

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2007 HCV 04845

BETWEEN PAULETTE GORDON CLAIMANT
AND VINCENT GORDON FIRST DEFENDANT
AND ROHAN ALPHANSO GORDON SECOND DEFENDANT

IN CHAMBERS

Burchell Brown for the claimant

Leila Parker for the defendant

December 8, 2008 and April 7, 2009

APPLICATION UNDER THE PROPERTY (RIGHTS OF SPOUSES) ACT -
SECTIONS 2, 4, 6, 8, 10, 11, 13 AND 14 OF THE PROPERTY
(RIGHTS OF SPOUSES) ACT - WHETHER APPLICATION CAN BE MADE
UNDER SECTIONS 11 AND 13 - WHETHER SAME PRINCIPLES IN
RESPECT OF SPOUSES APPLY UNDER BOTH SECTIONS - SETTING
ASIDE OF TRANSACTION - FACTORS CONSIDERED - MEANING OF
SEPARATION AND NO REASONABLE LIKELIHOOD OF
RECONCILIATION

SYKES J.

1. Mrs. Paulette Gordon is the second wife of Mr. Vincent Gordon ("Vincent"). Mr. Rohan Alphanso Gordon ("Rohan") is the son of Mr. Vincent Gordon by his first wife. Mrs. Gordon has applied, by way of fixed date claim form, for a number of orders. The main ones are that she is entitled to a half interest in property registered at volume 110 folio 960 of the Register Book of Titles and that Rohan's name be removed from the title. The civic address is 7 Outlook Avenue. The other orders are consequential orders that may be made if she is

successful in her claim. The claim is vigorously resisted by Vincent and Rohan. I use the first names of the defendants in order to differentiate between them.

2. In this claim there were several affidavits. On enquiry, I was told that the parties are relying on the following affidavits: the affidavit of Mrs. Gordon, filed May 14, 2008; the affidavit of Vincent filed April 23, 2008; and the affidavit of Rohan dated October 24, 2008.

Does the claim fall under the Property (Rights of Spouses) Act?

3. Mr. Brown, counsel for Mrs. Gordon, submitted that the Property (Rights of Spouses) Act ("PROSA") applies to this application. This submission is not accepted by Mrs. Leila Parker, counsel for Vincent and Rohan. Therefore, the first issue for me is whether this claim falls under PROSA. In order to determine this issue I must examine the Act in some detail.
4. PROSA was passed in 2004 but only came into force on April 1, 2006. Section 13 (1) of the Act entitles a spouse to apply for a division of property under the legislation if any one of the four trigger events listed in the provision arise. Section 13 (2) provides a time period within which the application is to be made provided that section 13 (1) applies. Section 13 (2) also gives the court a discretion to enlarge time to make the application. Section 13 (1) and (2) state:

(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 grant 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

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful 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 a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant

5. I must also consider section 11 (1) which states:

Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides. (my emphasis)

6. Before looking at these two provisions more closely, I must refer to two definitions. Section 2 (1) defines "family home".

"family home" means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly

or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor, who intended that spouse alone to benefit.

7. Property in section 2 (1) means:

Any property real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled.

8. In section 2 (1), property is given a very wide meaning and definitely includes the family home as defined in section 2 (1). On the face of it, there is overlap between sections 11 (1) and 13. Section 11 is saying that it applies to any question as to title or possession of property between the spouses in relation to property. There is nothing in section 11 (1) that excludes "family home" from the definition of property for the purposes of that section. Thus section 11 (1) applies to the "family home." Section 13 permits spouses to make an application to determine property rights and the wording of section 13 with its reference to "property" undoubtedly, like section 11, covers the family home. Do these two provisions cover the same ground? This is an important question which I shall attempt to answer.
9. In answering this question, there are some important points to bear in mind. First, under section 13 only spouse can apply. Second, under section 11 any one can apply including spouses.
10. The key word in section 11 is "subsistence." An application can be made under section 11 by a spouse or any other person only during the subsistence of the marriage or cohabitation. Subsistence means continuing to exist or to live. There are legitimate reasons why a spouse may wish to have their property rights determined while the marriage or cohabitation subsists. Let me give a few instances in which this may be desirable. One circumstance may be where one

spouse is bankrupt and the creditors are seeking enforcement against the family house or other property. The other spouse may wish the court to declare their interest so that her proprietary interest is not taken by the judgment creditor or trustee in bankruptcy. Another instance may be that one spouse is a career criminal and has fallen into the clutches of the Proceeds of Crime Act. An order may be made under that Act which necessitates a determination of the criminal's interest in the family home or other property. Another circumstance may be that a spouse has died intestate and it is necessary to determine the extent of his estate.

11. Section 13 is limited to spouses because that section is directed at preserving the right to apply for a determination of property rights after the marriage has ceased to subsist.
12. I am now going to look at the trigger events in section 13 (1) to see how they relate to section 11. I shall take them in the order listed in the section. It would appear that for the purpose of maintaining separate circumstances of operation for sections 11 and 13, then a decree nisi must be regarded as making the marriage no longer "subsisting" for the purposes of section 11, even though the marriage has not been fully dissolved and will not have been completely dissolved until the decree absolute.
13. Going now to the second trigger event, it's obvious that a decree of nullity clearly means that the marriage no longer subsists. This needs no further comment or analysis.
14. Moving now to the third trigger event. It has to be noticed that there are two conditions that must be met. There must be (a) the separation and (b) no reasonable likelihood of reconciliation. This trigger event will be, at times, an intensely factual question. It is entirely possible that parties may separate but they have not separated long enough for the court to conclude that there is no reasonable likelihood of reconciliation. Does this mean that if the spouses separate but there is uncertainty over the second part of the criterion that the court would not have jurisdiction? The answer is that the court would have jurisdiction because the marriage would still be subsisting and so the

application can be made under section 11 because section 11 does not have any precondition that has to be met.

15. The fourth trigger event speaks for itself and does not require much analysis.
16. The two provisions do not cover the same ground in all respects. It would seem to me that in case of doubt as to whether any of the trigger events of section 13 applies, then the application can be made under section 11 once, of course, the application is a spouse within the meaning of the legislation. It is also true to say that in some instances, the applicant may have a choice of proceeding under either section.
17. If an applicant has a choice of proceeding under either section, are the applicable legal principles the same where the applicant and respondent are spouses within the meaning of PROSA? Section 4 provides the answer. It reads:

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 provisions is made by the Act, between spouses and each of them, and third parties.

18. Once the application is properly under PROSA, then, so far as the rules of equity and common law would have applied, then those rules and principles are now displaced and the Act applies where the statute applies to the transaction between the spouses. Therefore, in relation to the family house, if the application is brought under section 11 the half-share default rule laid down in section 6 applies, unless it can be displaced under section 7. This is so because the rules of equity and common law would have normally applied to the acquisition of the property those rules have now been replaced by the statutory provisions.

19. The implication, for lenders and creditors is enormous, particularly when section 8 is taken into account. Once the asset being put forward for security is the family home, then subject to agreements made under section 10, or some other law, the institution knows that there is the risk that if only one spouse is the debtor and the other spouse is not a party to the agreement, that is to say, has not offered their interest as security as well, then the none borrowing spouse has, prima facie, a half share.
20. In the case before me, there is no evidence of any decree nisi or absolute being granted, and neither is there evidence of a grant of decree of nullity. No one has alleged that any of the spouses is endangering the property or diminishing its value. The expression "termination of cohabitation" under section 13 (1) (c) applies to unmarried co-habiting couples and not to married couples. Therefore, for section 13 (1) to apply, in this case, it must be established that the spouses have separated and there is no reasonable likelihood of reconciliation, assuming of course that the home in question falls within the definition of family home.
21. Is the disputed property the family home? In order to determine whether the property in question was the family home I must look at the evidence. The definition has already been stated. An important part of the definition is "wholly owned by either or both spouses." In the case before me, the evidence is overwhelming that 7 Outlook Avenue was bought by Vincent without any financial input by Mrs. Gordon. The legal title is solely in Vincent's name. The property was solely owned, at the time of its acquisition by Vincent.
22. Mrs. Gordon has never asserted that she bought or contributed to the acquisition of the property. She agreed that the mortgage was paid by Vincent. She did not assert that she paid any of the mortgage.
23. The evidence is that the parties lived at 7 Outlook Avenue from 1990, when the property was bought by Vincent, until Mrs. Gordon left. Vincent said that she left in 2004 and Mrs. Gordon is saying that she left in December 2007. The parties were married in 1999. The parties therefore lived at the home for nine years before the marriage and

after the marriage, they continued living there. Thus whether Mrs. Gordon left in 2004 or in 2007, what cannot be doubted is that 7 Outlook Avenue was the habitual and in fact, the only place of residence for Vincent and Mrs. Gordon, after they were married. I conclude that 7 Outlook Avenue is the family home within the meaning of that expression. It seems to me that, prima facie, the application is properly brought under the Act, if Mrs. Gordon left in 2007 and not 2004. By 2007, the Act would have been in force. If the separation took place in 2004, this would be before the Act came into force.

24. In an attempt to lay the evidential foundation for disapplying PROSA, Vincent alleged that he and his wife separated in 2004. He claims that Mrs. Gordon moved out and went to live with a male companion at Ocean View Avenue. Mrs. Gordon has denied this and insists that she moved out in December 2007.

25. A good way of testing Vincent's evidence in this regard is by examining documents which came into existence before the parties contemplated litigation. One of the most powerful items of evidence is a letter or notice to quit given to Mrs. Gordon by Vincent. Exhibited to Mrs. Gordon's affidavit is a letter dated November 9, 2007. It reads:

*Mrs. Paulette Gordon
7 Outlook Avenue
Kingston 2*

*Re: Gordon v Gordon [bold in original]
In view of the existing domestic situation which obtains at the house I shall be pleased if you would find alternative accommodation on or before the 15th December 2007. The house needs a complete refurbishing as you know it leaks. I need the Living Room (sic). Please regard this as a Formal Notice to Quit. [as in original]*

26. It is signed by Vincent Gordon. If it were the case that Mrs. Gordon had left from 2004, then this letter would not be necessary. This

letter is predicated on an acceptance of the fact that Mrs. Gordon was living at the house in 2007. If this is not so then using a November 2007 date does not make much sense. It has not been argued that the 2007 date is an error. Additionally, since Vincent is claiming that his wife lived at Ocean View Avenue why did he not use her Ocean View Avenue address? The best explanation for using 7 Outlook Avenue as the address is that Vincent knew that his wife was living at the stated address until she left.

27. I find that Mrs. Gordon made every effort to be as honest and as reliable as she could be. I am not saying that her memory was perfect but I did not get the sense that Mrs. Gordon was trying at all costs to secure an interest in the house. I was impressed by the fact that she did not seek to say that she contributed to the down payment or the mortgage. In fact, she willingly admitted that the mortgage was paid by salary deduction from Vincent's salary while he was working at a place known as PAMCo. She never tried to make her case stronger than it was. I therefore accept her evidence that she did not leave the house until December 2007. I do not accept Vincent's evidence that she moved out of the house in 2004.

28. By way of explaining why I rejected Vincent's evidence I wish to point out the following matters. At one point during the case, Vincent sought to make out that his wife had left him twice and took away his furniture before the marriage. When asked why he went ahead with the marriage in light of this behaviour, his explanation was that Mrs. Gordon was adamant that she was going to marry him and he simply went along with her plan. In other words, he was trying to make out that Mrs. Gordon dominated and controlled him to the point where he was helpless to resist her. He sought to say that she raided his house and took his furniture, not once, but twice. It is my view, that if this was an attempt at establishing some sort of duress, Vincent has failed. There is no credible evidence that his will was overborne by Mrs. Gordon. There is no evidence that he was not in control of his faculties at the time of the marriage. There is no reliable evidence that Mrs. Gordon so controlled him that he could not make an independent decision. I formed the view, having observed Vincent during the hearing, that he simply was making all effort to deny any

interest his wife may have in the property. He even went as far as saying that Mrs. Gordon threatened to poison him but he continued to eat meals prepared by her right up to the time she moved out of the house.

29. Vincent tried to create the impression, during the hearing, that his memory was not quite so clear but the persistence of Mr. Brown demonstrated that this was not the case. He was forced to admit that during the time Mrs. Gordon was at 7 Outlook Avenue, he did not employ a domestic assistant to cook or clean for him. This is against the background that Mrs. Gordon had earlier testified that she was the one who kept the house in good order, washed, cooked and cleaned. In short, she ran the house and looked after Vincent.
30. Toward the end of cross examination when it was clear that he was unmasked, he was asked, "Why [did] you put on Rohan's name [on the title] when things breaking down?" His reply was, "Ask Miss Parker [his counsel]. I have no reason." This is in sharp contrast to the reason given in his affidavit which was that, "It is my son who has had to finance most of these bills [light, water and medical bills] and in consideration thereof I have given him a one half-share in my house." Surely, he could not have forgotten that reason when he was cross examined. It seems to me that he was attempting, as submitted by Mr. Brown, to deny his wife's claim to an interest in the property.
31. In light of Vincent's unreliability on the circumstances of marriage to Mrs. Gordon; in light of the fact that he did not willingly admit, and literally had to be cornered into admitting that Mrs. Gordon ran the house, did all the domestic chores and looked after him; in light of his inconsistent evidence on the sub-issue of why Rohan's name was placed on the title; in light of the fact that he sought to lead the court to believe that he did not live with Mrs. Gordon before he was divorced from his first wife and light of the letter which contradicted his oral testimony, I am left with no choice but to reject his testimony on the issue of whether 7 Outlook Avenue was the family home.
32. At this point I have found that 7 Outlook Avenue was the family home and that Mrs. Gordon moved out in December 2007. The issue is

whether this moving out and the period before the application was filed is sufficient for me to say that the requirement of section 13 (1) (c) has been met, namely, that the parties have separated and that there is no reasonable likelihood of reconciliation. The fact that Mrs. Gordon has moved out does not necessarily mean that the parties have separated within the meaning of the statute.

33. Separation in a marriage is not withdrawing from a physical place but withdrawal from a state of affairs. In my view, the dictum of Watson J., although stated in the context of the Family Act of Australia, gives an accurate picture of what is meant by separation in the context of a marriage. His Honour said in *In the Marriage of Todd (No 2)* 25 FLR 260, 262

In my view "separation" means more than physical separation - it involves the destruction of the marital relationship (the consortium vitae). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed. What comprises the marital relationship for each couple will vary. Marriage involves many elements some or all of which may be present in a particular marriage - elements such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationships.

34. In examining the issue further I adopt the following passage from another Australian judge, His Honour Selby J. in *Crabtree v Crabtree (No 2)* [1964] ALR 820 as quoted by Wilczek J. in *In the Marriage of Batty* 83 FLR 153, 156:

[T]he question of consortium is ... a different matter from that of physical separation.

Consortium has been defined as a partnership or association; but in the matrimonial sense it implies much more than these rather cold words suggest. In (sic) involves a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse - all those elements which, when combined, justify the old common law dictum that a man and his wife are one person. It is not necessary that all these elements should be present to establish the existence of a matrimonial consortium; one or very few may exist and they may show that the matrimonial consortium has not been destroyed; that it is still alive, although in a maimed and attenuated form.

35. From these passages it is patent that establishing both limbs of section 13 (1) (c) of PROSA can be problematic. Parties may separate but they may have not separated long enough for it to be said, even on a balance of probability, that there is no reasonable likelihood of reconciliation.
36. The point that I am making is that in determining whether Mrs. Gordon and Vincent have separated and there is no reasonable likelihood of reconciliation cannot be determined simply by using the bald fact of Mrs. Gordon's departure from the family home in December 2007.
37. Mrs. Gordon in her evidence referred to sleeping in the living room. This seemed to have occurred sometime in 2007 but the evidence was not precise on when she began to sleep in the living room and more important, the reason for this. There is evidence of an amended petition for divorce being served on Mrs. Gordon on September 5, 2007. If this is so, then this would be strong evidence that Vincent had withdrawn from the marriage. The service of the petition, in the

absence of communication from Vincent to Mrs. Gordon, would have been the best evidence that he had withdrawn from the marriage.

38. Mrs. Gordon's evidence is that the relationship between herself and her husband was good until the arrival of Rohan and his family.

39. Rohan said that he went to live at the home in 2004. Mrs. Gordon said that problems with her husband arose soon after this because her relationship with Rohan was bad and her husband took sides with Rohan. Mrs. Gordon says, despite this, she lived with her husband and did not withdraw from the relationship.

40. Having regard to the fact that Vincent only added Rohan's name to the title by way of transfer registered on September 27, 2007, his consistent alignment with his son, the service of the divorce petition twenty two days before adding his son's name to the title, and finally, the letter in November 2007, it would seem that Vincent had decided to separate from the marriage before September 2007, but this was not communicated to Mrs. Gordon. The difficulty here is that Vincent's consistently taking sides with Rohan is not conclusive of the issue of separation. I think that the decisive evidence of Vincent's separation the service of the petition on September 5, 2007. I think that that date is the best date to be used as the date of separation.

41. Turning now to the second limb of section 13 (1) (c). The use of the word "reasonable" in the expression "no reasonable likelihood of reconciliation" imports an objective element. It cannot be established by the bald assertion of the parties. There would need to be evidence justifying the conclusion that reconciliation is not likely. It is for the court to decide based on the evidence presented that there is no reasonable likelihood of reconciliation. As I have said already time is important here. The initial act of separation is not conclusive of the matter. There has to be some passage of time before the conclusion that there is no reasonable likelihood of reconciliation can be reached. How long that time must be would necessarily vary from case to case since each marriage has its own characteristics and nuances such that what may in one case appear to be decisive, in another, may not have much significance.

42. It seems to be that the November letter put paid to any likelihood of reconciliation. Thus when Mrs. Gordon moved out in December, she seemed to have finally accepted that there was no possibility of reconciliation. Whether November 2007 or December 2007, is used as the time when it can be said that there was no reasonable likelihood of reconciliation is of no moment here because, this application was filed on May 14, 2008, well within the twelve month period set down by section 13 (2).
43. If I am wrong that November or December 2007 is the starting point to measure time for the purpose of determining that this application has been triggered by section 13 (1) (c), I am prepared to hold that this application could also be accommodated under section 11.
44. The reason for holding that section 11 is applicable here is that if none of the trigger events under section 13 (1) apply, then the marriage must necessarily be subsisting. There is no other position; under PROSA a marriage either subsists or it does not. This completes the first stage of the resolution of this case.
45. Having determined that the application is properly brought under PROSA, I now have to determine the extent of Mrs. Gordon's interest. Before I do so, I must examine Rohan's evidence because it fits conveniently here in the judgment.

Rohan's evidence

46. In his affidavit he swore that there was an agreement with Vincent that he (Vincent) would provide accommodation for Rohan and his family because of "the monies which my mother and my siblings gave him to assist in the deposit to purchase the house" and Vincent "therefore had an obligation to share the residence with us when it was convenient and possible so to do" (see paragraph 6 of Rohan's affidavit). He went on at paragraph 9 to say that he had an equitable interest in the property and his name was not placed on the title in order to deny Mrs. Gordon any right in the property.

47. It is not clear what this evidence is directed at. At first (para. 6), he seems to be saying that Vincent had an obligation to provide him with accommodation because of an agreement. He is not saying, at this point, that he gave any money to purchase the property. The money, he says, was given by his mother and siblings. If this is correct then he is not claiming an interest based on any financial contribution, by him, either to the acquisition of the property or its upkeep. It is not clear if he is saying that the mother and siblings have a proprietary interest which they gave to him. If this is what he is saying, then such a disposition would not be effectual for want of writing under the Statute of Frauds. He is not suggesting that he has a proprietary claim against his mother or siblings arising under trust or equitable principles.

48. Surprisingly, he asserts in paragraph 9 that he has an equitable interest in the property. It is not clear if he meant a proprietary interest or that it would be fair and just that he has an interest because his mother and siblings assisted the father to acquire the property so, it is only fair that he has a proprietary interest in the property. Assuming, that he is claiming a proprietary interest, the basis of this claim is not immediately obvious. The funding of meals and paying of bills could hardly be used to secure a proprietary interest in the property unless he is saying (which was not stated) he undertook those expenses and they were so significant that without him taking up these expenditures the defendant could not have paid the mortgage for the property.

49. According to the endorsements on the title, a mortgage was taken out on the property in 1990 and was discharged by December 19, 1994. There is no evidence that Rohan paid any of the mortgage, directly or indirectly, by assuming other expenditures. In any event, in re-examination, he said that he went to the property in 2004, some ten years after the mortgage was discharged.

50. It was in cross examination, for the first time, Rohan asserted that he personally provided any money to Vincent to acquire the property. Having said this, he also said that he did not help his father with a view to securing any interest in the property. He assisted simply

because Vincent was his father. If this is so, then he is saying that he made a gift of money to the father and this, clearly, cannot give him a proprietary interest in the property.

51. Rohan claimed, in his affidavit, that it was his wife who prepared the meals for Vincent (see paragraph 8 of affidavit). This, however, is contrary to the evidence of Mrs. Gordon and Vincent who both say that Mrs. Gordon provided the meals for Vincent until the very day she left the house in December 2007. Eventually, Rohan, under the pressure of cross examination, admitted that it was Mrs. Gordon who looked after Vincent's meals. I could not help but note that this admission came after Vincent was cross examined in Rohan's presence, and admitted this fact. It appeared that Rohan having heard this decided not to pursue that line of evidence.

52. Rohan added a startling bit of evidence. He claimed that his father had many female companions. These women would move in to the house when Mrs. Gordon and Vincent were living at Summerset Avenue, and later at 7 Outlook Avenue. According to Rohan, Mrs. Gordon was in the habit of moving out of the house for extended periods of time. She would be absent, on some occasions, for up to four months. This was never asserted by Vincent and was certainly not put to Mrs. Gordon. This seemed to be an attempt by Rohan to portray Mrs. Gordon in a negative light.

53. I found Rohan to be an unreliable witness and so I do not place much reliance on his evidence. I have formed the same view of Vincent.

What is the extent of Mrs. Gordon's interest?

54. Rohan's name is now one of the registered proprietors of the property. He would, on the face of it, have a legal interest in the property. I have examined Rohan's evidence in some detail to see whether I should exercise my power under section 8 to remove his name from the title. His role in the matter and how he came to acquire the interest must be relevant considerations in determining how the discretion under section 8 should be exercised.

55. At the risk of repetition, the extent of the beneficial interest in the family home is now determined solely by the provisions of PROSA. Section 4 makes this clear. If the application is properly under section 13 then what follows is the legislative scheme to be followed.

56. Section 14 provides:

(1) 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 and 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 paragraphs (a) and (b). (my emphasis)

(2) The factors referred to in subsection (1) are -

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisitions, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be the property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account. (my emphasis)

57. It is important to make an observation at this stage. Section 14 (2) only applies to property other than the family home. Where the property is the family home, then the court must apply sections 6 and 7.

58. Section 6 states that:

(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home -

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

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

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation.

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the

surviving spouse shall be entitled to one half-share of the family home.

59. So the new principle in relation to the family home under section 13 application is that on the occurrence of any of the events in section 6 (1), the spouse is, prima facie, entitled to a half share. This is the default rule.

60. Section 10 does not arise for consideration here because it deals with agreements made in contemplation of marriage.

61. To get from under the default rule, the spouse who wishes some other percentage distribution other than the default fifty/fifty rule has to bring the application under section 7. Section 7 states:

(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following -

(a) That the family home was inherited by one spouse;

(b) That the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) That the marriage was of short duration.

(2) In subsection (1) "interested party" means -

(a) a spouse;

(b) a relevant child;

(c) any other person within whom the Court is satisfied has sufficient interest in the matter.

62. The legislature accepted that the automatic half-share rule may not be fair in all circumstances, and so it empowered the court in section 7 (1) to vary this half-share starting point in respect of the family home on the application by an interested party. It seems to me that "application" in section 7 contemplates a formal one and not just an oral submission to the effect that the half-share rule should not apply. I say this because section 7 authorises an interested party to ask the court to disapply the half-share rule and when one looks at section 7 (2), one sees that the definition of interested party includes a relevant child and any person with a sufficient interest. As a matter of procedure, these persons could not simply turn up at the Supreme Court, which is a superior court of record, and make oral submissions to the court without filing documents setting out their contention.

63. In section 7 (2) spouse is included in the definition of interested party and would be a party from the outset and so an argument may be mounted to the effect that since the spouse is a party to proceeding from the beginning what I have said ought not to apply to the spouse with the same strictness. I would disagree with this because the spouse would be asking the court not to apply the default position stated by the legislation and in so doing, should set out the basis for the submission and of course, adduce evidence to support their position. The formal application to disapply the default rule in relation to the family home, would be, in relation to the applying spouse, much like a defence to a normal claim. It would give the other party notice that the court is being asked not to apply the normal rule and the ground on which such an application is based. This would give the other side sufficient notice so that they can adduce evidence, if they think fit, to rebut the application. I think that this is a fair way to go about it rather than have the application sprung on the other side at the hearing.

64. In the case before me, the defendants did not raise in their affidavits in response, or any other documentation, any factual foundation for me to vary the default rule if I found that the claim is within the Act.
65. Thus far I have shown what the position is in relation to section 13 applications. In the event that this application is properly under section 11, I need to identify the rules that are applicable to determine the extent of the beneficial interest of Mrs. Gordon under section 11.
66. It is my view that as between spouses, section 4 excludes the rules of common law and equity in property disputes where those rules would have applied and replaced them with the statutory rules. Indeed the Act has gone on to repeal those provisions (sections 16 and 17) of the Married Womens' Property Act ("MWPA") that enabled the court to determine the beneficial interest of property between spouses. Under the MWPA, the jurisprudence was that the rules of equity applied (see *Pettitt v Pettitt* [1970] A.C. 777). One of the main reasons for this conclusion was that the MWPA did not exclude the operation of the principles of equity. PROSA has now done that and established a default rule for the family home. It accept that section 11 of PROSA repeats in substance section 16 of the MWPA and I accept that section 11 did not say what legal principles apply to application under that section but it is quite clear that PROSA was enacting new rules for the determination of property rights between spouses. I make no comment on what rules apply to spouses and third parties because that is not an issue before me.
67. It is my view that when one looks at the preamble to PROSA which reads, "An Act to make provisions for the division of property belonging to spouses and to provide for matters incidental thereto or connected therewith", coupled with the repealing of sections 16 and 17 of the MWPA, the conclusion is inescapable that the legislature was sweeping away all the old law and replacing it with special provisions in relation to the family house so far as the dispute is between spouses.

68. It would be ludicrous in light of the clear words of section 4 to conclude that there is one rule for the family home under section 13 but another rule under section 11 where the disputants are spouses. Thus by necessary implication the default rule laid down in section 6 of PROSA applies equally to section 11 applications.

69. There is one final hurdle to be cleared before declaring the beneficial interest of Mrs. Gordon. The opening words of the family home definition are important. It says that the dwelling-house that is wholly owned by either or both of the spouses and used habitually as the only or principal place of residence. As already stated there is no doubt that 7 Outlook Avenue was used as the sole place of residence after the marriage and it was the family house. At the time of this application, the property was registered in the names of Vincent and Rohan. Because the property now has two names, it may be said that the property is not wholly owned by Vincent and therefore is not the family home.

70. It is my view that the definition of family home is referring to the time when the dwelling started being used as the family home and is not directed to what may happen after that point. This conclusion is supported by the fact that section 8 makes provision for setting aside transactions. This power was given because it was appreciated that a spouse who is the sole legal owner at the commencement of the time when the property became the family home may deal with the property in such a manner with the intention of defeating the half share rule. So the fact that the property is, at the time of the application, in a name or names other than or in addition to the spouse who, initially, was the sole owner, cannot, without more, defeat the operation of the Act. This is supported by the opening words of section 8. This could only be referring to the time at which the property became the family home.

71. Section 8 deals with transactions to defeat the interest of the spouse. Section 8 needs to be set out in full. It reads:

(1) *Where the title to a family home is in the name of one spouse only then, subject to the provisions of this Act -*

(a) the other spouse may take such steps as may be necessary to protect his or her interest including the lodging of a caveat pursuant to section 139 of the Registration of Titles Act; and

(b) any transaction concerning the family home shall require the consent of both spouses.

(2) *The Court may dispense with the consent of a spouse required by subsection (1) (b) if it is satisfied that consent cannot be obtained because the spouse is mentally incapacitated or the whereabouts of the spouse are unknown or consent is unreasonably withheld or for such other reason consent should be dispensed with.*

(3) *Where one spouse enters into a transaction concerning the family home without the consent of the other spouse then -*

(a) subject to paragraph (b), that transaction may be set aside by the Court on an application by the other spouse if such consent had not been previously dispensed with by the Court;

(b) paragraph (b) shall not apply in any case where an interest in the family home is acquired by a person as bona fide purchaser for value without notice of the other spouse's interest in the family home.

(4) Where by virtue of subsection (3) (b) a transaction cannot be set aside by the Court, the spouse whose interest is defeated shall be entitled to claim, out of the proceeds of the transaction, the value of that spouse's share in the family home.

72. The provision is designed to protect spouses who do not have legal title to the family home. The spouse who has legal title to the family home is prohibited, by law, from entering into any transaction regarding the family home without the consent of the other spouse. The court may only dispense with the consent of the other spouse where the conditions laid down in section 8 (2) are met.
73. The statute recognises that despite its efforts, a spouse may in fact enter into a transaction without the consent of the other spouse. If this happens, the court is empowered to set aside the transaction where the consent has not been dispensed with by the court. The section provides protection for the bona fide purchaser for value without notice of the other spouse's interest in the family home.
74. One of the remedies in the fixed date claim form is that the name of the defendant be removed from the title and that Vincent pays to Mrs. Gordon half of the rent collected each month (see paragraph 7 of fixed date claim form). This is an express application under section 8 (3) of PROSA for the transaction to be set aside.
75. On the facts before me, Rohan is not a purchaser for value. The notation on the title says the transfer to Vincent and Rohan is by way of gift. He is a volunteer, that is to say, he received an interest in the property without any valuable consideration. There is no evidence that court was asked to dispense with Mrs. Gordon's consent to the transaction in which Rohan's name was added to the title.
76. What this means is that if there is a bar to the court exercising its power under section 8 (3) (a) of PROSA to set aside the transaction it cannot be founded on the proposition Rohan is a bona fide purchaser for value without notice of Mrs. Gordon's interest in the family home.

77. Under section 8 (3) (a) the power to set aside the transaction is a discretionary one. The statute does not state the criterion or criteria which the court would use to set aside the transaction.

78. It would seem to me that given that the section was designed to protect the unsuspecting spouse from the guile of the spouse who has legal title, it would seem to me that once the unsuspecting spouse has established that the transaction was in breach of the provision and has asked for the remedy of setting aside the transaction, then it is up to the other spouse to indicate why this remedy should not be granted. Of course, there may be cases, where the evidence makes it obvious that such a remedy should not be granted. For example, it may be that the property has since the transaction been subject to other transactions that may make it very difficult to reverse the prohibited transaction. No reason has been presented for me not to grant this remedy.

79. There is no reliable evidence that Rohan acquired any proprietary interest by virtue of money expended in the upkeep and maintenance of the property pursuant to a promise made to him by his father that if he undertook these expenses he would receive an interest in the property. Rohan and Vincent have clearly decided to concoct an account to deny Mrs. Gordon her due.

The Remedies

80. I see no reason to decline the remedy of setting aside the transfer to Rohan. I order that the transfer by way of gift to Rohan registered on 27th day of September 2007 to Vincent Gordon and Rohan Alphonso Gordon be set aside. This means that the property is now to be viewed as standing solely in the name of Vincent Gordon.

81. On the evidence, which I have accepted, it is too plain that the house was purchased by Mr. Gordon to be used as the dwelling place for him and Mrs. Gordon, who at the time of the purchase was his girl friend. They lived together, without difficulty, for nine years before they were married. After the marriage in 1999, the property was still their dwelling place save that they were now married. It is obvious that until Vincent's son arrived at the property, he and Mrs. Gordon had no

problems that would suggest that the relationship was heading for a breakdown. It is true that at the time of the marriage the property was owned only by Vincent but they were living there for nine years before. This is a factor to be taken into account. This is different from a couple, who before the marriage had separate homes and then moved into a family home after the marriage. Therefore, even if one were to say that they were married for a short time before they separated, the actual relationship and the time they lived in the house was seventeen years. There is evidence that she regarded the house as her permanent place of residence. I accept that she contributed to the maintenance of the property. I accept that she spent the \$100,000.00 on the property. I also accept her evidence that the property was gradually improved over time by the efforts of both parties. In light of all this, I see no reason why Mrs. Gordon should not be granted the half-share and I so decide.

82. There is evidence to suggest that since Mrs. Gordon has moved out part of the property has been rented. This fact is reflected in the orders made.

The Orders

83. It is declared that:

the claimant has a half share in property registered at volume 1105 folio 960;

And it is ordered that:

- (1) the transaction transfer of property registered at volume 1105 folio 960 into the names of Vincent Gordon and Rohan Alphonso Gordon is set aside;
- (2) the property is to be valued by a valuator agreed by the parties and failing agreement, the Registrar of the Supreme Court is empowered to appoint a valuator and such appointment is binding on both parties;

- (3) each is to pay half of the cost of valuation;
- (4) each party has the right to purchase the share of the other within 120 days of the date of this order;
- (5) in the event that neither party is unable to purchase the share of the other the property is to be sold on the open market;
- (6) in the event that either party is purchasing the share of the other and in the event that the property is to be sold on the open market, in either case if any of party fails to or refuses to sign any document necessary to complete the sale whether that sale is the purchase of each others share or a sale of the property on the open market, the Registrar of the Supreme Court is empowered to sign and execute all documents necessary to complete the transaction as the case may be;
- (7) Vincent Gordon to account for all rents received in respect of rental of part of the property after December 2007 and on such accounting taking place, to pay half of that rent to Paulette Gordon.
- (8) costs to the claimant to be agreed or taxed;
- (9) liberty to apply