

A
GREEN AND OTHERS v GREEN †

Court of Appeal: Gleeson CJ, Mahoney and Priestley JJA

7, 8 June, 11 October 1989

B *Trusts and Trustees — Constructive trusts — De facto relationship — Promise of home — Home provided in name of nominee — Cohabitation and children of relationship — De facto husband dies — Common intention in respect of proprietary interest — De facto wife acting to detriment in relation to joint lives — Common intention reflected by joint holding of property.*

C *Trusts and Trustees — Constructive trust — De facto relationship — Significance of relationship — Consideration of relationship not contrary to public policy.*

D The parties had lived in a de facto relationship since 1966 when the de facto husband brought the de facto wife (then a minor) to Australia from Thailand, set her up with accommodation, provided for her maintenance, and persuaded her not to return to her home with promises that he would care for her, that they would have children and that he would provide a house for her. In 1969, the de facto husband purchased a house property at Kirrawee in the name of a nominee, telling the de facto wife that “this is your house, I bought this for you”. The parties and their two children then lived in this house until 1975 when the de facto husband persuaded the de facto wife to move from the Kirrawee house to a house in Blakehurst by telling her, inter alia, that the Blakehurst house would be hers and shortly thereafter he repeated that promise to her and his solicitors and instructed his solicitors to set about transferring title to her. The de facto husband died in 1981, without having transferred the Blakehurst property, and the de facto wife sought declarations that she was the beneficial owner of the Kirrawee property or the Blakehurst property and an order for possession. The trial judge found that there was a constructive trust and declared that the Blakehurst property was held on trust by the registered owner for the estate of the de facto husband, and that the estate was subject to a trust in favour of the de facto wife to permit her to reside there during her lifetime.

E On appeal and cross-appeal,

F *Held:* (Mahoney JA dissenting) A constructive trust had been established: the de facto husband had over the entire period of the relationship represented to the de facto wife that it was his intention that she should have some form of proprietary interest in the homes provided for her and following the move to the Blakehurst property, it was the common intention of the parties that the de facto wife should have a proprietary interest in the Blakehurst property; the de facto wife had acted to her detriment in relation to their joint lives on the faith of the relevant promises or representations.

G The conclusion which best gave effect to the intention of the parties, in all the circumstances, was that at the time of death of the de facto husband he and the de facto wife were beneficially entitled to the Blakehurst property as joint tenants thus giving the de facto wife the absolute beneficial ownership of that property by right of survivorship. (356A-359D)

† [EDITORIAL NOTE: An application for special leave to appeal to the High Court has been filed.]

would look after her, pay her expenses, and arrange for her education. She had no parents and was living with her grandmother. She agreed to come to Australia. When she arrived in Australia the deceased at first put her up in a motel room and later arranged for her to board with another lady of his acquaintance, Mrs Partington. She was provided with a little schooling. She could not write English although she could read a little. The deceased visited her regularly and their sexual relationship continued. In due course she began to menstruate, and then fell pregnant. Ultimately she had two children, one who was born in 1968 and another who was born in 1972.

By the time the deceased died in 1981 the various women and children in his life had become aware of the existence of one another. Exactly when and how that occurred is not entirely clear. The respondent gave evidence that when she came to Australia in 1966 the deceased had told her that he had a wife and children, but that he was separated from his wife and intended to marry the respondent when his children reached adulthood. It appears, however, that the deceased's wife did not learn about the respondent until quite late in the piece. The respondent gave evidence that she learned about the deceased's other de facto wife, Margaret Green, in around 1976, at about the time of the move to Blakehurst to which reference will later be made. Margaret Green, for her part, said she first learned of the respondent's existence in about 1977 or 1978. She had been aware of the existence of the deceased's lawful wife and children at all material times.

The deceased appears to have maintained simultaneous domestic establishments with all three women and their respective children. In terms of division of his time he appears to have given preference to Margaret Green, but it seems that he spent two nights a week, regularly, with the respondent and, at least according to her evidence, gave what she regarded as a plausible explanation of his absences. Presumably, over a number of years, he managed to achieve the same result with the other women. This is consistent with his apparent success as a used car salesman.

At the time of his death the deceased owned, or had an interest in, five residential properties. The first three of these were not in dispute in the present proceedings. First, there was a house and land at 4 Parkview Grove, Blakehurst, which was owned in equal shares by the deceased and his wife and the deceased's parents. Secondly, there was a home unit known as 11/2 Arthur Avenue, Cronulla of which the registered proprietor was the deceased's wife Beryl Green. It has been referred to as "Beryl's unit". Thirdly, there was a house and land at 236 Terry Street, Connells Point, of which the registered proprietor and occupier was Margaret Green. It has been referred to as "Margaret's home", and it is where the deceased from time to time resided with Margaret Green and their children. The two other parcels of real estate were in dispute in these proceedings, and they have been referred to respectively as "the Kirrawee property" and "the Blakehurst property". The former piece of real estate is a house and land known as 34 Gundain Street, Kirrawee, and the latter is a house and land known as 683 Princes Highway, Blakehurst. At the time of the death of the deceased the registered proprietor of the Kirrawee property was one Cecil Milton Crealy, who claimed no beneficial interest and originally acquired the property as nominee at the request of the deceased. The registered proprietor of the Blakehurst premises was Robert William Green, who is the eldest child of