words:

> *The terms "single woman" and "single man" used with reference to the definition of "spouse" include widow or widower, as the case may be, or a divorcee*

8. I should also refer to the definition of cohabit which is defined in section 2 (1) of the Act to mean:

> *to live together in a conjugal relationship outside of marriage and "cohabitation" shall be construed accordingly.*

9. The effect of these definitions is that "single" means single in law, and not a person who is lawfully married but living with another person, as if they were lawfully married. Thus a married person cannot be a single person within the meaning of this Act regardless of how long he or she is cohabiting with someone other than his or her lawfully married spouse.

10. The consequence of this is that any claim to a beneficial interest while one of the parties to the union is still lawfully married to a person other than the claimant or defendant to the claim, can only arise under general property law, trust and equity.

11. In effect, if Miss Nelson wishes to rely on the period 1995 to September 9, 1998, to ground her claim to a proprietary interest in the property, she can only do so using general principles of law and equity. By parity of reasoning any claim based on the Act would have

to begin on September 9, 1998, since it is from that date that Mr. Brown became a single man within the meaning of the Act.

12. I wish to emphasise that the Act stresses the length of time of the relationship where the court is dealing with spouses who are spouses because they have cohabited and not because they are lawfully married.

13. The Act does not emphasise the length of time the parties lived at the disputed property. Once the parties meet the spousal test based on cohabitation, the only remaining question is whether the disputed property is the family if the dispute is over the family home.

14. In the case before me, there is no doubt in my mind that the home in question was the family home. While it is true that Miss Nelson and Mr. Brown lived in the house as tenants from December 2001 to August 31, 2004 before it was bought in Mr. Brown's name alone, it is clear that the house was intended to be and was the family home.

15. From August 31, 2004, the disputed property was the family home since it falls squarely within the definition of section 2 (1). That definition is

> *"family home" means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor, who intended that spouse alone to benefit.*

16. The date of August 31, 2004, is used as the date when the property became the family home because the definition requires the family home to be "wholly owned by either or both spouses." Until the

transfer was registered on August 31, 2004, the house was not wholly owned by either Miss Nelson or Mr. Brown.

17. From August 31, 2004 until cohabitation ceased, 115B Guango Street was the habitual place of residence of Miss Nelson, Mr. Brown and the family home. This leaves the critical question of whether the parties lived together for the five years preceding the claim or they lived together for five years preceding termination of cohabitation.

18. There is one further point to make. The statute does not require the parties to live at the family home for a minimum of five years. What the statute requires is (a) the parties have lived together for a minimum of five years before the cohabitation ceased or five years before the presentation of the claim; and (b) that the home be the family home.

The acquisition of the property

19. It is agreed that Mr. Brown acquired the property in his own name. It is also agreed that he made the down payment, borrowed money from the City of Kingston Credit Union to assist with the down payment and was the sole mortgagor in a loan from the National Housing Trust Corporation.

20. This, however, is not the end of the story. As I understand the case for Mr. Brown, he is resisting Miss Nelson's claim on the basis that she did not contribute money, directly or indirectly, to the acquisition of the property. He has asserted that during the time the relationship was on foot, Miss Nelson was not employed until he left the property in November 2005. His case is that he not only paid for the house but supported Miss Nelson financially. He alleges that he funded her evening classes at Dunoon Technical High School. He swore that he supported the children she had from a previous union. He stated that he undertook all the bills and expenses in relation to the disputed property.

21. Mr. Brown is also taking his stand on the premise that the Act does not apply to him because the relationship between himself and Miss Nelson ended before the Act became law. This being so, the argument

went, the only applicable law is the general law of property, trust and equity which, he submitted through his counsel, cannot assist Miss Nelson because she did not contribute directly or indirectly to the acquisition of the property.

Does the Act apply?

22. The first important issue is whether the Act applies. Miss Nelson asserts that the relationship ended in September 2006. The Act came in to force on April 1, 2006. If Miss Nelson's evidence on this point is accepted then this claim was filed on August 30, 2007, within the one year period of the ending of the relationship during which the claim can be brought (see section 13 (2)). In this particular case, because the dispute is between spouses by cohabitation and not by marriage, the date of cessation of cohabitation is vital.

23. If Miss Nelson is the spouse-by-cohabitation of Mr. Brown, then under section 13 (1) (a), a spouse is entitled to apply to the Supreme Court for a division of property on the termination of cohabitation. The Act establishes a default rule of 50:50. By section 6 (1) (a) on termination of cohabitation, each spouse is entitled to 50% of the family home, unless the court is of the view that the presumptive 50:50 rule ought not to apply.

24. It is agreed that when the cohabitation began in 1995, Mr. Brown was still married to Mrs. Brown. This union with Mrs. Brown was dissolved on September 9, 1998. It was from this time that singleness of Mr. Brown is to be measured for the purposes of determining whether this claim falls under the Act. Therefore, time begins from September 9, 1998. As pointed out earlier, if the parties have lived together for five years prior to the cessation of cohabitation and they were single persons then they are spouses for the purposes of the Act.

25. In 1995, the couple began living at 2 North Greater Portmore. Miss Nelson said that plans were made to purchase a house and to have another child after her first pregnancy of the union ended prematurely. This is denied by Mr. Brown.

26. The couple then moved to the disputed property in December 2001 because the landlord of 2 North decided to raise the rent. Miss Nelson said that the disputed property came to her attention through her friend. One Miss Yasmine Maurice was migrating and the house was for rent. Miss Brown says that she negotiated with Miss Maurice to secure the house for rent and thereafter she and Mr. Brown moved in. Miss Nelson also said that she told Miss Maurice that should she decide to sell the property then she (Nelson) and Mr. Brown would wish to purchase the property.

27. Mr. Brown, on the other hand, while accepting Miss Nelson told him about the property, states that he and Miss Nelson went to see the disputed property and Miss Maurice decided to rent the property to him alone and thereafter, the couple moved into the premises. He claims that he was solely responsible for the rent.

28. It turned out that the property was in need of repairs. Mr. Brown's testimony is that he would go and pay the rent to Ms Walker, a sister of the landlord. On one such trip to pay the rent, in October 2003, Ms Walker told him that major repairs to the house needed to be done. Mr. Brown says that he realised that he would have to leave the house if the repairs were to be done. Based on this recognition, according to him, he asked if the owner was prepared to sell the house. In November 2003, he alleges that he was told that he could purchase the property. Thereafter, he states, it was he and he alone who set about purchasing the property. He says that he had the property valued, made the various applications to financial institutions for loans and such like.

29. Miss Nelson, on the other hand, states that she received a call from the landlady advising that the property was for sale at JA$1.6m but she (Nelson) could have first preference at JA$1.5m. She says that she discussed the matter with Mr. Brown and they agreed to purchase the house. It was agreed, she said, that the house would belong to both in equal shares. She also testified that because she was not a contributor to the National Housing Trust, it was agreed that Mr. Brown would purchase the house in his name alone. She says, further, that her contribution was to provide food, lunch money for, her two

children from the previous relationship, and for Mr. Brown's sister who was living with them. Miss Nelson stated that she would purchase furniture and share the household bills with Mr. Brown. This, she said, enabled Mr. Brown to pay the monthly mortgage. The property was transferred in to Mr. Brown's name alone on August 31, 2004.

30. On either version, what this evidence shows so far is that the parties were cohabiting in a relatively harmonious relationship up to August 2004. This means that Miss Nelson and Mr. Brown appear to have been living together, since September 9, 1998, for the minimum period of five years as required by the Act.

31. I need to indicate that Mr. Brown's case is that cohabitation ceased in 2003. The resolution of the date of cessation of cohabitation is bound up with the issue of credibility generally. I now turn to the credibility issue.

32. In the same year, 2004, Miss Nelson says that the relationship experienced some difficulties because the father of her two children from the prior relationship began taking steps to have them join him in the United States of America. This, she said, aroused the suspicions of Mr. Brown. She stated that Mr. Brown moved out of the house in November 2005 and returned in the same month to resume cohabitation.

33. Mr. Brown alleges that he moved out of the bedroom in May 2005. He slept by himself while Miss Nelson and the children slept in the other bedroom. He claims that he and Miss Nelson were not on speaking terms for many months.

34. In February 2006, it was Miss Nelson's turn to become suspicious when she received a telephone call from an unidentified female who apologised to Miss Nelson for coming between her and Mr. Brown. When Mr. Brown was confronted with this call by Miss Nelson he denied it.

35. Miss Nelson continues her saga. In May 2006, she says that Mr. Brown told her that he was involved in undercover work which would take him away from the house for extended periods of time.

36. Mr. Brown testified that he eventually moved out of the house in November 2005 and in February 2006, he was living in Spanish Town with someone else. He expressly asserts that the relationship between himself and Miss Nelson ended in 2003.

37. Mr. Brown's assertion that the relationship ended in 2003 is difficult to accept. Neither his affidavit evidence nor his further examination in chief provided any evidence that is consistent with a cessation of cohabitation in 2003. It is simply a naked assertion without a line of evidence that would make such a scenario probable. Why is there an absence of any factor, in Mr. Brown's evidence, indicating why the relationship ended in 2003? If what he has asserted were true, why would he only be moving out of the bedroom in May 2005? It does seem incongruous that a conjugal cohabitation could have ceased in 2003, but Mr. Brown is only moving out of the bedroom in 2005. Consequently, I reject his evidence on the point when he says that the relationship ended in 2003. This is the first serious dent in Mr. Brown's general credibility.

38. I now turn to another bit of the evidence which has permitted me to accept Miss Nelson's version on when the relationship ended. Mr. Brown sought to make out that he alone was responsible for all the expenses, including a mortgage and Miss Nelson did not contribute anything, directly or indirectly.

39. To bolster his position, Mr. Brown has put forward salary two slips. One from the year 2005 and the other from the year 2008 to support his proposition that he alone paid the mortgage and all expenses related to the house. The 2005 salary slip shows that he was repaying the mortgage of $10,000.00 per month and $4,684.61 to the City of Kingston Credit Union. The 2005 salary slip also shows that his net salary was $39,235.15. The 2008 salary slip still shows the $10,000.00 per month mortgage and $45,226.26 payment to the

credit union. The 2008 salary slip shows that his net salary is $63,306.35.

40. If the 2005 salary slip is representative of his salary over the period 2004/2005 when he received a mortgage from the National Housing Trust Corporation and took out a loan from the City of Kingston Credit Union, then there had to have been a source of income from some source other than his salary. The 2005 salary slip states that his net salary after mortgage payments and other deductions was $39,235.15. Deduct from this figure the $6,000.00 for his daughter's maintenance. This would leave $33,235.15. From this figure would come the purchase of food for Mr. Brown, Miss Nelson, Miss Nelson's two children from an earlier relationship and Mr. Brown's sister. Indeed Mr. Brown claims that he took care of Miss Nelson's two children financially. This means that he took care of all their expenses. This would be truly a remarkable undertaking when one considers how house holds operate. There are the planned and unplanned expenditures. They arise unexpectedly. Mr. Brown clearly appreciated that to maintain his assertion on a net salary of $39,235.15 was not going to be easy. There simply had to be another source of income.

41. Sitting as a tribunal of fact, I am entitled to assess the assertion of the defendant against the living conditions including the cost of living in Jamaica during the relevant time. Even Mr. Brown recognised that his monthly salary $39,235.15 would be inadequate to carry the expenditure he has outlined. This explains why he stated that he earned money from fixing radios for Metro Security Company. He had to find an additional source of income. But for the purposes of his case, he would not dare to say that Miss Nelson was that source of income.

42. Mr. Brown asserts that he would pay $6,000.00 per month for his daughter's maintenance. Take this amount from the $39,235.15, we are left with $33,235.15 to undertake all the expenditure he said he undertook. For this to have happened, it would need something in the scale of the fish and the loaves miracle. Mr. Brown does not possess the necessary power to perform such miracles.

43. Mr. Brown said that he knew that Miss Nelson could sew. However, he was not prepared to accept that she earned from this skill except for two contracts she received in March 2002 from which she earned $14,500.00 and February/April 2004, from which she earned $18,167.00. In other words, Miss Nelson did absolutely nothing to earn save for the two contracts just mentioned from the couple were living at 2 North right up to the breakdown of the relationship.

44. Under cross examination Mr. Brown made the crucial admission while they were living at 2 North, he saw persons coming to Miss Nelson about sewing. He even added that some of them were dissatisfied customers. This, he said, went on for approximately one year. Despite this, he was unable to say whether any income was generated from the sewing.

45. Here we see, yet again, Mr. Brown attempting to portray Miss Nelson as a sluggard. He is saying that she was such an incompetent seamstress that what he recalls were disgruntled customers. However, the critical word here is "customers."

46. Miss Nelson has asserted that she earned income from her sewing. Mr. Brown remembers customers. On a balance of probability, this suggests that she was conducting some kind of economic activity for there to be customers. There is nothing to suggest that Miss Nelson was providing sewing services for free. This evidence suggests that Miss Nelson was indeed earning. It is not clear how much she earned but what she says is that her earnings enabled her to contribute indirectly to the mortgage payments by taking up some of the household expenses which would enable Mr. Brown to pay the mortgage. This sewing, she swore, continued throughout the relationship. I accept her evidence on this point.

47. Regarding the care of Miss Nelson's two children from a previous relationship, she tendered Western Union money remittance slips showing receipt of money from a Mr. David Pratt. This money, she says, was used to look after the two children. This is strong evidence that she had a source of support for her two children. I do not accept

Mr. Brown's assertion that he alone took care of these two children's expenses.

48. Given the unreliability of Mr. Brown's evidence, I have no hesitation in accepting Miss Nelson's assertion that she contributed directly to the household expenses and this contribution was significant enough to enable Mr. Brown to pay the mortgage and the loan from the City of Kingston Credit Union. I believe her when she says that she earned from sewing.

49. It may be said that I am not in a position to prefer her evidence on her earnings over the evidence of Mr. Brown that he supplemented his income from repairing radios given that neither party has adduced actual figures of their respective earnings. It is true that actual figures are missing but I have found Miss Nelson to be a more truthful witness generally than Mr. Brown. At one point during the hearing when he was being cross examined I had to remind Mr. Brown that he needed to answer the questions posed as best he could and not stall. After this reminder, he began answering in a less evasive manner. If truth be told, Mr. Brown did not create a favourable impression at all. I have serious misgivings about his evidence. I have therefore concluded that, despite the absence of the specific figures of earnings, Miss Nelson did contribute to the household expenses. I find too, that at all material times she was working and earning and not an unemployed woman as Mr. Brown attempted to portray her.

50. What this means is that I am prepared to accept her evidence that Mr. Brown moved out in November 2005 and returned in the same month. I accept her evidence that Mr. Brown told her that he would be away from the home for extended periods of time in 2006 because of his professional engagements. I accept her evidence that the cohabitation ceased in September 2006.

51. My conclusion then is that the separation occurred after April 1, 2006. This means that Mr. Brown and Miss Nelson were cohabiting for five years before the cessation of cohabitation. They were living as man and wife. The fact that there were difficulties in the relationship does not negate this conclusion.

52. The disputed property was clearly the family home within the meaning of section 2 (1) of the Act. It follows that the default 50:50 rule applies unless there is some reason not to apply the rule. From all the evidence which I have accepted the parties had intended to live together for a protracted period of time. I see no factors deflecting the default rule. Therefore declare that Miss Nelson is entitled to a half share of the disputed property.

Equity

53. In the event that I am wrong that the Act applies and that the cessation of cohabitation occurred before the Act came into force, I am prepared to hold that Miss Nelson is entitled to a half share in the property. These are my reasons.

54. It is well established that under the Statute of Frauds an express trust is not enforceable unless it is properly constituted, that is to say, it has met all the statutory formalities. However, this principle, did not apply to resulting and constructive trusts. This enabled equity, on certain circumstances of fact being proved, to recognise and enforce the beneficial interest of the party whose name did not appear as the legal title holder. Hence, if the non-legal title holder was led to believe that he or she would have a beneficial interest once they undertook and executed an agreed course of conduct, then equity would enforce that understanding and not allow the legal title holder to behave in a manner that frustrated the particular understanding. The important judgment of Nourse L.J. in ***Grant v Edward*** [1986] 3 W.L.R. 120 makes this clear. His Lordship observed at pages 120 - 121:

> *In a case ... where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the*

defendant to deny that interest and will construct a trust to give effect to it.

In most of these cases the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: see per Fox L.J. in Burns v. Burns [1984] Ch. 317, 328H-329C. If it is found to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it.

There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting upon it by the claimant. And although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so.

55. This passage must be read carefully. The learned Lord Justice is not saying that the only evidence capable of establishing that there was a common intention that the non-legal title holder is expenditure of money. What he is saying is that expenditure of money is the usual evidence provided from which the court is asked to infer that there was a common intention that the non-legal title holder would have a beneficial interest in the property. His Lordship also appreciated, that there are instances where the act or acts done by the non-legal title holder, are relied on to establish (a) the establishing the common intention and (b) the evidence of acting on the common intention. It

follows from this that expenditure of money is not the exclusive means of proof of showing that there was a common intention.

56. Where, I think, the English cases, departed from this understanding was to treat expenditure of money as the only irrefragable proof of the common intention. It is this almost fanatical insistence on the expenditure of money approach that has led the many decisions from England that are virtually impossible to reconcile, thereby creating the conditions for Baroness Hale's judgment in ***Stack v Dowden*** [2007] 2 W.L.R. 831. Admittedly, where there is no expenditure money, the difficulty will be identifying the conduct that will suffice to cause the court to recognise the proprietary interest of the non-legal title holder. However, difficulty of evidence is not a sufficient reason to depart from well established principles which sees the courts giving itself the power to reorder property rights by simply saying, as Baroness Hale did at paragraph 60:

> *The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.*

57. The key expression here that has the potential to give the courts extensive reordering power without legislative approval is, "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it." What is the basis of the imputation? What is meant by "their whole course of conduct in relation" to the property? On this approach, it is difficult to see how different this is from Lord Denning's theory that the court could divide property as it saw fit. This approach was rightly repudiated in ***Pettitt v Pettitt*** [1970] AC 777

58. In the case before me, it is not desirable that I resort to this wide and apparently limitless property ordering power of the court. In this particular case, I accept the evidence of Miss Nelson that Mr. Brown

and she agreed to purchase a house where they would live together as if they were man and wife. I also accept her evidence that was the common understanding that both would have an equitable interest in the disputed property. I also accept that she would make the contribution to the household that she said was agreed between the parties. I accept that she was always employed and utilised her seamstress skills to earn money. I also find that she undertook the expenditures she said she did. This expenditure was sufficiently significant to enable Mr. Brown to service the mortgage. In this way, Miss Nelson contributed to the acquisition of the property.

59. I also find that it was the agreed position that the house would belong to both beneficially and that the arrangements entered into by Mr. Brown with the lending institutions arose because he had better documentation of his income and was making the all important contributions to the National Housing Trust which enable him to secure a loan from them. It is still the case in Jamaica, that many persons, male and female, like Miss Nelson operate in a very informal manner. They do not keep much documentation of actual income and expenditure but yet they do in fact earn and spend significant sums of money. This is our social reality and the courts ought not to ignore it in cases of this nature. What matters in the end is the nature and quality of the testimony.

60. I therefore conclude that even applying the law of property and equity, Miss Nelson would be entitled to a half share of the disputed property.

Conclusion

61. On the above analysis I declare that both parties are entitled to a 50% share in the property.