

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 131 OF 1999

BETWEEN MARJORIE RICHARDS BARNES APPLICANT

A N D PAUL WAYNE BARNES RESPONDENT

Mr. Michael Hussey for Applicant

Miss Judith Cooper for Respondent

Heard: 26<sup>th</sup> October & 4<sup>th</sup> May, 2001

CORAM: CAMPBELL, J (Acting)

The husband and wife, were married on 14<sup>th</sup> September 1991. They had cohabited prior to marriage and have two children. Brad, was born on the 5<sup>th</sup> November 1989, Rochelle, on the 18<sup>th</sup> January, 1997.

At sometime, either during the wife's pregnancy with Rochelle, or shortly thereafter, the husband left the matrimonial home, the marriage having broken down.

On the 13<sup>th</sup> March 1999, the wife filed a Summons seeking a declaratory Order that she was entitled to one hundred (100%) percent beneficial interest in the matrimonial home and in the household furnishings.

Failing such declarations the applicant sought a determination of the parties respective interest and consequential orders for the transfer of the Respondent's entitlement and to allow the applicant to purchase the Respondent's interest.

The lot on which the matrimonial house was built was acquired solely by the Respondent, at Greenvale in Manchester. The consideration being "approximately" Forty-three Thousand (\$43,000.00) Dollars. The transfer of the property was registered in the name of the parties as joint-tenants on the 10<sup>th</sup> November, 1995. A mortgage loan of One Million (\$1,000,000.00) Dollars was granted by the National Housing Trust to the parties. This loan financed the construction of a three bedroom house, the matrimonial home.

Improvements, by way of grilling, a paved driveway and fencing around the property were executed. The substantial portion of the improvements were effected by the applicant, who also undertook timely maintenance repairs of the property.

The area of greatest divergence between the evidence of the parties was in relation to the mortgage payments and household expenses. The Applicant depones at paragraph 10 of her affidavit in support of the summons:

“That for the first two (2) months after obtaining the loan the Respondent assisted in paying the mortgage. That after this he instructed the National Housing Trust by letter that he would no longer be responsible for paying the premiums. I exhibited hereto mark “MRB 2” a copy of the Respondent’s said letter to the National Housing Trust.”

At paragraph 11:-

“That since then and up until now I have paid all the mortgage premiums to the National Housing Trust. I exhibit hereto “MRB 3” copies of the receipt obtained by me for mortgage paid.”

Paragraph 13:-

“That the Respondent since 1993 when he stopped paying the mortgage, has taken no further interest in the premises and left the matrimonial home in 1996. He is now in the process of building another house elsewhere.”

In his Reply, the Respondent at paragraph 3 depones:-

“That paragraph 10 of the Applicant’s affidavit is denied. I removed from the matrimonial home shortly after the birth of our second child, Rochelle Toni Ann Barnes, who was born on the 18<sup>th</sup> January 1997, I removed sometime in or around March 1997. That prior to that date I had contributed to the household expenditure and also the mortgage payments to

the National Housing Trust. The mortgage payments were usually physically made by the Applicant, this was as a result of the nature of my job, which caused me to be on the road and out of town quite often. I never wrote to the National Housing trust informing them that I would no longer be responsible for the mortgage payments.”

The Applicant’s reply to the Respondent’s rebuttal, conflicted with her earlier evidence, in which it is stated that he left, “in or around March 1996 and he stopped all contribution approximately two months after he left.”

The Applicant, recanted her earlier evidence, that the Respondent had written to the National Housing Trust “that he would no longer be responsible for paying the premiums, stating that it was an error made by my previous Attorney.”

I find that the Respondent did cease making contributions to the mortgage payments from as early as 1993. See paragraph 13, Applicant’s Affidavit in Support of Application, “that the Respondent since 1993 when he stopped paying the mortgage, has taken no further interest in the premises and left the matrimonial home in 1996.” Although he had not evidenced this in writing to the National Housing Trust, as alleged by the Applicant.

However, his household expenses contribution was continued until a couple

months after his departure in March 1997 and not 1996, as deponed by the Applicant.

I find that the Applicant has since the Respondent's departure been solely responsible for the mortgage payments, such arrears that have accrued, and all the household expenses.

It is clear from the evidence that there was no agreement between the parties either expressed or to be implied at the time of the acquisition as to their respective beneficial entitlements in the event of the breakdown of the marriage. The Court is therefore empowered to make a determination of their respective beneficial entitlement based on their conduct and contributions, thereby giving effect to their presumed common intention at the time of the acquisition of the property.

In **Fribance vs. Fribance 1957 1ALL E.R. 757** where the home was acquired in the husband's name and both parties, had contributed towards the purchase. Lord Denning had this to say:-

“In many cases, however, the intention of the parties is not clear, for the simple reason that they never formed an intention: so the Court has to attribute an intention to them. This is particularly the case with the family assets, by which I mean the things intended to be a continuing provision for

them during their joint lives such as the matrimonial home and the furniture in it.”

The approach to be adopted by the Court faced with making a determination of the beneficial interests of husband and wife in disputed property was outlined in

**Mahabir vs, Mahabir** (1964), 7 WIR. 131, where at page 138 Wooding, C.J. said:

“I agree with Taylor J, that the question of beneficial ownership as between husband and wife is not to be determined according to strict rules. Some latitude must be allowed by reason of the casual informality, which normally characterized arrangements between spouses. Theirs may be a partnership but it is not a business relationship.”

The issue must therefore be examined broadly and niceties must be disregarded. The ordinary consideration, which is well known to affect the dealings between husband and wife, should be given their full scope.

One such consideration is the obligation of a husband to maintain his wife even in certain circumstances after their status as husband and wife has changed. See sec. 22 Maintenance Act **Cooke, J.A stated in Jarrett vs. Jarrett R.M.M.A. No. 5/99**, after comparing sec. 12 of the local act, with the relevant English statutes:

“There was nothing in the English statute which showed that liability to pay maintenance under that statute was dependent on the relationship of husband and wife. I would think that, although not so specifically stated in section 5 © (supra), that section assures that, there is an obligation of a husband to maintain his wife. This obligation I suggest is founded in the common law.”

The Respondent on his own evidence has made no contribution to the mortgage payments and the household expenses since his departure. The wife has undertaken all mortgage and household expenses since the husband's departure. It was her singular efforts that cleared the arrears of mortgages.

It is true that the fact that they registered the property as joint tenants, and secured a mortgage in both names, would appear to be strong indications of a common intention to share equally.

However, the wife's contribution in paying off the mortgage arrears, and keeping the payments current and undertaking all the household expenses in addition to improving the property, are expenses she would not necessarily have undertaken if it had been the common intention that her beneficial entitlement was the same as that of the Respondent. Why then would she have taken on an additional burden?

In **Falconer vs. Falconer** 1970 3 ALL. E.R. 444 Lord Denning M.R

said:

“I was troubled by one point made by Counsel for the wife. The husband had stopped paying anything in October 1967. Since that time the wife has paid all the mortgage installments and rates, but I think the Counsel for the husband gave the right answer. During that time the wife has had the benefit of the whole house, although it belonged in part to the husband and she has paid no rent. So it even out.”

In this case it does not even out, the wife did not have the benefit of the entire house, as there were three other occupants in the house, for which the Respondent had responsibility.

Accordingly, it is hereby declared that:

- (i) That the Applicant is entitled to eighty (80%) per cent interest in the matrimonial home, and the Respondent to twenty (20%) per cent.
- (ii) That the Applicant be allowed to purchase the Respondent interest by paying the current market value hereof within four months of this order, in exchange for which the Respondent should give the applicant a registered transfer of his interest in the said property.
- (iii) That the cost of the transfer is to be borne equally between the parties •