



[2014] JMSC Civ. 212

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. HCV 06078 Of 2010**

<b>BETWEEN</b>	<b>ELONIA SHIM</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MIGUEL SHIM</b>	<b>DEFENDANT</b>

**Ms Audrey Clarke instructed by Judith Clarke, for the Claimant**

**Ms Dianne Edwards for the Defendant**

**Defendant's written Submissions received June 2014**

**Heard on: 20<sup>th</sup> May 2013 and 17<sup>th</sup> December, 2014**

***Husband and Wife - Whether property is matrimonial property –***

***Couple married and lived in England – Subsequently returning to Jamaica –  
Defendant inheriting property – Application for division of property – Last will and  
testament of defendant disposing of contested property – Prior will naming  
Claimant as beneficiary – Divorce proceedings by Defendant aborted***

**CORAM: MORRISON, J**

[1] By way of Fixed Date Claim Form dated December 6, 2010 and filed on December 8, 2010 the Claimant sought the following declarations:

- a) that the Claimant and the Defendant are each entitled to fifty percent (50%) interest in the matrimonial property located at 82 Mannings Hill Road, Kingston 8 in the parish of Saint Andrew, Jamaica, registered at Volume 1167, Folio 278 of the Register Book of Titles in the name of the Defendant;
- b) An order that the Registrar of the Supreme Court is empowered to sign all or any other document necessary to give effect to the other orders herein;
- c) An order that the said property be valued by a reputable valuator mutually agreed between the parties, failing which a valuator shall be appointed by the Registrar of the Supreme Court;
- d) A declaration that either party shall be entitled to purchase the one-half share of the other within one hundred and twenty (120) days of the valuation of the said property or in the alternative the Defendant if he desires may convey/transfer the property to register the Claimant's interest thereon;
- e) An order that the said property be sold and the net proceeds of sale divided equally between the Claimant and the Defendant in the event that neither desire or is able to purchase the fifty percent (50%) interest of the other;
- f) In the alternative a declaration that the Claimant is entitled to an equitable interest in the said property at 82 Mannings Hill Road, Kingston 8 in the parish of Saint Andrew;
- g) An order that the Claimant is to be compensated by the Defendant to the extent of her equitable interest in the said property or that the said property be sold on the open market and the Claimant be compensated from the net proceeds of sale thereon;
- h) such further and other relief as seem just;

## **Background**

[2] A number of relevant facts are readily apparent. First, the parties were married on the 19<sup>th</sup> day of May 1962 in England.

Second, the parties lived and cohabitated at 3 Water Street, West Bromwich, England.

[3] Third, Miguel Shim returned to Jamaica in 1977 when Ms Blanch Gordon, his mother became ill. He resided at 82 Mannings Hill Road, Kingston 8, St. Andrew, the subject property. Meanwhile, the matrimonial home in England was sold and the proceeds of sale divided equally between the Claimant and Mr. Shim.

[4] Fourth, Ms Blanche Gordon died around the 8<sup>th</sup> day of March 1978 and the subject property is recorded as being registered on transmission to Miguel Shim on the 8<sup>th</sup> day of March 1978.

[5] Fifth, the Claimant, on occasions, would visit Mr. Miguel Shim at 82 Mannings Hill Road where she would stay and at the end of such stays she would return to England where her children were living. However, in 1993 the Claimant returned to live in Jamaica, permanently.

[6] Sixth, the Claimant on her permanent return to Jamaica started renovation on her parents home at Flagaman, St. Elizabeth. After renovation was completed and as Mr. Shim did not desire to live in St. Elizabeth, the Claimant resided there. During all this time the parties would visit each other at their respective homes.

[7] Seventh, it appears that divorce proceedings were commenced at the instigation of Mr. Shim in November 2008 to which the now Claimant filed an Answer on the 8<sup>th</sup> May 2009. However, the Petition was not pursued as the Petitioner became mentally ill.

### **The Affidavit Evidence**

[8] I shall now advert to the salient aspects of the affidavits of the Claimant and those of the substituted Defendant Ms Sharon Shim.

From the affidavit of Elonia Shim, filed on December 8, 2010, she gives her address as Flagaman District, Flagaman P.A., Saint Elizabeth and describes herself as a Retired Nursing Assistant.

[9] She depones that the original Defendant, Mr. Miguel Shim, who died after these proceedings were instituted, and herself, were married on the 11<sup>th</sup> day of May 1962 in England and that they returned to Jamaica to reside in 1981. Significantly, she depones, that they both lived as man and wife at the matrimonial home located at 82 Mannings Hill Road, Saint Andrew, until sometime in 1985 “when we separated and I left the matrimonial home ...” However, she confirms that though her husband “is the registered owner of the said property”, she continued “over the years of separation from the Defendant to have cordial relations with him to the extent that he visited me on several occasions in the parish of St. Elizabeth where I reside at premises belonging to my parents and that I have visited him at 82 Mannings Hill Road ...” Hence, she describes their relationship as one that was a visiting one, mutually arrived at.

[10] In a significant paragraph of her affidavit she asserts that she expended large sums of her money to repair and refurbish the property at 82 Mannings Hill Road as well as to restock the bar and restaurant business that were housed there.

[11] Further, she asserts, that up to one year from attesting to her affidavit on 6<sup>th</sup> December, 2010, “the Defendant ensured that I received proceeds of rent from a section of our matrimonial home/family property at 82 Mannings Hill Road ... pursuant to an agreement between them that she was entitled to the benefit of the front section of the said property. This agreement was arrived at after consultation with Stanbury & Company Attorneys-at-law ...” In proof of the latter she exhibited correspondence from a firm of attorneys-at-law and asserted, at paragraph 7, that “The Defendant consistently sent the sum of thirteen thousand dollars (\$13,000.00) to me on a monthly basis in respect of the agreement that I was entitled to part proceeds of the rental

income from the said property.” She bemoans, at paragraph 8, that she was no longer receiving any funds from the Defendant and that no explanation has been forthcoming with respect to that failure. Also of the Defendant’s refusal to honour that particular obligation to her.

[12] In another poignant paragraph she bewails that the Defendant had made provision for her in his last will and testament dated 7<sup>th</sup> October 1983 and 14<sup>th</sup> September 1994. However, in a subsequent will dated 22<sup>nd</sup> October 2000, “he has not made any provision for me to benefit from any interest in the matrimonial property at 82 Mannings Hill Road...” This appears to be the nub and gravamen of her complaint.

[13] The substituted Defendant, daughter of the Claimant and original dependant, would have none of the Claimant’s pertinent challenges go without demur. From her affidavit of October 19, 2012, she depones that she is one of the named executors of the Defendant Last Will and Testament dated 22<sup>nd</sup> day of October 2008. In this affidavit she attached the said Last Will as well as the Death Registration in respect of Miguel Shim.

[14] It is Ms Sharon Shim’s second affidavit filed 19<sup>th</sup> September 2012 and made in response to that of the Claimant’s first affidavit where the pivot turns. She depones, that she resided with Mr. Shim at 82 Mannings Hill Road from July 2008 to the present and that she was his sole caregiver up to the time of his death on 3<sup>rd</sup> October 2011.

As to the facts she states that her affidavit is based on her own knowledge and what was told to her by Miguel Shim.

[15] She refutes the Claimant’s assertion that both she and Miguel Shim returned to Jamaica to reside in 1981. Rather, she says, Mr. Shim returned to Jamaica to reside permanently in 1977 when Mr. Shim’s mother, Blanche Gordon became ill.

[16] At paragraph 8 she refutes the Claimants assertion in deponing that “the Claimant did not reside with the Defendant at 82 Mannings Hill Road as man and wife and the home was not the matrimonial home.” Rather, she maintains, “The Claimant

came to Jamaica in 1980 and stayed a couple of weeks and she returned to England thereafter.”

[17] While in England the Claimant had resided with a Mr. McKetty from 1974 to 1977 at Claypit Lane and it was during his period that the Claimant would visit the matrimonial home at 3 Water Street, West Bromwich, England. This she depones to being true as then she and her sister went to reside with the Claimant at Claypit Lane from 1976 to 1977. The matrimonial home in England was sold in 1979. During the period 1978 to 1983, the Claimant would visit Jamaica, she depones, and the Claimant would often stay with a Roy Gray at a Kingston address. The Claimant would also stay at 82 Mannings Hill Road where “she would reside in a separate room and cooking was done separately as well.” However, the Claimant returned to Jamaica permanently in or around 1993 where she resided with the said Mr. Roy Gray at her sister’s home in Flagaman in St. Elizabeth.”

[18] As to the sums of money paid to the Claimant by Mr. Miguel Shim deponed to at paragraphs 6,7. And 8 of the Claimant’s affidavit, Ms Sharon Shim depones that she was not aware that the Claimant was receiving proceeds of rent from the section of the matrimonial home/family property pursuant to an Agreement between the Claimant and Mr. Miguel Shim.

What the affiant knows, in this respect, is that between November 2006 to March 2007 she had left her two (2) children with the Claimant and that the Claimant was paid by Nr, Shim on her behalf to assist the Claimant in taking care of the children. She had gone to England and on her return to Jamaica in 2007 she resided with the Claimant, Mr. Roy Gray and her children at Flagaman, St. Elizabeth until she left for Florida leaving her children in the care of their grandmother – Claimant. Accordingly, she depones that, “During March 2007 to March 2008 money was still being sent to the Claimant by the Defendant who was still acting upon my request.”

### **Analysis Of Evidence**

[19] What the factual divide between mother and daughter reflect are deep-seated anxieties on each others part concerning, *inter alia*, the real or perceived infidelity on the

part of the Claimant towards Mr. Shim. The plaintive tenor of Mrs. Gloria Shim's complaint is that she was more sinned against than sinning. This is what the Claimant had to say about her relationship with the substituted defendant:

“Even if he (Mr. Shim didn't give me anything everything would be fine for the sake of my children. I have had a change of heart as Sharon has brought me down low. Sharon and I have no relationship. Sharon has treated me like a doormat ... She should have respect for me. She emptied my bank book.”

[20] Whatever the interpersonal differences between mother and daughter are it certainly has led to suspicions of inaccuracies or of downright falsehoods on each others part from their evidence.

[21] If anything, on the issue of who is to be believed on the essential facts, I prefer the evidence of the substituted Defendant, Sharon Shim, to that of the Claimant, if only because, but not restricted to, the sworn falsehoods of the Claimant as well as the general drift of her evidence which suggest that efforts were directed at truth obfuscation.

[22] As to the sworn inaccuracies I need only refer to a few. In cross-examination the Claimant says: “My husband and I never separated.” However, germane to that assertion, at paragraph 3 of her affidavit, when confronted, in cross examination she says that her affidavit evidence is incorrect. Also where she says that where her affidavit says that the Defendant boxed her in her face and they started fighting, and that the defendant fell to the ground and was cut by broken glass. I need not descend to further details in order to emphasise the point made above.

### **The Issues**

[23] Whether 82 Mannings Hill Road for the purposes of the Property (Rights of Spouses) Act, **PROSA**, can be regarded as the family home/matrimonial property and if so, whether the Claimant is entitled to a share of the said property. If not, whether the

Claimant is entitled to a share of the said property on the equitable principles of either a resulting trust or a constructive trust.

### **The Law**

[24] Was 82 Mannings Hill Road the matrimonial home/family property?

The interpretation section of **PROSA**, Section 2, defines “family home” as 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.”

As to the expression “property” the meaning ascribed by the said Section 2 is “any 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.”

[25] The entitlement to the family home is governed by Section 6 of **PROSA**. Section 6(1) reads:

“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 the termination of cohabitation;
- b) on the grant of a decree of nullity of marriage;
- c) where a husband and wife have separated and there is no likelihood of reconciliation.”

Further, according to Section 6(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.”



[26] The entitlement to a one-half share in the family home is however made amenable to the court's power to vary that share. Section 7(1) makes the point:

“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 is of short duration.”

The expression, “interested party” as used above, includes, a spouse, according to Section 7(2).

[27] As has been already adverted to, the evidence so stoutly maintained by the Claimant that 82 Mannings Hill Road is to be regarded as the family home is this: “... after the Defendant and I got married in England in 1962 we returned to Jamaica and resided at 82 Mannings Hill Road, Kingston 8 in the parish of St. Andrew and even started a business at the said property.” Further, that sometime thereafter a Chinese riot broke out in Jamaica and they closed the business and moved back to England. Subsequently, Mr. Shim returned to Jamaica in 1977 and “Even though the Defendant did not return to England we continued our relationship and I would visit him in Jamaica where I stayed with him at 82 Mannings Hill Road ... doing wifely duties.”

[28] So far so good for the Claimant's contention as regards No. 82 Mannings Hill Road. However, not only was 82 Mannings Hill Road wholly owned by Mr. Miguel Shim but it has not been shown that 82 Mannings Hill Road was used habitually or from time to time by them as the only or principal family residence. It is to be observed, however, that the law's liberal beneficence was mounted upon a restriction: the

dwelling house “shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit:” per Section 2 of **PROSA**.

[29] It is irrefutably clear that Ms Blanche Gordon, mother of Miguel Shim, died sometime in March 1978 and she left 82 Mannings Hill Road to her son. This is borne out by the fact that Mr. Miguel Shim was registered on transmission on the 22<sup>nd</sup> October 1981 of all estate of Blanche Elizabeth Gordon.

[30] I fail to see that there was any intention on the part of the donor of 82 Mannings Hill Road that she intended any other than the donee to benefit from her disposition. Before I go on to other considerations I wish to emphatically state that in relation to Section 6(2) of **PROSA** such a claimant must satisfy the criteria of the family home. I reiterate that the requirements are, as stated above. At the risk of repetition such a family home does not include a dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit.

[31] In the instant case the expression “...but shall not include such a dwelling-house which is a gift” puts it beyond a peradventure that Mrs. Blanche Gordon, by her bequest of 82 Mannings Hill Road to Mr. Miguel Shim, intended him alone to benefit.

[32] Even if I am wrong that 82 Mannings Hill Road cannot be so regarded in law, as the family home, another consideration warrants scrupulous attention.

The Fixed Date Claim Form having been filed on December 8, 2010, I have not seen, nor were any arguments prosecuted, as to the appropriateness of Section 13 of **PROSA**.

[33] The time and condition precedent when an application may be made to the Court for the division of matrimonial property is of great significance. Section 13(1) declares that “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 of termination or cohabitation; or
- b) on the grant of a decree of nullity or marriage; or

- c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- d) ...
- e) any application under subsection (1)(a),(b) or (c) shall be made within twelve months of the dissolution of a marriage termination of cohabitation, annulment or marriage, or separation or such longer period as the Court may allow after hearing the applicant.

In what circumstances should an application for division of property be made?

Shall an applicant seek the leave of the Court before making the application?

[34] In **Delkie Allen v Trevor Mesquita** [2011] JMCA 36 delivered on 7<sup>th</sup> October 2011, Harris JA in addressing Section 13(2) of **PROSA** treated with the issue thus: “The learned judge failed to take into account that before a grant of an extension of time can be made leave must be granted. No application was made for leave. Before making the order the learned judge was under an obligation to satisfy herself that she was clothed with jurisdiction to hear and determine the application. There being no evidentiary material before her outlining the reasons for the respondent’s failure to have made the application within the statutory period, she erred in treating the application as being one for an extension of time to file the claim and ordering that the Fixed Date Claim Form should stand.”

[35] In **Brown v Brown** [2010] JMCA Civ. 12 Morrison, JA listed, non-exhaustively, some of the factors to be considered under a Section 13(2) consideration of whether leave should be granted –

- a) fairness to the applicant and fairness to the respondent;
- b) on a *prima facie* basis, the merits of the case;
- c) delay and any prejudice resulting therefrom; and
- d) the overriding objective.

[36] Indeed, in **Allen's** case *supra*, Harris, JA said that “the absence of good reason is not in itself sufficient to justify a refusal of an application to extend time, however, some reason must be advanced.” The reasons for a tardy application according to Harris, JA, are fundamental in determining whether an applicant had explained the delay in not acting timeously.

[37] In the instant case the question is, has the Claimant acted timeously? The Claimant's Notice of Application for Curt Orders, it is to be observed, sought among other orders, “That the Applicant be given permission to apply for an order for division of matrimonial property ...”, under **PROSA**.

[38] According to the affidavit of the Applicant, filed in support of the application, she did not apply for division of the family home within twelve months following the termination of cohabitation because she “thought the matter could be resolved amicably but I know that that is not a possibility.”

[39] In the consolidated appeals of **Angela Bryant-Saddler v Samuel Oliver Saddler** No. 57/2009 and Fitzgerald **Hoilette v Valda Hoilette and Davia Hoilette**, SCCA No. 137/2011, Phillips, JA with whom Harris, P(Ag.) and Brooks, JA agreed concerned actions filed in the Supreme Court wherein the applicants claimed an entitlement to pursue their claims under the Property (Rights of Spouses) Act (“PROSA”) in order to obtain benefits thereunder as well as to secure declarations of the legal and beneficial interests in the division of the family home and other property. Both applications were refused by the Court. However, I shall here for current purposes, confine my attention to the **Hoilette** case.

[40] There, on a preliminary objection taken in the court of first instance, when the Fixed Date Claim Form came on for hearing, the judge opined that he had no jurisdiction to hear the claim. The rationale offered for declining to do so was that the Claim Form, which purported to include a claim under “**PROSA**,” had been amended out of time without the Court's permission as well as the granting by the Court of an extension of time in which to do so. Accordingly, the judge ruled that the Fixed Date Claim was invalid and as such could not be corrected by a subsequent order.

Notwithstanding, he intimated that the Claimant could, even at that state, elect to make an application for leave to extend time and for the grant of an extension of time to file the claim under **PROSA** .

[41] In bringing to bear on the outcome of both appeals Phillips,JA posed the issues thus:

- a) Does **PROSA** have retrospective effect:
- b) Is a claim form valid if (i) filed outside the twelve (12) month period stated in Section 13(2) of **PROSA** or filed (ii) filed under a repealed statute;
- c) Is leave/ permission, together with an extension of time, required prior to the filing of a claim for relief under **PROSA**?
- d) Is a claim made under **PROSA** without leave/permission or extension of time irregular and curable by a subsequent application filed pursuant to Section 13(2) of **PROSA**?
- e) What, if any, is the effect of the orders made in the action prior to the filing of the application under Section 13(2) of **PROSA**?

[42] As to the posited issues Phillips, JA considered it appropriate to look at the true and proper construction of Sections 2,3,4,6,7,14 and 24 of **PROSA** and, particularly, Sections 13(1)(2) and (3).

In the instant case I do not see where any leave or permission was deliberated upon or indeed any order from the court that leave or permission was granted.

**Was There An Agreement Between Miguel Shim and Elonia Shim About 82 Mannings Hill Road?**

[43] By Section 3(1) of **PROSA** it is stated that, “Except as otherwise provided in this Act and subject to subsections (2) and (3) and Section 6, the provisions of this Act shall not apply after the death of either spouse and every enactment and rule of law or of

equity shall continue to operate and apply in such case as if this Act had not been enacted.”

[44] According to Subsection (2), “The death of either spouse shall not affect the validity or effect of anything done or suffered in pursuance of the provisions of this Act.” As to subsection (3), “If, while any proceedings under this Act are pending one of the spouses dies, the proceedings may be continued and be completed: and any appeal may be heard and determined and the Court may make such order as it thinks fit in the circumstances of the case as if the spouse had not died.”

[45] Section 6(1) provides that, “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 dissolution of a marriage or the termination of cohabitation;
  - b) on the grant of a decree of nullity of marriage;
  - c) where a husband and wife have separated and there is no 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.”

[46] It is to be noted that the Fixed Date Claim Form was filed on December 8, 2010. From paragraph (4) of the affidavit of Ms Sharon Shim, sworn to on May 16, 2013 and filed on May 17, 2013. The defendant, Miguel Shim died on the 3<sup>rd</sup> day of October, 2011. The fact of Mr. Shim’s death is confirmed by the Death Registration Form, which is attached to the affidavit.

[47] According to Section 10(a) of **PROSA**, which is made subject to Section 19,

- a) spouses or two persons in contemplation of their marriage to each other or of cohabitating may for purpose of contracting out of the provisions of the Act, make such agreement with respect to the

ownership and division of their property (including future property) as they think fit as they think fit;

- b) also, spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

[48] In respect of the above, Section 10(2) states that an agreement may –

- i) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation;
- ii) provide for the calculation of such share and the method by which property or part thereof may be divided.

[49] However, notes Section 10(4), every agreement made pursuant to subsection (1) shall be in writing signed by both parties whose signatures shall be witnessed.

[50] From the affidavit evidence of the Claimant dated 6<sup>th</sup> December 2010 at paragraphs 9 and 10 the Claimant deposes that after 1988 and up to 2004 she expended large sums of money not only to effect repairs to the subject property but also to refurbish and restock the bar and restaurant business that was being operated thereon.

[51] In fact, asserts the Claimant, “Up until one year ago the Defendant ensured that I received proceeds of rent from a section of our matrimonial home/family property ... pursuant to an agreement ...” between them that the Claimant was entitled to the benefit of the front section of the property.

[52] The Claimant’s offer of proof of this agreement is a copy of correspondence from Stanbury and Company, attorneys-at-law dated February 9,, 1994 addressed to Mrs. Elonia Shim. It is in these terms: “Dear Mrs. Shim. We have been consulted by your husband, Mr. Miguel Shim, regarding certain matrimonial matters. We would, however,

like to have an opportunity to meet with you and discuss these matters further with a view to ascertaining the appropriate steps to be taken. To this end we are inviting you to call the writer' secretary, Miss Isoline Beaufort, and confirm an appointment to come and see the writer at your earliest convenience." This letter fell under the signature of Mrs. Janet-Kaye Stanbury.

Even should this court find that the Claimant made monetary contributions to effect repairs to the subject property and to refurbish and restock the business operated therefrom any purported agreement between the Claimant and Mr. Miguel Shim, under **PROSA**, would have to be in writing, signed by both of them and their respective signatures witnessed by duly authorized persons. No such agreement was produced and the Claimant cannot find any comfort in Section 10 of **PROSA**. Also, it is insufficient simply to say, in abstract, that she expended "large sums of money" without ever clothing that expression in the garb of concrete figures.

[53] In fine then, the Applicant has failed to bring her claim with the definition of family home under **PROSA**. Accordingly, 82 Mannings Hill Road cannot be regarded as the family home for the purposes of division of matrimonial property.

[54] Also, the Applicant has not shown that leave or permission was granted by the court for her to pursue her application. In view of my earlier decision this failure may well yet be otiose.

[55] Further, the Applicant has failed to prove that the "Agreement" between herself and Mr. Miguel Shim bears any conformity to the dictates of **PROSA**.

[56] Furthermore, the Applicant's complaint that she was a beneficiary under the first will of Mr. Miguel Shim and that she lost out on her "inheritance" through the machination of Ms Sharon Shim who influenced the removal of her name from Mr. Shim's last will, is understandable though unhelpful to her claim.

[57] I wish now to turn the spotlight on the equitable doctrines of resulting and constructive trusts to see if the Applicant can find relief under other.



### **Resulting Trust**

[58] Tersely put a resulting trust will occur where a person makes a direct financial contribution to the purchase of property with another and the said property is then conveyed into the name of the other. In that scenario, the contributor will, in the absence that some other result was intended, such as, that the contribution was intended as a gift or loan, be entitled in equity to a share in the property commensurate to the amount of contribution.

[59] In the instant case there is no evidence that Mrs. Elonia Shim contributed to the purchase price. In point of fact, the property in question was not purchased by Mr. Miguel Shim but instead was a bequest to him by his mother, Blanche Elizabeth Gordon. Hence I can find no validity in a claim based on the equitable principle of a resulting trust.

### **Constructive Trust**

[60] The question of whether a constructive trust has arisen is determined by asking whether the parties are joint legal owners or where one is claiming an interest in property of which the owner is the sole legal owner. In each case the burden of showing that such a trust has arisen is on the party who claims that the beneficial interests of the parties differ from the legal title: See **Stack v Dowden** [2007] UKHL 17.

[61] In determining the parties' respective beneficial interest there are two stages in the inquiry. The first is that the Claimant must establish an interest.

Second, the Court must ascertain the extent of that interest.

[62] However, where one party is the sole legal owner, the claimant will be required to show that it was the common intention of the parties that each should have a beneficial interest in the property. Further, and crucially, that the claimant has relied upon that common intention to his or her detriment.

[63] According to Lord Bridge in **Lloyd's Bank plc v Rosset** [1991] AC 107 at 132, the fundamental question to be asked at the very outset is whether there have, "[A]t

any time prior to the acquisition of the disputed property, or exceptionally at some later date, been discussions between the parties leading to any agreement, arrangement or understanding reached between them that the property is to be shared beneficially.

[64] From the above formulation of the principle the point is underscored that the expression 'common intention' does not mean an intention that each party harboured in his or her mind but did not communicate it to the other: See **Evans v Hayward** [1995] 2 FLR 511. Rather, it must also be an understanding that relates to the ownership of the property and not to its use or occupation.

[65] In the instant case the Claimant has not shown that a trust has arisen in her favour. I fail to see any common intention on the part of Mr. Shim and Mrs. Shim that each should have a beneficial interest in 82 Mannings Hill Road. Also, I am unable to find any evidence that after the acquisition of the property through the law of succession that there was any agreement or understanding that the property was to be shared by them beneficially.

[66] Accordingly, by my offer of these reasons the Application for Court Orders is refused.

