



[2018] JMSC Civ 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV03319

IN THE MATTER of the Estate of
OWEN DEAN SMITH, late of 16
Phadrian Avenue, Kingston 6 in the
Parish of Saint Andrew, Retired
Superintendent of Police, Testate

BETWEEN	NILZA SMITH	CLAIMANT
AND	ESTATE OF OWEN DEAN SMITH	DEFENDANT

IN CHAMBERS

Mr. Gordon Steer and Mrs. Kayan Parke instructed by Chambers, Bunny and Steer for the Claimant

Dr. Mario Anderson instructed by Miss Dian Watson for the defendant

Heard on March 19 and 20, 2018 and May 22, 2018

Division of property on death of sole owner; Section 6(2) The Property (Rights of Spouses) Act

Pusey J. J (Actg.)

[1] By Fixed Date Claim Form dated February 4, 2013 the claimant seeks the following Orders:

1. That the claimant, the deceased's spouse, is entitled to one-half share of the family home located at 16 Phadrian Avenue, Kingston 6 in the parish of Saint Andrew;

2. That the said property be sold on the open market or by private treaty;
3. The claimant shall receive fifty percent (50%) of the proceeds of sale and the remaining fifty percent (50%) shall be distributed among the beneficiaries of the Will of Owen Dean Smith;
4. That a valuator shall be agreed and the costs of the valuation shared equally between the parties;
5. That if no valuator can be agreed within 21 days of the date of the Order then CD Alexander Realty Company Ltd. shall value the said property;
6. The Registrar of the Supreme Court be empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unwilling to do so.

PRELIMINARY POINTS

- [2]** By Notice of Application for Court Orders dated the July 8, 2013, Mr. Linton Jackson and Mr. Robert Anthony Smith, Executors of the Will of Owen Dean Smith, deceased were appointed to represent the estate in the matter at bar. Only Robert Smith participated in the matter.
- [3]** On the April 22, 2015 at a Case Management Conference, the claimant's attorney-at-law was ordered to serve the Fixed Date Claim Form dated February 4, 2013 and supporting affidavits on the beneficiaries in the estate of Owen Dean Smith namely Angelicia Smith, Rainer Smith and Steven Smith, who along with Robert Smith are the children of the deceased. They all filed affidavits in the matter.

THE ISSUES

- [4]** The issues in this matter are;

1. Whether 16 Phadrian Avenue was the family home of the claimant and Owen Dean Smith, deceased at the time of her death; and
2. Whether Section 6 (2) of the Property Rights of Spouses Act (PROSA) is applicable and entitles the claimant to a fifty percent share in 16 Phadrian Avenue.

THE CLAIMANT'S CASE

- [5] The claimant and Owen Dean Smith (hereinafter referred to as 'the deceased'), met in 1994 and established a relationship in Cuba. In 1996 the claimant came to Jamaica and lived and cohabited with the deceased at 16 Phadrian Avenue, Kingston 6. In May 1997 they solemnized their union in marriage and continued to live at 16 Phadrian Avenue. The union produced one child Abygail.
- [6] The deceased had four other children from previous unions who are parties to this matter. Three of the children Angelicia Smith, Steven Smith and Rainier Smith lived between Phadrian Avenue and their mother's home at Nutmeg Drive during the course of the claimant's marriage.
- [7] During the period that the claimant and the deceased resided at Phadrian Avenue a significant amount of construction work to renovate and improve the premises was carried out. In her affidavit the claimant provided documents to substantiate her claim that for a while her salary was deposited in the deceased's account and then in a joint account held by them. The cost of running the home, and assisting in financing the improvements came from these accounts and the deceased would fully utilize an overdraft facility in his chequeing account. He would then seek a loan to cover the overdraft.
- [8] The deceased was a Superintendent of Police until his retirement in 2004. The claimant, who has a Doctorate in engineering and is now a Professor of Engineering at the University of Technology (UTECH), was a consultant in a

consultancy firm when she arrived in Jamaica and lecturer at the University of Technology two years later and earned substantially more than the deceased. She is still so employed.

- [9]** The deceased retired in or around 2004 and sought a loan thereafter to pay credit card, overdraft and other bills which was refused as he was retired and the claimant obtained a loan through a facility provided by National Commercial Bank to UTECH employees, to cover the debt.
- [10]** Disharmony entered the union and in or about 2008 the claimant and her daughter moved from Phadrian Avenue and stayed with friends. Subsequently the claimant purchased a property at 5 Gary Avenue, Kingston 5, where she has resided since 2011.
- [11]** According to the claimant, although she had left the family home, she still had relations with her husband and continued to assist him, now retired and on approximately \$80,000.00 per month pension, with the settlement of bills, especially after he became ill and subsequently died on June 10, 2012. She paid for his medical care, took him herself to doctor's visits and labs, prepared, delivered and shared meals with him although she resided elsewhere. Their daughter refused to return to live at Phadrian Avenue. It is the claimant who discovered him dead and paid his funeral expenses.
- [12]** After the passing of the deceased the claimant learned of the contents of his Last Will and Testament. He devised 25% of Pharadian Avenue to her and their daughter, 50% to his first born, Robert Smith and the remaining 25% to his other children Angelicia Smith, Steven Smith and Rainier Smith.
- [13]** It is in these circumstances that the claimant seeks the orders listed *supra*.

THE DEFENDANT'S CASE

- [14] When the claimant came to live at Phadrian Avenue in 1996 the deceased's children Angelicia Smith, Steven Smith and Rainier Smith were between the ages of 5 and 10 years old. They were living between their mother's home and their father's home. They spent a substantial amount of time with the claimant and their father. Their affidavits (evidence in chief) were remarkably similar and sought to establish that the claimant did not assist with their upbringing, never cooked and made no contribution to the running of the house. Their father and helpers assisted them.
- [15] They all gave evidence that they were present when renovations were done to the home and that their father did all the financing.
- [16] The relationship between the claimant and their father, they declared, was over from 2005 when the claimant moved out of their father's bedroom and subsequently left the premises.
- [17] However, on cross examination it was revealed that she made contributions to the education of Angelicia Smith and Steven Smith. She also bought a car which transported the family. Steven Smith gave evidence that the claimant moved into her daughter's room as a 'maternal thing' to stay with the baby.
- [18] Robert Smith, the eldest child of the deceased and one of the Executors of his Will, was joined in this matter representing the interest of the estate. Robert Smith lived at Phadrian Avenue from 1981 to 1991 when he migrated to the United States of America.
- [19] Robert Smith asserts that 16 Phadrian Avenue was purchased by the deceased in July 1981 approximately 16 years before he met the claimant, with assistance from him (then 17 years old) and friends. He is aware that substantial expansion and improvement work was done to the house prior to and during their marriage

but he says it was done solely by the deceased. He gave evidence that he contributed money to assist with the renovations. He does not possess any documentary evidence to substantiate this, as he did not keep records.

[20] At the material time he was residing overseas and in school, therefore his source of information is what was told to him by his father. He knew nothing about who was living at the home when, nor the nature of the financial arrangements between his father and the claimant. He knew that the claimant made substantially more money than his father at all material times.

[21] He says he was close to his father and believed him when he confided in him that the claimant was unfaithful to him.

[22] After the deceased's retirement, he contributed to the maintenance of the deceased by sending him monies from time to time as gifts.

[23] After the death of the deceased, Robert Smith began improvements to the premises in 2013.

[24] The defendant contends that awarding a fifty percent share in the property to the claimant would be unjust and unreasonable. The court should not dispense with the terms of the Last Will and Testament of the deceased as she had left the home and made no contribution to its improvement and it was not the family home within the meaning of the statute.

CLAIMANT'S SUBMISSIONS

[25] The claimant submitted that there are three issues to be determined in this matter;

1. Whether the property at 16 Phadrian Avenue is the family home?

2. Whether the claimant can avail herself of Section 6(2) of PROSA as prayed, and
3. Whether Section 7 is applicable to the matter and if so whether there ought to be a variation of the equal share rule as contemplated by Section 7 of PROSA.

[26] He examined the definition of 'family home' in Section 2 of the Act and its analysis by Sykes J (as he then was) in **Shirley Stewart (Peaches) v Rupert Stewart**, (unreported) Supreme Court, Jamaica, Claim No. 2007 HCV 0327, judgment delivered November 6, 2007 where the family home was defined as;

'Thus family residence means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses.'

[27] He agreed wholeheartedly with the definition and concluded that Phadrian Avenue is the family home.

[28] Turning to the question of whether the claimant is entitled to a fifty percent share in the property he focused on Section 6(2) of the Act. He argued that the parties agree that the property was owned solely by the deceased many years preceding his marriage to the claimant. The couple resided there together prior to and during the marriage as their only abode. He argued that Section 6(2) of PROSA was applicable in determining the interest of the claimant in the property as the marriage ended with the death of the deceased.

[29] Section 6(2) can be divided into two segments – where property is jointly owned and, by operation of law, upon the death of one party, the other takes the fee simple absolutely; and where the property is owned solely by one spouse, as in the matter at bar.

- [30] Section 6(2), he argued, takes effect from the death of one of the spouses. Unlike Section 6(1) it is not dependent on or is constrained by any other section of PROSA. Section 6(2) is not subject to Section 7 and Section 10 and makes no reference to the termination of the union by dissolution or ending of cohabitation, as a factor for consideration in the division of property upon death where only one party owns the property. He posited that as Section 6(2) stands alone. It does not enable a court to interfere with the 50% rule.
- [31] He bolstered his contention by looking at the side note to Section 6 which is designated 'Entitlement to Family Home,' emphasizing that the circumstances contemplated by Section 6(2) manifests an entitlement by the surviving spouse, untrammelled, to a 50% share in the property.
- [32] The defendants, however, raised the issue of separation arguing that if there was a separation prior to death it affected the entitlement of the claimant to a 50% share in the family home, as at the time of death it was no longer the family home.
- [33] The claimant submitted that there was physical departure from the home but not a cessation of consortium. By way of evidence, he relied on the daily visits of the claimant to the deceased, occasional physical relations between them, the claimant paying his utility bills, taking him to the doctor, providing meals for him and paying for his funeral expenses, as demonstrative of continued consortium. It was the claimant on her daily visit that found the deceased dead. Counsel referred to dicta in, **In the Marriage of Batty**, 83 FLR 153 at 156 where it was stated that,

“The 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. It (sic) involves a sharing of

two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments...”

- [34] He stressed that consortium vitae is unique to each couple and the defendants are not in a position to speak to the relationship that existed between the couple. They rely, on all occasions, on hearsay evidence, allegedly from the deceased. The conflicting evidence of Steven Smith, who claimed to have been living there, put a large dent on the veracity of this evidence.
- [35] More importantly counsel referred to Section 13 of the Act which grounds jurisdiction to pursue a claim under the Act for division of property. He argued that separation or the grant of a decree of divorce is merely a trigger to ground jurisdiction and does not affect entitlement under Section 6(2) of the Act.
- [36] Counsel also took issue with the defendant’s contention that it would be unjust and unreasonable to grant a 50% share to the claimant by virtue of Section 6(2) and that Section 7 should be invoked to vary the share in accordance with the provisions of the Will of the deceased.
- [37] He submitted that Section 7 is not applicable based on his analysis of Section 6(2) already alluded to. However, if the court is minded to apply Section 7 it should consider the guidance given by Brooks JA in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47, as to how Section 7 factors are to be approached. He submitted that the fact that the property was owned by one spouse solely is a Section 7 factor and issues such as contribution – monetary and non-monetary – are relevant. Based on the evidence of the claimant and the documentary evidence she exhibited, the 50% share should not be varied.

THE DEFENDANT’S SUBMISSION

- [38] Counsel for the defendant submitted that the issues in this case are;

1. Whether the property is the family home at the time of the death of Owen Dean Smith;
2. Whether Section 7 of PROSA is applicable if the property is deemed the family home; and
3. If Section 7 is not applicable, whether the court ought to vary the share of the parties under common principles/equitable considerations.

[39] In considering the issue of the family home he referred to Section 3 of the Act which excludes the operation of the Act upon the death of either spouse except where Section 6 applies and where the action is commenced prior to the death of the spouse. Section 3 also preserves anything already determined under the Act.

[40] He argued that Section 6(1) sets out conditions that trigger a claim. It is subject to Section 6(2) which applies on the death of a spouse and is therefore the applicable clause in this matter. The claimant's eligibility to make the claim under Section 6(2) must be at the time of the death. Consequently he raised the issue of whether at the time of the death 16 Phadrian Avenue should be regarded as the family home. He argued that as the claimant and her daughter had moved from the home prior to the death of the deceased, it was not the only or principal residence of the couple, as required by Section 2 of the Act.

[41] Further, he argued that the deceased received assistance with the construction and purchase of the property in 1981. He relied on the evidence of Robert Smith, who at the time was 17 years old, asking the court to accept it as credible evidence. The donors of the gift did not intend for the claimant to benefit, as she was not known to them. Based on the foregoing the claimant's application for a 50% share should be denied.

[42] If the court accepts that Phadrian Avenue is the family home Section 7, he urged, should apply in determining the claimant's share. He rejected the submission of the claimant that Section 7 is only applicable to Section 6(1), as misconceived based on the current rules of statutory interpretation.

[43] He referred to Cross' Statutory Interpretation 3rd Edition and Lord Griffith's statement in the House of Lords decision in **Pepper v Hart** [1991] 1 ALL ER 42, as reflective of the current attitude of the Court on the law on statutory interpretation;

"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[44] He highlighted the rules of statutory interpretation outlined at page 49 of Cross, which were adopted and applied by our Court of Appeal in the **Ministry of Finance et al v Winsome Bennett** [2018] JMCA Civ 9, in analysing the purposive approach to Section 62 of the Constabulary Force Act in defining 'widow' for the purpose of a pension award.

[45] In demonstrating the operation of the purposive approach he argued that Section 6(2) is also subject to Section 10. If it is accepted, as urged by the claimant, that Section 6(2) is not subject to Section 10, it would lead to an absurdity. It is best to quote from his written submission to demonstrate the argument;

*Section 10 of PROSA deals with prenuptial agreements and makes it clear that such agreements are valid. This is significant as previously these agreements were not recognized. **It is inconceivable that such agreements now recognized by a deliberate Act of Parliament would be valid whilst the parties are alive but invalid upon the death of one***

of the spouses, and to interpret Section 6 of PROSA in that manner would lead to an absurdity and would be contrary to the purpose of the statute. (Emphasis present)

Section 6(2) should therefore be subject to Section 7 and Section 10.

[46] In furtherance of the argument, Dr. Anderson opined that a purposive approach was considered by the Privy Council in **Bromfield v Bromfield** [2015] UKPC 19 at paragraph [19] considering Section 20 of the Matrimonial Causes Act, and adjusting the typing format in interpreting the statute. The presentation or the format on paper is an aid in interpreting the statute.

[47] Applying that analysis, he concludes, Section 6 should read;

“(6) 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 (1) etc.”.....(2).....”

[48] Dr. Anderson concluded therefore, that the proper interpretation of Section 6 is that the entire section is subject 7 and 10. Section 7 gives the court power to vary the 50% share where the court thinks it is unjust or unreasonable to apply the 50% rule.

[49] Counsel then analyzed the evidence and concluded that the claimant did not contribute to the improvement of the home or to the upbringing of the children. In addition she acquired a property from the monies in a joint account with her husband (the evidence is that the joint account she utilized was with her mother). It is therefore unjust and unreasonable for her to receive a 50% share in Phadrian Avenue or any share at all.

[50] If the court finds that Section 7 is inapplicable, the court should apply Section 3 and distribute the estate of the deceased according to his Last Will and Testament.

THE LAW

[51] Section 6 (2) of PROSA provides for what is to subsist upon the death of a spouse when that deceased spouse is the sole owner of the home in which the couple lived during the course of the marriage or cohabitation. Section 6 falls in Part II of the Act and is entitled 'Family Home'. It is says;

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

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

(b) On a grant of a decree of nullity of marriage;

(c) Where a husband and wife 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 the marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share in the family home. (Emphasis mine).***

[52] Any discussion of Section 6 cannot escape settling the issue of whether the property in question is the family home. Section 2 of PROSA defines the family home thus;

“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, building 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.”

[53] The interpretation of Section 2 can almost be described as settled law and was discussed by Sykes J, as he then was, in **Shirley Stewart (Peaches) v Rupert Stewart**, (unreported) Supreme Court, Jamaica, Claim No. 2007 HCV 0327. I adopt Sykes J’s interpretation quoted *Supra*. However, for the purposes of the matter at bar, it is not necessary to carry out a fulsome discussion of Section 2, as the parties are not disputing whether 16 Phadrian Avenue was the family home at all, but rather whether at the time of the death of Owen Deans, when the claimant was residing elsewhere, it could still be considered the family home within the meaning of the Act.

[54] This question resulted in both parties raising the issue of separation. The claimant made submissions and led evidence concerning whether there had been a cessation of consortium vitae. The claimant referred the court to **Alva Heron-Muir v Maureen Heron-Muir**, an unreported judgement of this court delivered October 21, 2005, **Miller v Miller** [2009] FMCA fam (16 April 2009) and **Santos v Santos** [1972] 2 ALL ER, to support the contention that consortium in matrimonial matters is highly subjective and is dependent on the circumstances of each case. It connotes much more than a partnership and association and involves ‘a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments’. Physical separation is just one aspect of this intertwined association. I adopt this definition in these matters regarding consortium.

[55] Osborn’s Concise Law Dictionary defines consortium thus;

The association between husband and wife which embraces

companionship, love, affection, comfort, mutual services and sexual intercourse.Consortium normally implies cohabitation of the spouses but is not determined by the mere temporary absence of one the spouse from another.

- [56] Dr. Anderson, in his submission for the defendant, invited the court to interpret Section 6 utilizing a modern approach to interpretation of statutes which places less emphasis on the ordinary or technical meaning of the words of the statute and embraces a more purposive approach.
- [57] He highlighted the rules of interpretation enunciated in Cross' Statutory Interpretation 3rd Edition. According to those rules the court must give effect to the grammatical and ordinary meaning of the statute in their context. If the application of this rule produces a result contrary to the purpose of the statute, the court can apply any secondary meaning which the words are capable of producing. If this application makes the statute absurd, unintelligible, unworkable unreasonable or irreconcilable, then the court can read words into the statute which are implied. The court under this formulation has limited power to add to, ignore or alter statutory words to interpret the statute.
- [58] Counsel referred the court to the decision of the Court of Appeal per Straw JA (Actg.) in **The Ministry of Finance et al V Winsome Bennett** [2018] JMCA Civ. 9. In that case the court disagreed with the application by the trial judge of the purposive approach in interpreting Section 62 of the Constabulary Force Act in defining the word 'widow' to include a common law spouse. The trial judge had gone beyond the ordinary meaning of the word 'widow' and in keeping with advancements in the law which defined widow to include a common law spouse that had lived and cohabited for 5 years with deceased. The trial judge had argued that in the existing norms, the law had advanced to recognition of such

unions and therefore the legislature intended for this definition to be embraced in the Constabulary Force Act.

- [59] The Court of Appeal disagreed. I also disagree with the application of the purposive approach and formatting manipulation of the legislation in the matter at bar. Straw JA (Actg.) at paragraph 36 of her judgement focussed on the purposive approach, and stated,

*In **Jamaica Public Service Company Limited**, Brooks JA referred to a summary of the rules of statutory interpretation proffered by the learned editors of Cross' Statutory Interpretation, 3rd Edition. At paragraph [54] of the judgement, he stated that the authors stress the use of the natural and ordinary meaning of words and cautioned against "judicial legislation" by reading words into statutes.*

- [60] She agreed with the statement of the law in Cross' as an accurate reflection of the principles governing statutory interpretation.

- [61] Brooks JA in **Special Sergeant Steven Watson v The Attorney General and others** [2013] JMCA Civ 6 at paragraph [19] of the judgment, quoted and applied Lord Reid's statement on this issue in **Pinner v Everett** [1969] 3 ALL ER 257 stated thus;

*In determining the meaning of any word or phrase in a statute the first question to ask always is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase. **We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for words of the statute.***

[62] It follows that in seeking to understand Section 6(2) of the Act the court needs first to examine the ordinary meaning of the words before it embarks on a purposive approach or manipulation of the format of the statute. Lord Bingham in **Regina (Quintavalle) v Secretary of State for Health** [2003] 2 WLR 692 in setting out the rules of interpretation, approved of the purposive approach thus;

“Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation.”

as the final item in his thorough list of aids to interpreting a statute.

[63] In **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12 Morrison JA (as he then was), outlined the history and purpose of PROSA. This account provides insight into the background and the direct intention of the legislature. That intention included making provision for common law unions and giving some certainty to entitlements upon the breakdown of a union, including a breakdown resulting from the death of a spouse. This was a reaction to the societal norms current in Jamaica. In this context, concerns about the interpretation of Section 6, which cannot be resolved by the ordinary meaning of the words, could find understanding. The norms manifest in 2004 has not changed substantially in Jamaica. If they change, Straw JA, (Actg.) in **Ministry of Finance et al v Winsome Bennett** found that it is for the legislature to adjust the legislation, as they did to deal with the issues raised in that case.

[64] To my mind there is no ambiguity with the words in Section 6 of PROSA. The section speaks to entitlement to a half share in the family home. It speaks to the scenarios where the union ends in divorce, annulment, cessation of cohabitation and death. It prescribes what is to obtain in these eventualities.

[65] Termination by death, when the property is owned solely by the deceased spouse is given special treatment. The clear intention of the legislature,

discerned from the ordinary meaning of the words used, is that the surviving spouse should not face uncertainty when the union ends by death of the spouse who owns the fee simple. The surviving spouse should not have to prove things such as contribution, in circumstances sometimes, when the contenders can only proffer hearsay evidence or surmise. It is a departure from the evidentiary challenges of *Petit v Petit* and its companion *Gissing v Gissing*.

[66] I cannot therefore, accede to the submission of Dr. Anderson to interpret Section 6(2) of the Act by adjusting the format or speculating as to a purpose of the legislature other than that which the ordinary meaning of the words connote and in the absence of ambiguity, absurdity or unintelligibility.

ANALYSIS AND CONCLUSION

[67] My failure to comment on all the evidence presented in this matter is not the result of ignoring it. I have considered all the evidence and the submissions made. However, I will only refer to what is necessary to explain my reasoning and conclusion.

Was 16 Phadrian Avenue the family home?

[68] The affidavit evidence of the defendants in this matter is striking in its similarity, with the exception of that of Robert Smith. The impression given, is that the claimant was a cold, uncaring step-mother, who did nothing for the children and contributed nothing to the renovation or management of the home that she shared with them and their father. To be fair, the resentment is not without reason supplied by them, as their father blamed them for upsetting the claimant by their performance in school and behaviour in the home. It was almost surprising to hear in cross-examination, that she assisted with school fees and purchased a car which all enjoyed.

- [69]** The discussion concerning whether Phadrian Avenue was the family home is manifest in these revelations in the evidence. Consistent with Section 2 of the Act, the claimant and her husband lived only at that home with his three youngest children, until she was forced from the home for her safety, when the deceased pulled a knife at her.
- [70]** Upon her departure she remained married to the deceased and visited him, shared meals with him and paid bills for him. There was occasional intimacy. When he became ill, she took him to the doctor and to have tests done and paid for them. On her regular visit to be with him, she found him dead. She summoned the children and paid for his funeral. Robert Smith says he asked her to provide the bills so he could settle his portion. This has not been done six years later.
- [71]** None of the defendants gave any evidence of assisting the deceased, now a retired man, substantially or regularly, in the latter years of his life. Neither can they speak, from direct experience, to the nature of the relationship between the deceased and his wife, as disclosed by her evidence, up to the time of his death.
- [72]** I find that consortium continued between the claimant and her husband up to the time of his death. I am bolstered in this view by her evidence that it was her daughter, not her, who did not wish to go back to live at Phadrian Avenue. Presumably, she would have returned to live there. It was three years after she left, that she moved into 5 Gary Avenue.
- [73]** I disagree with the defendants that Phadrian Avenue ceased to be the family home. The couple still met and shared there, although the claimant stayed elsewhere. The claimant maintained her room there and items of furniture and appliances owned by her remained there with some of her clothing. She continued to take her mail there and had free entrance and exit from there. It is the only place that they lived.

Is the claimant entitled to a 50% share in Phadrian Avenue?

[74] I am grateful to Dr. Anderson for his insight into modern statutory interpretation. In a proper case the purposive approach to aid interpretation of a statute has its place. However, Cross' Statutory Interpretation and **Ministry of Finance et al v Bennett (Supra)**, clearly establish that the starting point in statutory interpretation remains the ordinary meaning of the words of the statute. Other factors can be considered if the ordinary meaning of the words does not aid understanding.

[75] The ordinary, grammatical meaning of Section 6(2) is pellucid – upon the death of the sole owner of the fee simple in the family home, the surviving spouse is entitled to a 50% share. This entitlement is not circumscribed and not subject to any other consideration in the statute. Section 6 confers jurisdiction See **Angela Bryan-Sadler v Samuel Oliver Saddler** SCCA No. 57/2011 and **Fitzgerald Hoilette v Valda Hoilette and Davian Hoilette** SCCA No. 137/2011 Per Phillips, JA, where among other findings the learned judge stated;

Section 13 of PROSA does not go to jurisdiction but is a

*procedural section setting out the process to access the Court and the remedies available. **Jurisdiction is conferred by sections 6, 7 and 14.** (Emphasis mine)*

Section 6(2) stands alone and is devoid of uncertainty or absurdity. The legislature clearly intended that in those circumstances, the surviving spouse is to be protected. Issues of contribution to the acquisition, renovations and upgrading of the property as well as Section 7 considerations are otiose.

[76] The contributions of friends and well wishers at the time of the acquisition of the property were, I find, never intended to operate as a barrier to the claimant or what is envisioned in Section 2 of PROSA and are based on suppositions and hearsay. According to Robert Smith, the main contributor at the acquisition of

the property in 1981 is the other executor of the will of the deceased and he did not provide any evidence in the matter. Robert Smith was 17 years old when the property was acquired. He seems to have assisted with physical labour in the construction for his father. That could never be construed as a gift to attach to the property in the manner suggested. I doubt strongly whether he made any financial contribution to either the acquisition or renovation and upgrading during his father's lifetime. I did not believe him based on his vagueness and demeanour.

What is the purport of the Last Will and Testament of Owen Dean Smith?

[77] It is trite law that a testator can only devise what he has. Section 3 of the Will Act states;

“It shall be lawful for every person to devise, bequeath, or dispose of by Will, executed in manner herein after required, all real estate and all personal estate **which he shall be entitled to**”

(Emphasis mine)

[78] It follows that Owen Dean Smith was only competent to dispose of, by his Will, what he was entitled to at the date of his death. At his death he was only entitled to dispose of his half interest in the property. The dispositions in his Will are therefore subject to the entitlement of the claimant. Accordingly, his 50% share in Phadrian Avenue is to be divided in accordance with his Will.

ORDER

[79] The following orders were made:

1. That the claimant is entitled to one-half share of the family home located at 16 Phadrian Avenue, Kingston 6 in the parish of Saint Andrew;

2. That the said property be sold on the open market or by private treaty;
3. The claimant shall receive fifty percent (50%) of the proceeds of sale and the remaining fifty percent (50%) shall be distributed among the beneficiaries of the Will of Owen Dean Smith;
4. That a valuator shall be agreed and the costs of the valuation shared equally between the parties;
5. That if no valuator can be agreed within 21 days of the date of the Order then CD Alexander Realty Company Ltd. shall value the said property;
6. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unwilling to do so.