

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV – 3430 OF 2009

BETWEEN VINCENT LLOYD GUTHRIE CLAIMANT
AND DORRETTA MAY GUTHRIE DEFENDANT

Claim for division of property and other remedies under the Property (Rights of Spouses) Act section 14; Whether suit brought within time specified in section 13; If not, whether application necessary to extend time for bringing suit; whether if no such application matter proceeds under ordinary principles of equity and trusts; rights of joint bank account holder; liability for jointly acquired debts.

Heard: January 21, June 17 and July 19, 2011

Mr. Gordon Steer instructed by Chambers Bunny and Steer for the Claimant; Ms. Audrey Clarke instructed by Judith Clarke and Co. for the Defendaant.

CORAM: ANDERSON J

(1) The Claimant and the Defendant who have been married to each other some thirty four (34) years since 1977, separated in 2006. They have between them three children and several pieces of real estate are now before this court in relation to claims by the Claimant over certain of the real property. By way of a Fixed Date Claim Form dated June 17, 2009, the Claimant (now the estranged husband) claims the following reliefs or orders: -

(a) That the Claimant is entitled to the entire beneficial interest, in the property known as Lot 123, Orchard Gardens Subdivision, Hopewell, in the parish of 1Hanover, registered at Volume 1313, Folio 776 of the Register Book of Titles.

- (b) That the Claimant is entitled to the fifty percent (50%) interest and the Defendant entitled to fifty (50%) in the property located at Sheffield called Mt. Zion, in the parish of Westmoreland, registered at Volume 1214, Folio 792, Volume 1214, Folio 793 of the Register Book of Titles.
- (c) That the Claimant is entitled to the sixty percent (60%) interest and the Defendant entitled to forty (40%) in the property located at Lot 24, Pitkelleny Sub-division, West Cliff Estates, in the parish of Westmoreland, registered at Volume 134, Folio 933 of the Register Book of Titles.
- (d) That the Claimant is entitled to the fifty percent (50%) interest and the Defendant entitled to fifty (50%) in the property located at Lot 93 Nompariel, Land Settlement, Negril P.O. in the parish of Westmoreland.
- (e) That a valuation agreed upon by the Claimant and the Respondent be taken and that costs of same be shared proportionally by the parties.
- (f) That if no valuator can be agreed upon then one shall be appointed by the Registrar of the Supreme Court.
- (g) That the Claimant be given the first option to buy the said properties, within 30days of the receipt of the valuation.
- (h) That should the Claimant be unable or unwilling to exercise his first option to purchase then the said properties be put on sale on the open market by public auction or by private treaty.
- (i) That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all orders of this Honourable Court if either party is unable or unwilling so to do.
- (j) That the Defendant account for the monies removed from the joint accounts numbered

606402236 & 606404484, held at NCB Negril, and the joint account numbered **711352** held at NCB Capital Markets, as well as the joint account numbered **4513879** held at JMMB.

- (k) That the Defendant shall refund the Claimant one-half of the payments made by him with respect to servicing the parties jointly acquired debts.
 - (l) Such further and other relief that Court deems just.
 - (m) Such costs as are incidental to the proceedings.
- (2) The Claimants claim is supported by his affidavit evidence contained in five (5) affidavits dated respectively June 19, 2009; October 22, 2009; January 19, 2010; July 5, 2010 and February 26, 2011. The Defendant has herself filed four affidavits in response to the claim by her husband, as follows: December 9, 2009, December 10, 2009, June 9, 2010 and March 31, 2011.
- (3) Although the Claimant has set out in the Fixed Date Claim Form the various reliefs he is seeking, the Defendant does not join issue with him except insofar as the claims at paragraph (a) (c) (k) and (l). These relate to the claims to property at the Orchard Garden Subdivision in Hopewell, Hanover registered at Volume 1313 Folio 776 of the Register Book of Titles; property at Pitkelleny in the Parish of Westmoreland and registered at Volume 134 Folio 933 of the Register Book; a claim for the Defendant to repay certain sums purportedly removed by her from joint accounts maintained by the parties at National Commercial Bank, NCB Capital Markets and JMMB; and a further claim that the Defendant should refund the

Claimant one-half of certain sums paid by the Claimant, purportedly in servicing jointly acquired debts of the parties.

- (4) While the evidence adduced by the parties covered many other issues such as the nature of their relationship, it will only be necessary to examine the evidence in relation to those matters in respect of which issues have been joined.

- (5) The Claimant says he is a person who had always been interested in making investments in real estate and he had purchased property in Shrewsbury Housing Scheme in Westmoreland with his own resources. He avers that after the purchase of Shrewsbury, the family resided in a home there. Some time afterward, he says he took up a job in Mt Airy, Westmoreland and the family moved into the school cottage provided there, where his wife continues to reside. He further states that he bought three (3) other lots of land, the first being property at Sheffield in or around 1989. Subsequently, he says he purchased the Pitkelleny property "for the purpose of building a home for my family to reside in". Later still, he saw a property at Hopewell "which too could be used to build a home for my family". He decided to purchase this property as well, "to give me more options when I raised enough funds to start the design and eventually commence construction on a home". He says that in 2005 he had accumulated enough funds and so he started construction of a house on Pitkelleny "completely on my own". He says that he has met the construction costs and continued to work on the property after the parties separated in 2006, although

he acknowledges that between September and December 2008, his wife "has done some mason work to the property".

(6) In the penultimate paragraph of his first affidavit, the Claimant states: "That over the years of our marriage I have supported the household and educated our children who are now young professionals".

(7) He acknowledged that properties were "purchased in the joint names of the parties, although the Claimant claims they were purchased from my sole resources without any assistance from the Defendant, save and except the property at Nonpareil, in which the title was taken in the sole name of the Defendant, although I helped to fund same".

(8) The Claimant further stated:

"That even though the defendant contributed nothing to the properties' acquisition, save and except Nonpareil as stated aforesaid, I placed her name on the titles just in case anything happened to me".

(9) The Defendant, on the other hand claims that any property acquired by them was acquired from their joint pooled resources and for no other reason than the joint benefit of the parties and the family. Indeed, she asserts that although the property at Nonpareil was in fact, purchased solely by her through a facility under the Land Settlement Programme, "it was always intended, as in the case of all other acquisitions

for the benefit of the union and the family in general notwithstanding the fact that the benefit was specifically attached to my employment which facilitated the provision of the parcel under the Land Settlement Programme as an incentive to encourage teachers who were employed in that particular geographical area."

(10) It was submitted on behalf of the Claimant and indeed, the Fixed Date Claim Form so states, that the claim is made pursuant to Section 14 of the Property (Rights of Spouse) Act. In that regard, the Claimant submits that none of the properties in issue fall within the definition of "family home", in the Act. It is common ground that the parties have habitually resided in properties provided by the employer of one or other of them. Although, as I shall state later the question of the "family home" does not arise in any event, it may be noted that there is no issue between the parties involving "family home".

(11) Section 14 of the Property (Rights of Spouses) Act ("the Act") provides as follows:

(12) Sec. 14. (i) Where under section 13 a spouse applies to the court for a division of property the Court may :-

- (a) make an order for the division of the family home in accordance with section 6 or 7 as the case may require; or
- (b) subject to section 17(2) divide such property other than the family home, as it thinks fit taking into account the

factors specified in subsection (2), or where the circumstances so warrant take action under both paragraph (a) and (b).

- (13) The Claimant's evidence is that he alone was responsible for the purchases of the various properties acquired in the joint names of the parties without any contribution from the Defendant. The Defendant meanwhile, consistently maintains that she was always working as a teacher/educator and that the resources of both were always pooled together in order to facilitate the acquisition of property for the benefit of the family. In that regard therefore, she does not resist the Claimants' claim to half interest in any property which is jointly held, but does challenge his claim for a one hundred percent (100%) interest in the property at Hopewell or his claim for a sixty percent (60%) interest in Pitkelleny (Vol. 134 Fol. 933).
- (14) The Affidavits filed by both parties contain numerous allegations and denials in respect to details of the arrangements which existed between the parties. It is not necessary for me to detail each and every such averment and to say in each case which is preferred. It is noted however that the court had the benefit of observing the Affidavits and the demeanour of each of them as well as the Affidavit evidence. The court finds that the Defendant was a more credible witness and that her demeanour was more consistent with one telling the truth.

(15) In that regard the Court was struck forcibly by the admission of the Claimant in cross-examination, that he does not know anything about the school fees of his own Dorvin who is pursuing tertiary education at the Caribbean Maritime Institute, nor has he contributed to the costs of medical treatment for his daughter Shanique, a sufferer from Aplastic anaemia, as he "has not been asked". This is in spite of his averment referred to above that throughout the marriage he "supported our household and educated our children who are now young professionals". The documentary evidence provided by the Defendant concerning the illness of the child, Shanique, is also very telling. In light of this the Court is of the view that unless there is objective third party evidence to lead to a contrary view, the Court is prepared to accept the evidence of the Defendant whenever it conflicts with that of the Claimant. Thus, the Court accepts the assertion by the Defendant that the parties had always proceeded on the basis of a shared intention to acquire property for the benefit of the family. I accept that, in that regard, they had pooled their resources and maintained joint bank accounts upon which they were both able to draw without need for reference by one to the other.

(16) Before considering the application of the law to the facts found in the evidence it is useful to recall that the issues which are joined relate only to the land at Orchard Gardens, (Volume 1313 Folio 775) and Pitkelleny (Vol. 134, Folio 933); the claim in respect of the various bank accounts at NCB, NCB Capital Markets and JMMB, and the claim for the Defendant to

refund the Claimant one-half of the payments made by him in respect of the parties' purportedly jointly-acquired debts.

The Law

(17) The Claimant submits that by virtue of section 4 of the Act, "the equitable principles such as the various trusts, resulting and constructive as well as the common intention of the parties plays no part in considering the interests of disputing spouses in property". This is on the basis that that section provides as follows:

"The provisions of this Act shall have effect in place of the rules and presumptions of the Common Law and of Equity to the extent that they apply to the transactions between spouses in respect of property and, in cases for which provision is made by this Act, between spouses and each of them, and third parties"

(18) In this regard, and as noted above, the Claimant relies upon Section 14 of the Act to ground his claim. The introductory words of Section 14 are :

(i) Where under Section 13, a spouse applies to the Court for a division of property. This seems to me to indicate that consideration of the provisions set out in Section 14 apply where Section 13 applies:

(19) Section 13 is in the following terms :

13 (1) A spouse shall be entitled to apply to the Court for a division of property
(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) on the ground of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by willful or reckless dissipation of property or earnings

(2) An application under subsection (1)(a)(b) or (c) **shall be made** within twelve months of the dissolution of marriage, termination of cohabitation, annulment of marriage or separation, *or such longer period as the Court may allow after hearing the applicant.*
(Emphasis mine)

(20) A claim for division of property under section 14 therefore arises when that claim is made pursuant to section 13. Fulfilling the requirements of section 13 must therefore be a condition precedent to an application under section 14. If that view is correct and I have no doubt that it is, then it would appear that unless the action is brought within twelve months of the named circumstances set out in Section 13(1) (a) to (c), then no application can proceed under Section 14 without the Court having extended the time to bring such action. In this case, there does not appear to have been any such application or agreement to extend the time for bringing the action under the relevant provisions of the act. In such

circumstances, the claim proceeds in the normal basis as contained in the Law of Equity and the Law of Trusts.

- (21) It is now settled (*see Stack v Dowden [2007] UKHL 17; Abbott v Abbott Privy Council Appeal 142 of 2005*) that where property is held in the joint names of two parties, the burden is on the person who asserts that the interests are to be treated as other than fifty-fifty, to show why this should be so.
- (22) In a judgment I delivered 24th April 2009, (*O'Connor v Shearer and Another* HCV 291 and 2769 of 2005) admittedly dealing with the family home, in considering the issue of the share of interests in property held in joint names, I explored the decisions of *Stack*, *Abbott* and *Fowler v Baron* [2008] EWCA (Civ) 377. Referring to the decision in the Stack case, I stated the following:

Baroness Hale's leading judgment in their Lordship's House is a tour-de-force of analytical reasoning, tracing and analyzing the case law and historical development in this area of the law. She stated her starting point in these cases in the following terms at paragraph 58.

Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership

cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

In delivering her judgment at paragraph 58 of the report, she said:

The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prima facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

And at paragraph 68 she said:

The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon.

Lord Walker of Gestingthorpe in agreeing with Lady Hale said:

I am in full agreement with the observation in paragraph 68 of Lady Hale's opinion, which I take to be of central importance to her reasoning and conclusions, that in cases where a house or flat has been registered in the joint names of a married or cohabiting couple (but with no express declaration of trust) there will be a considerable burden on whichever of them asserts that their beneficial interests are unequal, and do not follow the law.

- (23) So even apart from the intention which I have found above to have existed, I would hold that the Claimant has failed to discharge the burden now placed on him by the authorities cited above.
- (24) I hold that the evidence discloses that the parties always shared a common intention to acquire property jointly for their joint benefit. In that regard, I accept the evidence of the Defendant set out in her first affidavit that "It was a common principle in our marriage that all our resources were to be applied to joint acquisitions for the promotion of the union and the family of the union". She also contradicts the Claimant's averment that Shrewsbury, the first property allegedly purchased between them, was purchased with his own sole resources and states further that the proceeds from the sale of that property was used to purchase Pitkelleny. Indeed, the affidavit of the Claimant tends to support this as it speaks of an intention to acquire property "for the purpose of building a home for my family". I should also note that the Defendant also asserts, and this is not denied by the Claimant, that a part of the land at Sheffield has been sold by the Claimant and she has not benefitted from the proceeds thereof.
- (25) In respect of the property at Hopewell in which the Claimant claims a one hundred per cent (100%) interest, the Defendant stated that they both purchased the property "from our joint resources". She points specifically to a sum of three hundred and twenty five thousand dollars

(\$325,000.00) paid to G. Maffessanti and drawn from their joint account at the Bank of Nova Scotia in Negril, Westmoreland. This, she says, was the deposit for the land at Hopewell. The Defendant also rejects the averment that she had nothing to do with the construction of the intended home at Pitkelleny as she often made payments to the workmen as well as providing them with food. Based upon the evidence I have accepted, I hold that the property at Orchard Gardens, Hopewell, Hanover, registered at Vol. 1313 Folio 733 is held as to a fifty per cent (50%) interest each by both the Claimant and the Defendant.

- (26) With respect to the property at Potkelleny, it is even clearer that the Claimant's claim for a sixty percent (60%) interest is to be rejected. The evidence from both is clear that this property was purchased to be developed as the matrimonial home and further it is in the joint names of the parties. In that respect, the position is the same as that referred to in **Stack v Dowden**, above. There is therefore, both common intention (see **Gissing v Gissing [1970] 2 All ER 780**; **Pettitt v Pettitt [1946] 2 All ER 384**), as well as the fact that the property is held in both their names. (**Stack**). In **Gissing**, Lord Reid had held that where both spouses contribute to the purchase of property which is conveyed in the name of one spouse only, in the absence of a declaration of trust, the facts may impose an implied, constructive or resulting trust. In circumstances where, as here, I have accepted as fact that both parties contributed to the purchase, even were the title held solely in the name of the

Claimant, I would have been prepared to hold that the Claimant held a fifty per cent (50%) interest as constructive trustee for the Defendant.

(27) I am strengthened in the views arrived at above by the decision in the Jamaican Court of Appeal **Gem Harris v Eugene Harris** [1982] 19 JLR page 333. There, the Court held as follows:

- a. A common pool of funds does not require anything other than an intention that it was for the joint use of the parties and the parties having constituted a common pool from which the funds were provided to pay for property which was conveyed into their joint names, the only question arising is what proportion each should share.
- b. Where property is transferred into the joint names of husband and wife, prima facie the parties are treated as beneficially entitled in equal shares.

It should also be noted that the relative contributions of each party to the joint pool does not affect the rule that prima facie each is entitled to a fifty percent(50%) share. These considerations here, are also relevant in considering the issue of the joint accounts which I deal with below.

Claim re withdrawals from accounts

(28) It is agreed between the Claimant and the Defendant that the couple operated six joint accounts. This is shown by paragraph 3 of the second affidavits of both the Claimant and the Defendant. It is the Claimant's contention that the Defendant has "systematically depleted" the said accounts by

withdrawing various sums from the said accounts without his knowledge and has "not accounted" to him for the proceeds.

- (29) The Defendant, for her part, denies any wrongdoing, indicating that her withdrawals were used to pay inter alia, for treatment for the couple's daughter who has been diagnosed with Aplastic Anaemia. She also states that withdrawals from the NCB Negril Branch account were used to purchase materials from Kirlew's Hardware in Negril for the construction and to pay workers who were working on the home in Pitkelleny. She said that, in any event, the withdrawals from this account were done with the approval of her husband who was regularly unavailable to deal with those obligations. With respect to the account at the NCB Branch at Bay West, the account into which the Claimant's salary was paid, the Defendant admits that she withdrew sums after her husband had added her name to the account to facilitate her purchase of materials and paying workmen.

Should the Claimant succeed on this claim?

- (30) It is said: "'Joint bank accounts'. Sound so lovely and cosy, don't they: a fiscal manifestation of a couple's unity, a declaration of mutual trust in a shiny pair of his and hers cash machine cards. Nothing says "what's mine is yours" quite as much as pooling your resources, especially if you earn double what your partner does". The fact is that one can have a joint account with anyone else, but once persons are jointly on that bank account, once the papers have been signed off, then unless special conditions are imposed upon the operation

of the said account, both parties have one hundred percent (100%) rights to that account. No matter who started the account or who put in more money, in the eyes of the law, both are equal holders.

- (31) The result of this legal truism is that account co-owners enjoy the right to spend, give away or transfer funds to other accounts, without the consent or knowledge of other account holder. There are cases in which the "wronged" party may get back some of the money, but legal action is required to establish that the withdrawals have been in breach of the conditions on which the account had been established.
- (32) Although the parties here separated in 2006, there has been no evidence in the affidavits of the Claimant that the withdrawals of which he complained had been effected in breach of any condition on which the accounts, or any of them, had been established. Accordingly, I would hold that there is no basis upon which the Defendant ought to be required to account to the Claimant for any sums so withdrawn from any jointly held accounts.

Liability for jointly held debts.

- (33) The Claimant also seeks contribution from the Defendant in respect of their jointly acquired debts or obligations. It is trite law that where parties have jointly acquired debt obligations, then they are jointly responsible for the discharge of such obligations. The question here is whether there is evidence to support the Claimant's assertion that there are

such debts and that the Defendant should share in their discharge.

- (34) In the instant case, the Claimant alleges that the Defendant should re-imburse him for sums in respect of credit card payments purportedly made on her behalf. He said he was "left to continue to meet our jointly acquired debts inclusive of credit cards and loans". For example, he refers to an "outstanding loan regarding the property at Pitkelleny", the balance on which he said, stood at one million three hundred and fifty thousand eight hundred and sixteen dollars and seventy three cents (\$1,350,816.73) and he exhibits a document which purports to be a schedule showing how a two million dollar debt is to be repaid.
- (35) It must always be remembered that he who alleges must prove. It is therefore the Claimant's burden to show that there were in fact jointly acquired debts. As far as the claim for credit card payments are concerned, the Defendant denies using the credit save for the purpose of securing medication for the daughter Shanique. In any event, no specific evidence of ascertained sums is given by the Claimant and, insofar as the claim for credit card payments is concerned, that claim also fails.
- (36) One of the allegedly outstanding debts in respect of which contribution is sought by the Claimant is fees due to the law firm, Crafton Miller and Company. However, it should be noted that the Defendant has clearly demonstrated by her

final affidavit, that there is no outstanding debt to the law firm, it having written off the outstanding amounts due for legal fees.

(37) In his first affidavit, the Claimant mentions that he took "a loan for from the Jamaica Teachers' Credit Union in the amount of two million dollars". It is not stated in that affidavit what was the purpose of that loan. In his second affidavit, he speaks of "the outstanding loan regarding the property at Pitkelleny", to which I have already referred above. In his fifth affidavit he avers that the balance on the loan at the end of February 2011 would be one million two hundred forty three thousand five hundred and ninety one dollars and ninety-five cents (\$1,243,591.95). It would appear though it is by no means clear, that a loan was taken by the Claimant against land at Sheffield in order to be used in the construction at Pitkelleny. On the claimant's own affidavit evidence, that loan was taken on August 3, 2006. The evidence which has been adduced does not make it clear when the parties actually separated and whether it was before August 3, 2006. Notwithstanding that, it is also clear that the construction of the home at Pitkelleny is still not complete and that has implications for the Order that I should make.

(38) I accept that there is, on a balance of probabilities, an amount outstanding in relation to the construction at Pitkelleny and I also accept that the loan of \$2,000,000.00 taken out was with a view to that construction. The

Defendant must therefore bear some responsibility for that loan.

(39) In light of the findings which I have made above, I make the following orders:

- (1) The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Hopewell and registered at Volume 1313 Folio 776 of the Register Book of Titles.
- (2) The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the properties at Sheffield and registered at Volume 1214 Folios 792 and 793 of the Register Book of Titles.
- (3) The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Pitkelleny and registered at Volume 134 Folio 933 of the Register Book of Titles.
- (4) The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property located at Lot 93, Nonpariel Land Settlement, Negril in the Parish of Westmoreland.
- (5) All the properties are to be valued by a valuator agreed by the parties and if no such agreement is arrived at within thirty (30) days of the date of this Order, the Registrar of the Supreme Court shall appoint such a valuator; provided that the parties may by agreement in writing entered into within the time set for appointment of a valuator, use valuations of the properties, previously obtained and jointly paid for by them.
- (6) Upon the properties being valued and valuation reports provided to the attorneys at law for each party, each party shall have the option to purchase the interest of the other party, provided however, that the Claimant shall have the first option in respect of properties at Order (1) and (2) and the Defendant shall have the first option in respect of properties at Orders (3) and (4),

such options are to be exercised within one hundred and twenty (120) days of the delivery of the valuations to the parties' attorneys as aforesaid.

- (7) In the event of the failure of any party to exercise his or her option within the time limited by Order (6) above, the other party shall have the right to purchase the interest of the person so failing.
- (8) In the event that the Defendant exercises her option to purchase the property at Order (3) above, she will pay the Claimant one million dollars in reimbursement of the sums borrowed for the construction of the home, such sum is to be added to the cost of the 50% of the valuation for which she would otherwise be liable.
- (9) Where neither party is able to purchase the property as set out herein, such property may be sold at public auction or by private treaty and the proceeds divided in the same proportions as the ownership interests declared.
- (10) The Registrar is authorized to sign any document to give effect to the Orders made herein.
- (11) The Defendant is not indebted to the Claimant in respect of any sums withdrawn from any of their jointly held accounts.
- (12) The Claimant's claim for payment of any other debts other than any dealt with in these orders is denied.
- (13) Two-thirds of the Defendant's costs are to be paid by the Claimant, such costs to be taxed if not agreed.
- (14) Liberty to Apply.

ROY K. ANDERSON
PUISNE JUDGE
JULY 19, 2011.