

**BARBADOS.**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**FAMILY DIVISION**

**NO. 458 of 2008**

**BETWEEN:**

**VICTORINE PATRICIA GARVEY**      *Applicant*

**AND**

**PETER ATHELSTON WILKINSON**      *Respondent*

**Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.**

**2010: March 16, 17**

**April 20**

**May 10**

**2011: July 01**

**Mr. Clement E. Lashley, QC. with Ms. Honor Chase for the Applicant.**

**Mr. Ralph A. Thorne, QC. for the Respondent.**

**DECISION**

**Introduction**

[1] This matter involves an application for property settlement under the provisions of the **Family Law Act of Barbados Cap. 214.**

- [2] The properties involved are:
1. A dwellinghouse situate at 4<sup>th</sup> Avenue, Park Road, Bush Hall, St. Michael, and valued \$150,000.00.
  2. A chattel dwellinghouse situate at Danesbury, Black Rock, St. Michael, valued \$17,000.00 (the Danesbury property).
  3. A Toyota motor car valued \$7,500.00
- [3] The properties have been valued by Mr. Stephen Wiltshire of Felicity Limited and the valuations given above have been agreed as their fair market values.
- [4] The Applicant seeks a declaration that:
- (1) The relationship which existed between the respondent and herself was a union other than marriage within the meaning of **section 39 of part 5 of the Family Law Act of Barbados.**
  - (2) The two properties are owned by the parties jointly;
  - (3) A declaration of the respective interests of each party in respect of both properties
  - (4) A declaration in respect of the furniture and appliances in possession of the respondent found at the house situate at Park Road, Bush Hall, St. Michael.

- (5) The applicant seeks such consequential order/orders to give effect to the said declarations above referred to pursuant to **section 56(2)** of the **Family Law Act**.
- (6) Further or other relief

### **Background**

- [5] The parties cohabited in a union other than a marriage from about 1996 until August 2007. This is the union in respect of which these proceedings arose. Prior to this union, they were involved in a relationship which lasted four or five years before the applicant left Barbados to reside abroad.
- [6] It is common ground that the Respondent promised to marry the applicant but this promise was never translated into action. The applicant joined the church and withdrew from the cohabitation which she then regarded as contrary to her Christian principles.
- [7] In the affidavit dated 28<sup>th</sup> July 2008 and filed on the 6<sup>th</sup> August 2008 in support of the application, the applicant deposed that:
1. In so far as the facts and matters deposed to herein are within my own knowledge, they are true. In so far as they are not within my knowledge, they are true to the best of my information being derived from my Attorney-at-Law.
  2. The relationship between the Respondent and me commenced in the year 1996 when we lived at Sealy's

Land, Bank Hall, St. Michael for about 9 months. Thereafter we moved to Park Road, Bush Hall, St. Michael where we rented his sister's house. With my funds I furnished the entire house with items of furniture, bed, appliances, curtains, cutlery, pots and pans. It was in the year 2000 that we started the demolition of this wooden house and started the construction of a wall house on the same land. In a joint effort we purchased cement blocks, stone, grit, sand, steel, windows, tiles, wood and all material essential for the construction of such a structure.

3. We commenced construction of the said house in January 2000 and completed it in December the same year.
4. In regard to the wood and wall house near Danesbury, Black Rock, St. Michael, this house was purchased by the Respondent for the sum of \$18,000.00 in 1994 and I made a contribution of \$10,000.00 towards the purchase of this house. The house has been rented since the year 1994 to 1995 at \$375.00 per month and but for the occasional minor repairs the Respondent has been the sole Beneficiary of these rents from that time until now.
5. In this regard I say that from the time the house was built and throughout the years I have made direct contributions to the acquisition conservation and improvement of both properties.
6. Throughout the duration of the relationship I cleaned the house, cooked the meals and washed for both the Respondent and myself. I was conscious of my obligation to the Respondent as his companion and in this respect I saw to the personal and intimate needs of the Respondent. I therefore made a significant contribution as a homemaker.

7. The Respondent has given me the use of a Toyota Corolla motor car 1992 model which is valued at \$12,000.00 after I sold my car for \$5,000.00. He retains ownership of the same. Two years ago I paid \$2,500.00 to have this vehicle repainted together with other major work, thereto.
  8. I moved away from the house at 4<sup>th</sup> Avenue Park Road, Bush Hall, St. Michael in August 2007 and I live in rented accommodation, paying \$1,450.00 per month.
  9. I am employed as a Dental Hygienist earning the sum of \$5,000.00 while the Respondent is employed at Caribbean Broadcasting Corporation as a Senior Broadcaster Supervisor. His income is unknown to me.
- 9.1 There are no children from the relationship.

[8] No orders are sought under **section 57** of the **Act**.

#### **Union other than marriage**

[9] This is defined in **section 39** of the **Family Law Act as follows:**

“Union other than marriage or union means the relationship that is established when a man and woman who not being married to each other, have cohabited continually for a period of 5 years or more and have so cohabited within the year preceding the institution of the proceedings.”

Both parties have acknowledged that they cohabitated in a union other than marriage as defined by the **Act**. Accordingly, the Court has no difficulty in finding that such a union existed and that the provisions of the **Act** are applicable to these proceedings.

**Property at Park Road**

- [10] The applicant deposed that the property at Park Road was formerly an old chattel house which was falling apart. She stated that she and the respondent decided to build a wall house. The present structure was built without a mortgage. The respondent sold some land that he had in Gibbons, Christ Church and those monies were put into the construction. She was not aware of the price it was sold for.
- [11] She deposed further that she worked as a dental hygienist at the time and they cohabited in the house which was being converted into a house of masonry construction. She stated that she put money every month into the construction from the beginning.
- [12] She said she bought blocks, grits, sand and grout amongst other things. She either gave the respondent a cheque or she purchased the materials as required. The respondent, Mr. Wilkinson paid the workmen, she never paid them. She estimated that she bought ninety-nine percent (99%) of all the food, whilst he paid the other one percent (1%).
- [13] She said further that she paid the utility bills, M.C.T.V., telephone, gas, light, water and furnishings for the house. She bought the

appliances. The living room suite was bought for \$5,000.00 from DaCosta's Limited, dining room suite was \$1,500.00 to \$2,000.00 She replaced six dining room chairs for a cost of \$199.00 each. She gave evidence that she purchased two beds, refrigerator, stove, washing machine, pots, pans and microwave. The appliances were purchased on hire purchase and she paid for them monthly.

[14] Construction started in January 2000 and by December 2000 the house was partially completed.

[15] The applicant further stated that she would sometimes give the respondent money for the construction and at other times, if he told her that blocks were needed, she would purchase them, pick them up in her car and transport them to the site. The two down (marl) and gravel were delivered by truck and she would give the respondent \$800.00 to \$1,000.00 to pay for them.

[16] There was never an agreement as to how much money or material she would put in. She just put in because she was planning a life with the respondent and she wanted a better home and better surroundings.

[17] She did the washing, 95% of the cooking and 100% of the cleaning. She kept most of the bills for the building materials.

- [18] She gave further evidence that the respondent got a loan from the Caribbean Broadcasting Corporation, his employer, to help cover the cost of the roof which was between \$10,000 and \$15,000.00. She paid \$200.00 per month towards that loan throughout the period during which the house was under construction.
- [19] The applicant gave evidence that she purchased the bathroom fittings, tiles, bathroom sink and faucet; she purchased a double kitchen sink and all the tiles for the house. She also purchased four windows for the bedrooms, a double door for the living room and the window for the living room.
- [20] The respondent, she said, paid part of the cost of the electrical installation and she contributed. Most of the electrical fittings were purchased by the electrician, but she purchased the door bell.
- [21] She purchased the air conditioning unit for the master bedroom for \$500.00 and paid Knights Air Conditioning and Plumbing \$300.00 to \$400.00 for installation and wiring. The solar water heater she purchased for \$2,500.00 but the hire purchase charges brought it up to \$2,973.75. Custom made drapery for the house was purchased by her at a cost of \$3,460.00.

- [22] The applicant kept an account of moneys expended and items purchased for the property which was put into evidence by consent.
- [23] Under cross-examination, she agreed that she left the respondent voluntarily. The applicant said that the title to the land on which the house at Park Road was built was vested in his nieces. She was aware that the land was family land since 1996 and she was also aware that she was putting money into a building which she knew was on his family's land.
- [24] She had lived overseas for a period of some 28 years from 1968 until 1996 when she returned to Barbados to live. She and the respondent were involved in a relationship when she was aged 17 and she left Barbados to reside in Canada and the respondent went to England. She would visit him in England. That relationship lasted 4 or 5 years.
- [25] When she returned to Barbados in 1996 she lived at his mother's house at Sealy Land, Bank Hall, St. Michael.
- [26] She reiterated that she made a significant contribution to the house at Park Road, and said that the respondent contributed about 60% in the concrete building, whilst she paid for practically 90% of

everything else in the house. The exterior of the house is still not painted.

[27] There was a plan to put a trowel plastic finish on the exterior of the house. She took away six buckets of trowel plastic when she left.

[28] When she left she took away the living room suite, 26-inch flat screen colour television, living room suite, crystal chandelier, pots, pans, dishes, glasses, linens and some of the custom-made curtains. All of the things she took away, she considered to be hers. She left the dining room table and four chairs, two armchairs, refrigerator, stove and washing machine, television on a stand and a queen-sized bed on four cement blocks, ceiling fan, sheets, pillow cases, spoons, forks. She brought in a microwave. She stated that she left him those things because she was being kind to him. She said that she tried to keep records and the respondent did too, and that some of the bills, e.g., the stone, sand, and other materials have on the respondent's name.

[29] She denied counsel's suggestion that the fact that a name is on a bill is not necessarily a reflection of who pays it.

[30] The applicant said she had misgivings about returning to Barbados but the respondent encouraged her to return. The discussion about

building a house did not take place before she returned to live, but afterwards.

[31] The respondent showed her the plans for the house and they mutually agreed to build it without going to the bank. She denied the suggestion that the respondent told her he would sell his land and she should keep hers. But she agreed that she bought her land.

[32] The applicant in cross-examination said that she would say that she and the respondent did 50% each of the finished product, that is, the house at Bank Hall.

[33] In re-examination she stated that she lost her land at Fortescue to foreclosure because she was putting so much into the house at Park Road that she neglected to pay for the land. This land had been purchased after a suggestion by the respondent that she should own land in Barbados.

#### **The Respondent's evidence**

[34] The respondent gave evidence that he started construction of the house at Park Road on his own and that he had submitted plans to the Chief Town Planner in 1994/95 when the applicant was living in Maryland in the United States of America. At that time he had not had any discussions with the applicant. He first told her about the

building of the house in 1999 when he was a patient at the University of Maryland Hospital. He told her that he did not know what was going to happen to him and that if he got sick, he wanted a place where people could come and visit him. He told her about the plans for the house because she was someone he trusted, he was in love with her and she was his girlfriend.

[35] His evidence is that he told her that she would not have to spend any money or sell her land nor cash in any of her investments in the United States of America and that he would pay the majority of the heavy bills. The conversation took place in Maryland where the applicant was visiting him. She had already returned to Barbados and was living at Sealy Land.

[36] The house construction started in 2000, and took about one and a half years to complete. It was done piecemeal. They lived in the house whilst constructing the new house around them. He disagreed with the applicant's contention that she spent substantial amounts of money on the construction. He stated that the applicant kept most of the bills and considered herself "the general secretary". He saw the bills but paid no attention to them.

[37] He agreed that he put money into the project which he considered to be theirs and not his alone after the applicant came to reside in Barbados. He agreed that she purchased tiles, trowel plastic and some fixtures. She contributed to the building of the main structure but had no idea of how much money. He estimated her contribution into the main structure at 25%. Sometimes her contribution was in cash.

### **The Law**

[38] The principles applicable to an application under **sections 56 and 57** of the **Family Law Act** have been settled by the Court of Appeal in **Proverbs v Proverbs (2002) 61 WIR 91** where the court identified a three step process namely:

- ( i) the net property of the parties must be identified and valued by the court;
- ( ii) the respective contributions of the parties within the terms of **section 57(3)** must be considered and evaluated;
- (iii) that **section 53(2)** factors, so far as relevant, should also be considered.

[39] In the absence of any evidence to the contrary, the court assumes that all the assets of the parties have been disclosed to the court.

There are:

- (1) House at Danesbury
- (2) House at Sealy Land, Bank Hall
- (3) Toyota Motor car

### **Contributions/Findings**

[40] I saw and heard the parties give their evidence in chief and under cross-examination. The plaintiff was confident, articulate and positive in giving her evidence. However, her calculations as to the percentage of her input into the construction of the house at Sealy Land, Bank Hall, differed when giving evidence in chief and when cross-examined.

[41] She gave evidence that the respondent contributed about 60% in the concrete building, whilst she paid for about 90% of everything else in the house.

[42] In cross-examination she said that she and the respondent did 50% each of the finished product of the house at Sealy Land.

[43] The respondent was less impressive in giving evidence. He was apprehensive and evasive in giving answers to the court. He gave

evidence that the applicant contributed about 25% to the construction cost of the main structure, yet he had no idea of how much money she contributed. He failed to keep bills and receipts and allowed the applicant to keep them. He was equivocal as to the extent of the applicant's contribution to the construction of the house. He admitted that she contributed in cash. In his affidavit filed 19th December 2008 he denied that the applicant assisted with the demolition and reconstruction of the house.

[44] In cross-examination he admitted that the applicant assisted with the construction of the house. He also said the applicant became a part of the building at the end in cross-examination. In examination in chief he said the house construction started in late 1990/91. "We started it (construction). We started it, myself and Victorine from 1990 ... Whatever I paid I considered 'it' – we."

[45] His viva voce evidence also differed considerably from the evidence given in affidavit filed on the 19<sup>th</sup> day of December 2008.

[46] In his affidavit he referred to the applicant's contribution to the property at Danesbury and the property at Bush Hall as minimal and he prayed the court to so hold. He further asked the Court to hold

that the applicant had satisfied her interest (in the Bush Hall house) by removing the entire contents of the said house.

[47] Mr. Wilkinson is a senior announcer with the Caribbean Broadcasting Corporation. He has lived abroad and is a man of experience. I find it difficult to believe that, having cohabited with the applicant for so many years and having constructed a house with her, he can have no fair idea of the contribution that she made.

[48] The minimising of her contribution to the acquisition of both properties accords with his evidence that he told her that he would do the heavy lifting or paying the heavier bills. However, his acknowledgement of a more substantial contribution is an acknowledgement that he has not been forthright with the court. It is also consistent with her evidence that she made a significant contribution to the construction of the property and its improvement by way of providing the finances and accoutrements which make a house a home.

[49] I am satisfied that he also made a significant contribution to the construction of the home especially in the areas of the foundation and the roof. The applicant acknowledges his substantial contribution to the house up to the ring beam level.

[50] I make this finding of fact in spite of the absence of bills or receipts on his part, since failure to provide bills does not mean that he did not expend his own moneys.

[51] I am satisfied that the money he received from the sale of the land at Gibbons was used to begin the construction and that some, if not all of it, was used in this endeavour.

[52] I am also satisfied that the applicant lost her land to foreclosure due to her inability to make payments because of her expenditure in the house. I bear in mind that the applicant removed substantial items from the house which she considered to be hers, but which, having regard to the manner in which the parties structured their domestic relationship, belonged to them both.

[53] In paragraph 6 of her affidavit filed on 6<sup>th</sup> August 2008 in support of the application the applicant deposed that:

Throughout the duration of the relationship I cleaned the house, cooked the meals and washed for both the respondent and myself. I was conscious of my obligation to the respondent as his companion and in this respect I saw to the personal and intimate needs of the respondent. I therefore made a significant contribution as a homemaker.

[54] This affidavit evidence remains unchallenged and I accept it as true. Some credit must be given to her for her contribution as a

homemaker. With respect to the construction of the roof, the respondent says that he received advances on his salary. The applicant says he took a loan which she assisted him in repaying. No evidence was led to substantiate the loan. No letters or documents in confirmation of the arrangement with his employers were put in evidence, when such confirmation could easily have been obtained.

[55] The applicant gave evidence that she transported blocks for the building in her car which was challenged by the respondent who said they were bought to construct a shed, or when the mason ran short of a few blocks. Common experience would show that in most circumstances blocks are normally delivered in bulk and not in the manner disclosed by the applicant. However, the respondent's acknowledgement that she did so for the purpose of constructing a shed or when the masons ran short, demonstrates to me that she was not being untruthful but may have misunderstood the purpose for which she had bought and transported the blocks.

[56] In all the circumstances, I am of the opinion and, I hold, that they both contributed directly and indirectly to the construction of the house equally.

[57] In all the circumstances of the case, I assess the contribution of the parties to the acquisition of the property and to its conservation at 50% each and I so declare under **section 56** of the **Family Law Act**.

**Chattel Dwellinghouse at Danesbury (the Danesbury property)**

[58] The applicant gave evidence that she was living in Washington in the United States of America when this house was purchased. She had been told about the intended sale by the respondent with whom she had a friendly relationship at the time. He told her that it was a chattel house with potential, and it was worth about \$15,000.00. She sent U.S. \$5,000.00 after he asked her to send some money to assist with the purchase. An agreement was drawn up for the purchase and, by an addendum, to the agreement she was made a joint owner. The agreement ('the agreement') is dated 17<sup>th</sup> July 1991. She paid one half of the insurance and the respondent paid the other half. She stated that the respondent helped renovate the house and added on a toilet and bath. She has never received any money from the rent yielded by this house, which, she said, was rented up to a year ago.

[59] The respondent's evidence was that it was purchased for \$12,000.00 or \$15,000.00 and that she contributed U.S. \$5,000.00 or \$10,000.00 Barbados dollars. He started renting the house about three months after its purchase. The house was constantly in need of repairs and the rent moneys were not enough to do the renovations. The excess moneys came from his pocket. The house is situated on tenantry lands but he could not recall the name of the owner of the tenantry. The agreement for sale and the endorsement of the applicant's interest in the property are now reproduced in this decision:

**“BARBADOS**

**No. 2410069**

**AGREEMENT**

THIS AGREEMENT is made this 19<sup>th</sup> day of July 1991 BETWEEN EULIE FRANCIS-NOEL of Danesbury, Black Rock in the parish of Saint Michael (hereinafter called “the vendor”) of the ONE PART AND PETER ATHELSON WILKINSON of No. 1 Sealy's Land, Bank Hall in the parish of Saint Michael in this Island (hereinafter called “the Purchaser) of the OTHER PART.

By the terms of this Agreement the Vendor hereby in consideration of the sum of Thirteen thousand five hundred dollars (\$13,500.00) the receipt whereof the Vendor hereby acknowledges agrees to sell and the Purchaser agrees to purchase ONE TWO BEDROOM CHATTEL HOUSE which at the time of the execution

of these presents is situate at Danesbury, Black Rock in the parish of Saint Michael in this Island.

The Vendor hereby in consideration of the said sum of Thirteen thousand five hundred dollars (\$13,500.00) GRANTS TO THE Purchaser full and complete title in the said chattel house along with full and complete rights of ownership and all the rights and privileges incidental to such ownership of the said chattel house.

The Vendor further warrants that the said chattel house is in sound condition and free of any defects at the time of sale and purchase of the said chattel house.

The Vendor also acknowledges that she has been in exclusive processing occupation of the lot or house spot on which the said chattel house is at the time of the execution of this Agreement located and hereby in the exercise of such title as she currently enjoys or may hereafter enjoy PERMITS the purchaser to allow the said chattel house the subject of this Agreement, to remain located on the same lot or plot or house-spot where it is currently located.

And the Vendor hereby agrees that she will do all things in her power subject to the Law of Barbados to permit the Purchaser to remain in uninterrupted possession of the said lot or plot or house-spot so as to permit him to enjoy the use of the said spot as the location for the said chattel house after his purchase of the said house.

The Purchaser for his part hereby undertakes not to do anything to prejudice or undermine any title to the house spot or plot on which the chattel house which is and will be located after this Agreement takes effect.

And the Purchaser hereby acknowledges the possessory title of the Vendor to the said lot, plot or house-spot and will do nothing to assert superior right

of title nor to assign, bequeath, devise, transfer, sell mortgage nor charge the said lot, plot or house-spot.

The Purchaser further pledges by his being a party to these presents not to cause WASTE of any kind to the said plot, lot or house-spot.

**THIS AGREEMENT** takes effect on the     day of             1991.

**IN WITNESS WHEREOF THE PARTIES** hereto set their hands this     day of             , 1991.

Signed by the Vendor in     )  
The presence of:             ) Sgd. C. FRANCIS-NOEL

Witness: MARGARET M BELLAMY  
Name: Margaret M. Bellamy  
Address: Grosvenor Road, Carrington Village, St. Michael.  
Calling or description: Secretary

Signed by the Purchaser     )  
In the presence of:             ) Sgd.: PETER A. WILKINSON

Witness: MARGARET M. BELLAMY  
Name: Margaret M. Bellamy  
Address: Grosvenor Road, Carrington Village, St. Michael.  
Calling or description: Secretary

**ADDENDUM**

I PETER ATHELSON WILKINSON herein known as the Purchaser in this Agreement do hereby on this date the eighth of September nineteen hundred and ninety-one acknowledge that VICTORINE P. GARVEY OF 4201 limekiln in Fort Washington, U.S.A. is a 50% owner (fifty percent) of the said two bedroom chattel house, situated at Danesbury, St. Michael and is

responsible for 50% of all costs involved in reparations and also 50% of all proceeds resulting in sale as a whole or part thereof, of the said chattel house.

#### **SIGNATURES OF OWNERS AND WITNESS**

#### **ANALYSIS OF THE EVIDENCE**

[60] The respondent in his affidavit stated that the property was purchased for \$18,000.00. The applicant deposed that it was purchased for \$18,000.00. The objective evidence in the form of the agreement and the addendum thereto paints a totally different picture. Of concern to the Court as well is the fact that applicant's evidence is that this house was purchased for \$18,000.00 (Bds.) of which she contributed \$5,000.00 (U.S.) or \$10,000.00 (Bds.). This has not been challenged. This house was purchased for \$13,500.00 of which the applicant contributed US \$5,000.00 or \$10,000.00 Barbados dollars. Her contribution to the acquisition of this property is 74% or about two-thirds, whilst that of the respondent is 26% or about one-third.

#### **Rent accruing from the Danesbury property**

[61] The respondent's evidence is that he collected the rent which was not always faithfully paid, and that it was used to execute repairs on the house which was continually in need of repairs. He said that he

had to have the plumbing fixed, the roof repaired and the house repainted. He was unable to give figures for these repairs but gave evidence that he had to put money from his own pocket to help with the repairs.

[62] I am not satisfied with this evidence. There is no evidence that the respondent even communicated to the applicant that the property, purchased as an investment, was unprofitable. He never once suggested to her that the property be sold to salvage their investment.

[63] If regard is had to the valuation of this property prepared by Mr. Stephen Wiltshire of Felicity Limited on the 20<sup>th</sup> April 2009 under the caption **4.4.3. condition**, the valuer opines:

“There is ample evidence of physical deterioration mainly because an adequate maintenance program has not been pursued. This is seen where the galvanized iron sheets on the roof are rusting; there are numerous water stains in the ceiling; in the eaves, sections of the boards are rotting and sections of the ceiling are missing; there is rotting wood in the sidings; there is peeling paintwork on the exterior; the timber floor is rotting and unstable in sections; some of the windows need servicing; there is termite activity. The house is in poor condition and needs extensive renovation works.” (Emphasis added).

[64] The house at Danesbury was valued at \$17,000.00 in 2009, having been bought for \$13,500.00 in July 1991. The opinion of the valuer

does not mesh with the evidence of the respondent. It is clear that the house has fallen into grave disrepair over the years. Had the moneys collected in rent been expended on the house, as alleged by the respondent, it ought to have been in a much better physical condition and its value either maintained or improved.

[65] The respondent was responsible for the maintenance of this house.

It is clear that no proper maintenance programme was ever really implemented and that the bulk of the rental income could not have been applied in the manner alleged by the respondent. I am more inclined to the view that all of the rent was not applied to the maintenance and improvement of the house as the respondent said in his evidence. I am of the view that some of the rent remained with the respondent and I so hold.

[66] No real figures have been presented to the court, but the law provides that I must do the best I can to arrive at some figure for the rental income. No assistance in this regard was forthcoming from the respondent and there was no real challenge to the applicant's assessment of the rental income or to Mr. Lashley's calculation of the gross rents from 1994 and 2010 at \$73,650.00 assuming a rental income of \$350.00 per month.

[67] Making allowances for the repairs mentioned by the respondent and the periods of time for which the premises were untenanted I will discount the rental income by 25% or \$18,412.50 which gives a balance of \$ 55,237.50.

[68] I have already adverted to the parties' direct contributions to the acquisition of this property through their respective contributions to its purchase. The applicant gave evidence that the respondent added on a toilet and bath to the house. No evidence was given as to the cost of this addition. However, it clearly is a direct contribution to the improvement of the house and some credit must be given to the respondent for it. I must also give some credit to the respondent for his limited conservation of the property since the evidence does not disclose that the applicant played any role in looking after the property. In the absence of any figures and also having regard to the fact that it was bought as an investment for both parties and taking into consideration their respective direct financial contributions to its purchase, I assess their respective interests in the property at 50% each.

[69] I would also, for the same reasons, assess the interests of the parties in the rental income at 50% to the applicant and 50% to the respondent.

[70] **Joint Account**

There was a joint account between the parties which had a balance of \$147,000.00 but the balance was now \$21,000.00. The applicant admitted that she never contributed to that account. She gave evidence that the respondent had put her name on his account when he was sick in May 1991.

[71] The applicant stated that she had withdrawn money from the joint account only once when the respondent had surgery overseas to purchase an airline ticket and that she had never deposited any moneys on that account.

[72] She further stated that when the respondent took her to the bank to sign on the joint account he indicated that she would be an equal partner with him in case anything happened to him and she needed money, which meant if he had died or if she needed additional moneys.

[73] There is no claim to a share in these moneys in the application. The applicant's counsel, in his written submissions, agreed that she did

not make any contributions to this account. A withdrawal was made to purchase a ticket for her to travel to the United States when the respondent needed to have surgery overseas. The Court has been invited to alter the interest of the respondent in the account if it is shown that the account was not a joint account and to provide a share in the balance standing to the account of \$147,000.00 prior to its depletion.

[74] This submission is based on her direct and indirect contributions to the acquisition of the Bush Hall property; her advancement of the major portion of the purchase price of the Danesbury property; her payment of all utility bills and purchase of 99% of the food for the home and her contribution as a home maker.

[75] Counsel seems to be relying on a form of estoppel which has not been articulated. He submits:

“The question is whether the Respondent could claim sole beneficial ownership in the circumstances of this case. What was the common relation of the parties on the one hand, and on the other hand whether the applicant has acted to her detriment on the basis of this common relation.

[76] The evidence of the applicant is equivocal on this point. She states that it was his intention to benefit her if he died but at the same time it appears that the account was established so that she could have

access to it for the purpose of looking after the respondent's affairs. Her conduct in not making withdrawals or not depositing moneys in the account are consistent, not with an intention to create a joint account, but with creating an account for the respondent's convenience. And so I hold. In the premises I am of the opinion, and hold, that the applicant has no interest in the balance standing to the credit of the account.

### **Motor car**

[77] The applicant gave evidence that she owned a Mazda motor car from 1997. It was giving trouble. She and the respondent purchased a car together but she backed out because the car was never available to her. The arrangement was for the deposit to be paid by the respondent and the \$800.00 monthly installment to be equally shared. She stated that she paid one installment of \$400.00 before backing out of the arrangement. She sold her Mazda motor car and the respondent turned over a 1992 Toyota (one of two that he owned) to her. The car is still in his name and she pays for repairs and road tax. It is valued at \$7,500.00. There is no evidence that the respondent relinquished ownership of the car to the

applicant. I therefore hold that the motor car is owned by the respondent.

[78] However, having regard to the applicant's unchallenged evidence that she paid for the repairs and taxes with no contribution from the respondent and her affidavit evidence that she paid \$2,500.00 two years ago to have the vehicle repainted together with other major work to it, even though no cost is given for the repairs over the years, she has contributed directly to its conservation, improvement and maintenance. I also take into account her contribution as a homemaker since one cannot divorce the issue of ownership of the car from the factual matrix of the relationship which existed between these parties. In all the circumstances, I believe that it is just and equitable to alter the respondent's interest in the car so as to vest a one-half share and interest in the applicant.

### **Furniture**

[79] The applicant gave evidence as to the items of household use and domestic appliances which she purchased. The other items were personally purchased by the respondent. She gave evidence that she removed those items that she considered to be hers and left what she considered to be his.

In the context of a relationship which subsisted for years and two persons contributing to the building of a common life together, I do not think that one can divide these claims as the applicant seeks to do. I am inclined to the view and, I hold, that they contributed both directly and indirectly to the acquisition of these items. Therefore, I hold that the furniture and appliances are owned by the parties in equal shares.

**Law and Equity - The Bush Hall property**

[80] Mr. Thorne, for the respondent, submits that the applicant restricted her claim to a declaration under **section 56** of the **Family Law Act**.

It is his submission that the **Family Law Act** presupposes that the property in dispute belongs to either or both of the parties, since **section 56(2)** refers to “the existing title or right to property”. The dwellinghouse at Bush Hall was constructed on land which is owned by the respondent’s mother’s estate. Neither party, he opines, has any existing title or right to this property.

[81] It is counsel’s further submission that, although the applicant has not grounded her application under **section 57** of the **Family Law Act**, the application of that section still requires that the property be “the property of the parties ... or either of them.”

**Applicant's response**

- [82] In response to Mr. Thorne's submissions, Mr. Lashley Q.C. submitted that the **Family Law Act** was passed to redress the unjust situation created by decisions such as **Pettit v Pettit 1970 AC 777** where the legal estate was normally vested in one person, generally the husband, and the wife had to pursue a claim in equity. He further submits that Courts of Equity will come to the assistance of the applicant in this case.
- [83] Counsel further submitted that, if there was a ruling that neither party was entitled to the dwellinghouse at Bush Hall and that it was owned by the estate of the respondent's mother, the only person who would lose would be the applicant since the respondent would remain on the land of his mother's estate.
- [84] It is his submission that the applicant was encouraged to build on this land and to put her money into it with the assurance that she would suffer no detriment in the future. They were not warned against spending their money on the property. He relied on the case of **Maureen Griffith v P Griffith No 42 of 1984 [Barbados]**.

[85] With reference to the Danesbury property, Mr. Lashley submitted that there was an agreement drawn up for the purchase of the house which set out their interests.

[86] It is his submission that the Court has to make a finding in respect of the agreement. Counsel also submitted that under **section 60** of the **Act** the Court must bring finality to the proceedings between the parties. That even though there was no **section 57** application, there was no prejudice to the respondent and the Court may proceed. He relied on **Macuso v Macuso 1982 FLC 91-252**. Counsel submitted that he could make an application to amend his application to include a **section 57** application. Mr. Thorne said he would have had no objection to such an application, however, the application was never made.

#### **Law and Equity - Danesbury Property**

[87] In a similar argument, Mr. Thorne submits that the application is brought under **section 56** of the **Family Law Act** and not **section 57** thereof.

[88] Since no alteration is sought under **section 57** his further submission is that the applicant must establish her claim according to the principles of trust.

[89] The considerations for alteration of interests revolve largely around contribution; however, **section 56** does not import these considerations counsel further submitted.

[90] Reference was made by counsel to **Family Law** by *Anthony Dickey pg. 636* where the author states:

“The power conferred upon courts by subsection (1) is limited to declarations of title and rights according to ordinary rules of law and equity. It does not enable a court to vary the interests of spouses in their property according to notions of justice or fairness”.

[91] Counsel, therefore, submits further that the applicant must prove the creation of a trust and must adduce evidence of it, which she has not. He opines that she has restricted her evidence to the issue of contribution.

[92] Counsel also cites “**Equity and The Law of Trusts**” by **Philip & Pettitt 4<sup>th</sup> Ed at 35 et seq**, where the author writes:

“Lord Langsdale’s judgment in **Knight v. Knight (1840) 3 Beau 148** is frequently referred to as setting out the proposition that in order for a trust to be valid the “three certainties must be present: Certainty of words, certainty of subject and certainty of object”.

[93] He posits that the applicant has not proven these essentials which are absent from the transaction concerning the expenditures on the property at Danesbury.

[94] Further, he submits, the court is not empowered to declare any interest according to notions of justice or fairness. Thus, the claim for a declaration with respect to the Danesbury property must fail.

[95] The property at Bush Hall has been constructed on lands which are the property of the estate of Aletha Algernie Chase deceased (the deceased), the mother of the respondent. The house and land being one, he also submits, cannot be the subject of a declaratory order under *section 56* of the **Act** since **section 56(3)** precludes any order in relation to the property of third parties. Finally, counsel submits that there is no claim under **section 57** of the **Act** and no alteration can be made by the Court since the applicant is bound by her pleadings.

[96] A copy of the will of the deceased dated the 24<sup>th</sup> day of July 1990 and the grant of probate dated 21<sup>st</sup> March 1991 which was issued on the 12<sup>th</sup> day of April 1991 were handed to the court. Mr. Samuel Wilkinson, the brother of the respondent gave evidence as to the ownership of the real property. He and both counsel opined that the property was left to the nieces of the respondent.

[97] The devise in the will reads as follows:

“I GIVE AN DEVISE my two parcels of land situated at 4<sup>th</sup> Avenue Park Road, Bush Hall in the parish of

Saint Michael unto my son the said SAMUEL WILKINSON and my grandchildren JOY ELIZABETH WALTON TRACEY ANGELA WALTON and KAREN LAURA WALTON in equal shares for their own use and benefit absolutely.”

## DISCUSSION

- [98] My interpretation of that devise is that the property has been left to Mr. Samuel Wilkinson and the three named granddaughters and not the grandchildren alone as counsel submitted.
- [99] It is beyond doubt, therefore, that the estate of **ALETHA ALGERNIE CHASE** deceased (the estate), has an interest in the land on which this substantial dwellinghouse has been constructed. Mr. Samuel Wilkinson, therefore, like his nieces is affected by the construction of this house on land willed to them. They are the beneficiaries of this property under the devise.
- [100] Though not fully articulated, it appears that Mr. Thorne’s submission is that the dwellinghouse belongs to the estate since it was built on the estate lands under the principle **quicquid plantatur solo, solo cedit (whatever is affixed to the soil belongs to it)**. In other words, that the dwellinghouse which the applicant and respondent have constructed, being permanently attached to the soil or property of the estate, is the property of the estate. Whilst

this is the position at law, equity took a different approach. Equity developed the doctrine of proprietary estoppel which protects the interest of persons who, like the applicant and respondent, have built substantial dwellinghouses on the property of others or who have expended considerable sums on the property of others with their consent or approval.

[101] In **Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd**

[1979] ... Oliver J put the principle in these words:

“If A under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a Court of equity will compel B to give effect to such expectation.”

### **Law and Equity**

[102] **Section 37** of the **Supreme Court of Judicature Act Chapter**

**117A of the Laws of Barbados** provides:

“Subject to the express provisions of any other enactment, Law and equity shall continue to be administered by the High Court in accordance with sections 38 to 46 in every civil cause or matter commenced in that court.

[103] **Section 38 (1)** provides:

“The High Court and the Court of Appeal respectively shall give the same effect as heretofore –

- (a) to all equitable estates, titles, rights, remedies, reliefs, counter-claims, duties and liabilities, and
- (b) to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by common law or by any custom, or created by any statute;

and both courts shall ensure that as far as possible and subject to any enactment, including subsection (2) to the contrary, all matters in dispute in a cause or matter before those courts can be completely and finally determined without further proceedings in respect thereof.”

[104] **Section 39** of the **Supreme Court of Judicature Act** provides that:

“The High Court or the Court of Appeal shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing ... in the course of any cause or matter, and still give the same effect thereto as heretofore.”

[105] **Section 40** provides that:

“Subject to the express provisions of any other enactment, the rules of equity shall ...

- (a) ..., and
- (b) generally in all matters not particularly mentioned in this Act, in which there was or is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter.”

**Section 15 (1)** created three divisions of the High Court namely; the

Civil, Criminal and Family Divisions and **section 15(3)** provides that the jurisdiction vested in the High Court in its Civil Division or Family Division belongs to those Divisions alike.

[106] The net effect of these provisions is that it is unnecessary for the applicant to mount a new action in a court of equity, as submitted by Counsel for the respondent, since that jurisdiction is vested in this court under the **Supreme Court of Judicature Act**.

**Evidence of Mr. Samuel Wilkinson**

[107] Mr. Samuel Wilkinson gave evidence that he was the brother of the respondent and was aware that the applicant was his girlfriend. He also gave evidence that they built a house together on land which was owned by his deceased mother who died in November 1989. He was the sole executor of his mother's will and his mother made him totally responsible for the land which was willed to three grandchildren who are all alive. The estate, he said, was not administered.

[108] The effect of this testimony is that the executor of the estate who is also a beneficiary of the estate was aware of the building of the house on the land. Nothing was done by the estate to prevent it. In

other words, the estate acquiesced in the applicant and respondent building their home on the land.

In these circumstances, it would seem wasteful for the court to now send the applicant away to mount a fresh action against the estate which knew of these proceedings through Mr. Samuel Wilkinson, the executor, who came to this court and gave evidence. The estate should have, either before or after the executor gave evidence, sought leave to intervene so as to have its interest in the land declared and/or quantified.

[109] The phenomenon of persons building substantial buildings on other people's lands raises itself very often in this jurisdiction.

[110] In **Maureen Griffith and Percil Griffith** family case No. 42 of 1984 the parties were married in 1965 and had constructed a dwellinghouse on lands situated at Cole's Cave, St. Lucy on lands allegedly given to the respondent Husband under the will of his mother Larintha Griffith dated the 10<sup>th</sup> March 1967 which had not yet been probated at the date of the action.

[111] During the proceedings it was discovered that the land in question was not the land to which the respondent was entitled but rather, belonged to Harold Griffith, the respondent's uncle. This was

evidenced by an affidavit of John Peterkin, Land Surveyor, which was filed in the proceedings, both the applicant and respondent subsequently acknowledged this fact. The uncle had not intervened in the proceedings. Leave had been granted to the husband's mother to intervene as she claimed ownership of the house.

[112] **The Honourable Sir. Denys A. Williams**, Chief Justice (ag.) dealt with the issue thus, he said:

“This affidavit, supported by that of John Peterkin, Land Surveyor, of February 12 1986 revealed that the house was constructed not on land left to the respondent under his grandmother's will, but on land to which the respondent's uncle, Harold Griffith is beneficially entitled and this is now admitted not only by the applicant but by the intervener. Whatever rights the applicant, the respondent or the intervener have in the property are now subject to the rights of Harold Griffith and any relief/grant would be subject to the rights of Harold Griffith”.

[113] I am of the opinion that this approach achieved the objectives of bringing the proceedings between the parties to an end; preserving whatever right the estate has in the property so that the estate was not disadvantaged and saving costs to the parties and I will follow that formula in this case.

### **Saving cost to the parties**

[114] It is clear, therefore, that the parties by virtue of their expenditure on this dwellinghouse, have built up a substantial equitable interest in this property subject to the rights of the respondent's mother's estate. The words "existing right or title" referred to in **sections 56 and 57** of the **Act** are not limited to legal rights. Certainly, the word 'title' would suggest a legal title, but one may, in lieu, have a possessory title or a proprietary interest under the doctrine of proprietary estoppel. I therefore see no good reason why I should decline to make the declaration sought and cause the applicant to mount a new cause of action against the estate.

[115] In the circumstances, I will not make a **section 57** order in respect of the title to the land since to do so would adversely affect the rights of the estate which has not been represented in these proceedings.

### **Procedure**

[116] The court is of the view that Mr. Thorne's submission ought to have been made either in limine or earlier in the proceedings so as to allow notice of the proceedings to be served on the estate. This

would have facilitated an earlier disposition of this issue and would have allowed the estate to be heard.

**Section 56 procedure versus section 57 of the Family Law Act**

[117] Having regard to my ruling that it is appropriate to make declaratory orders, I do not propose to go into the submissions of counsel on this aspect of the case in depth. Suffice it to say that the courts of Barbados have already ruled that the failure to file an application under **section 57** of the **Family Law Act** is no bar to the court exercising its jurisdiction under that section.

[118] In **Franklin v Franklin No. 240 of 1982** the wife brought her application under **section 56** of the **Act**. *Douglas, CJ* The judge noted, however:

“It seems to me that in this case where either party had acquired property during the union and subsequent marriage that a section 57 application would have been more appropriate. But neither side has been prejudiced because the assets owned by each of them have been exhaustively examined, and their financial needs and obligations and other circumstances have been put before the court”.

[119] The learned Chief Justice then went on to take into account the considerations under **section 57 3(b)** of the **Act**, but made an order for a lump sum payment in lieu of an alteration. The court, therefore, sees no merit in Mr. Thorne’s submission that the court

cannot make a **section 57** order in these circumstances and it is accordingly dismissed.

[120] In this matter the applicant has left the home at Bush Hall, she is paying rent elsewhere; the respondent continues to reside in the said home on land of his mother's estate. I am of the opinion that to order the respondent to pay the applicant a lump sum payment representing her interest in the home would be just and equitable and obviate the need for further litigation in this matter.

### **DISPOSAL**

[121] In the premises the court makes the following declarations:

1. That the relationship which existed between the applicant and the respondent from 1996 to 2007 was a union other than marriage within the meaning of **section 39** of part 5 of the **Family Law Act** of Barbados.

And it is also declared under **section 56** of the **Family Law Act**:

2. That the applicant and the respondent are each entitled to a 50% share or interest in the property situate at Bush Hall, St. Michael subject to the rights of the estate of Aletha Algernie Chase in the said land;

3. That the applicant and the respondent are each entitled to a 50% share or interest in the chattel property at Danesbury, Black Rock, St. Michael;
4. That the applicant is entitled to a 50% share in the net rents accrued from the property at Danesbury, Black Rock, St. Michael assessed at \$27,618.75.
5. That the applicant has no interest or right to any share in the joint account in the names of the applicant and the respondent;
6. That the applicant and respondent are equally entitled to the household furniture, appliances and effects formerly the contents of the house situate at bush Hall, St. Michael.

And it is ordered:

7. That the respondent do pay to the applicant a lump sum of \$75,000.00 representing her one half share or interest in the property situate at Bush Hall, St. Michael on or before the 30<sup>th</sup> day of September 2011.
8. That the respondent do pay the applicant the said sum of \$27,618.75 representing her share of the rents on or before the 30<sup>th</sup> day of September 2011.

9. If the said sums of \$75,000.00 and \$27,618.75 are not paid by the date specified then the respondent will pay to the applicant interest on the outstanding balances from the date due for payment until actual payment at the rate of 6% per annum.
10. That the respondent's interest in the motor car is altered so as to vest a one-half share or interest in the applicant.
11. That each party shall bear their own costs.

**William J. Chandler**  
Judge of the High Court.