Session IV

The Property (Rights of Spouses) Act – The Imperfect Structure of Legislative Revolution

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Introduction

The **Property (Rights of Spouses) Act 2004 (PROSA)** came into effect on April 1, 2006. It seeks to revolutionize the legal paradigm on which the dispute over property on the break of domestic cohabitational relationships, whether marital or non-marital, among heterosexual couples[1] is resolved. The paper examines the aims of PROSA and highlights the challenging conceptual background presented to it by the existing law. I will go on to attempt to point to some of the legislative drafting difficulties of the Act as measured against those aims and challenges and analyse a couple of the judicial application which have so far come before the courts. It is hoped that along the way you will pick up some practice guidance on navigating the provisions of the Act.

The Aims of PROSA

The original bill was designated 'The Family Property (Rights of Spouses) Act 2003" and indicated that it was "an act to make provision for the division of Family Property". However nowhere was the term 'family property' defined. Instead, it gave interpretation to two concepts: 'family home' and 'property'. The family home was defined to mean:

> "the dwelling-house that is 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…"

The definition of property did not have any reference to family and conveyed an ordinary understanding of property as:

> "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

[1] It is important to indicate this because same sex domestic cohabitational relationships are not recognised in Jamaica and the Commonwealth Caribbean, unlike the UK which through the Civil Partnership Act 2004(UK) same-sex couples have all the rights of couples in heterosexual marriage. UK case law and legal literature, which influence much of our law and which in this so subjective area should therefore be read with this difference in mind where appropriate.

> right or interest whether in possession or not to which the spouses or either of them is entitled."

The Memorandum of Objects and Reasons, appended to the bill, while it pointed out that the present law is based on "the separate property law concept" and explained that "the present law does not provide for the equitable division of property between spouses upon the breakdown of marriage", and that "this concept has been abolished in many countries', it does not profess to create a regime of 'family property', but, instead, to generally state that it 'seeks to enact provisions to provide new rules for the division of property' between spouses and men and women living together in 'common law' unions. According to the Memorandum, These new rules seem specifically aimed at

- erasing the disadvantage which the current rules have on a wife who does not work outside the home,
- avoiding proof of contribution since records of expenditure are not usually kept,
- resolving the issue of indirect contribution

The appearance of the term 'family property' in the title of the bill is somewhat curious because in none of the reports which proceeded its enactment was the term recommended. One is not even sure that it is a term of defined significance rather than loosely used to describe "property [that is] owned by the family as a group of people"[2] to distinguish it from the concept of separate property which the bill seems to indicate that it has set out to abolish, as it claims has been done in other jurisdictions. It was therefore understandable that the word 'family' was dropped from the final version of the statute. That change may have significance for the construction of the statute itself, and the value of precedents from other jurisdictions, if even it is to make the point that the concept of separate property, property owned separately by each individual to the union, has not been replaced by its opposite, family property.

[2] Herring, Jonathan *Family Law* 5th edn (Pearson 2011) 149

In *Brown v Brown,*[3] Justice Morrison in his comprehensive recount of the history of the enactment of PROSA notes that the final version of the Act adopts the 'composite' approach, meaning that there is a combination of a fixed approach to redistribution and a discretionary approach. The fixed approach is relegated to the 'family home', while all other 'property', as defined by the Act, is subject to the discretionary approach with guidelines for the exercise of that discretion.

The Conceptual Challenges of Existing Law

Prior to the promulgation of PROSA the resolution of disputes regarding the ownership or share in property of couples in a domestic relationship, whether married or unmarried, was governed by the common law and, in terms of financial support on separation or termination, the Matrimonial Causes Act 1989, as supplemented or substituted by the Maintenance Act 2005. Strictly in terms of ownership of property, which is the subject of this paper, there was no power in the court to redistribute property between spouses. The Jamaica legislature did not adopt the provisions of the UK Matrimonial Proceedings and Property Act 1970, as replaced by the Matrimonial Causes Act 1973, which grants to the courts of that jurisdiction wide power to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. Instead, the law relating to the settlement of dispute regarding ownership of property of married couples in Jamaica remained within the procedural only framework of the Married Women Property Act 1887.

The early attempts in the English courts to use equity to remedy the limitations of the law were rebuffed and existing law was cemented into our jurisprudence by the twin pillars of *Pettit v Pettit*[4] and *Gissing* v *Gissing*[5] in which it was affirmed that there was no special law relating to

[3] [2010] JMCA Civ 12
[4] [1970] AC 777

families; instead the claims to ownership must be decided by the ordinary law of property. It was against this background that PROSA was enacted. Therefore, it is necessary to say a few words regarding the principles, (which still exist in relation non-marital cohabitational couples in the UK) and still influences our law, as despite the fact that our statute stands by itself, the courts still refer to English cases, even recent ones. The aim is to dispel certain misunderstandings of the concepts.

Law & Equity of Matrimonial Property

Quite simply at law, the person in whose name the property is held is regarded as the owner. In equity, on the other hand, three equitable concepts tempted judges to rectify the 'injustice' which seemingly fell from the strict legal recognition of property rights. They were:

- resulting trust
- constructive trust
- proprietary estoppel

However, neither resulting trust nor constructive trust was flexible enough to create the revolution in property rights that the realities of intimate relationships seem to call for. They were each limited by the maxim "equity follows law." The law of trust is not based primarily on justice or fairness, but on reality. Both resulting and constructive trusts attempt to discover, apart from whose name the title is in or how the shares are specified, who in fact **owns** the property. The law of trust is not re-distributive. It never denies the legal title but attempts to ascertain **who** has the legal title. Thus **resulting trust** states that the person who supplied some or all the funds is the beneficial owner of his share of the funds he provided. The **constructive trust** depends on what became known as **'common intention' to share** ownership. Even so, the method of proving common intention was not at large but limited to (a) an agreement, understanding or

[5] [1971] AC 886

arrangement or (b) a **direct** contribution to the purchase price or mortgage installment. If these two concepts are reminiscent of contract law, (consideration and consensus ad idem) this is not accidental because the basis of the law of trust is, anomalously, "equity follows law".

The equitable input in these trusts is the requirement of detrimental reliance on the common intention which invokes the Chancery Court's unique jurisdiction. Thus, it is important to understand the orthodoxy of resulting and constructive trust. As the Privy Council said in the Jamaican case of *Green v Green*[6]"Equity merely constructs a trust to give effect to the legal title."

Proprietary Estoppel was much more radical. It arises when A has acted to his detriment on the faith of a belief which was known to and encouraged by B that he either has or is going to be given a right in or over B's property. Equity estopps B from insisting on his strict legal rights, if to do so would be inconsistent with A's belief. Proprietary estoppel, unlike trusts, is a pure equitable principle because it is not entirely based on familiar legal principles of consensus or consideration but on the defining principle of equity – **conscience**.[7] Jonathan Herring points out that "Conscionability in essence means fairness. So proprietary estoppel cannot be tied down to a firm set of rules: each case turns on what is conscionable in all the circumstances." So unlike trusts, proprietary estoppel has the capacity to be redistributative. Proprietary estoppel does not follow the law; it supplements the law – another maxim of equity. It does not look objectively to the agreement, but subjectively to the detriment.

[6] [2003] UKPC 39

[7] "[T]he whole point of estoppel claims is that they concern promises which, since they are unsupported by consideration, are initially revocable. What later makes them binding, and therefore irrevocable, is the promisee's detrimental reliance on them. Once that occurs, there is simply no question of the promisor changing his or her mind." - William Swadling [1998] RLR 220 – quoted with approval in *Gillet v Holt*

In *Gillet v Holt* Walker LJ, as he then was, distilled the following relating to proprietary estoppel:

- The doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments
- The quality of the relevant assurances may influence the issue of reliance
- Reliance and detriment are often intertwined
- Whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood. The emphasis is not what B intended but the reasonableness of A's reliance on what B has said.
- Moreover, proprietary estoppel may even arise from an equivocal representation.[8]
- The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine
- In the end the court must look at the matter in the round.

The problem with proprietary estoppel, however, as a method by which the law relating to redistribution of family property, is the very nature of the **remedy**. Once the titled owner is estopped, then the court has to determine what the entitlement is, it may be nothing or it may be everything. The breadth of the individual judge's discretion brings the matter back to the cloud of uncertainty in the law which is the practitioner's nightmare.

> "The mere fact that a claimant can demonstrate that an 'inchoate equity' of estoppel has arisen in his favour does not mean that he has an automatic right to some court ordered remedy. His equity finally crystallises only when it is concretised in the form of a specific interest, award or order determined at the discretion of the court. The existence of the equity merely opens up the court's jurisdiction to consider the effects of the claimant's allegation against the good conscience of the landowner … The range of possible relief extends widely"[9]

[8] "The equivocal nature of the promises is merely one relevant factor when considering whether or not it would be unconscionable to permit the legal owner to rely on his strict legal title, "having regard to any detriment suffered by the plaintiff in reliance on them." - *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776

[9] Gray and Gray *Elements of Land Law* p.971

Moreover, the wide range and unpredictably subjective situations in which constructive and resulting trusts and proprietary estoppel has to be applied, the courts have lost track of which principle is being applied. In the important case of *Oxley v Hiscock* [10] Chadwick LJ stated:

> "Once it is recognised that what the court is doing is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition), is shown to be fair, it seems very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result; and that it may be more satisfactory to accept that there is no difference between constructive trust and proprietary estoppel."

Lately in *Stack v Dowden* [11]the controversy over the correct principle to be applied raged just as it did 40 years previously in *Pettit* and *Gissing.*[12] Therein, Baroness Hale is credited to have settled the law. But despite the fact that her colleagues mouthed concurrence, they expressed such grave misgivings as to totally undermine a comfortable consensus that the principles are in fact settled. Lord Neuburger was forthright in expressing his misgivings regarding uniting proprietary estoppel equity with constructive trust in terms of imputing intention where none in fact exists. Thus, now the common law is summarised by Carwath LJ in the Court of Appeal:

> "To the detached observer, the result may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them."[13]

He continues:

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[10] [2005] Fam 211, 245; [2004] EWCA 756 [66]
[11] [2007] UKHL 17, [2007] 2 AC 432
[12] "Unfortunately the speeches in Pettitt v Pettitt did not speak with one voice, and it is difficult to extract even a single majority view. The problems are compounded by the fact that in the following case, Gissing v Gissing [1971] AC 886 , the House itself found some difficulty in agreeing on what had been decided by Pettitt v Pettitt , and the speeches give further twists to the arguments. This was bad start." per Carwath LJ in *Stack v Dowden* [2005] EWCA Civ 857 [74]
[13] Id at [75]

> Underlying this apparent confusion is a range of conflicting **policy factors** which can be validly used to support different ideas. For example, the following ideas can all found in the cases, and all can be supported by respectable arguments:—
>
> (i) The interests should be solely as defined by the transfer deed, or by any written agreement of the parties;
>
> (ii) The interests as defined by (i) may be modified to give effect to differences in the financial contributions made by one or other of the parties at the time of the acquisition.
>
> (iii) They may be modified (further or in the alternative) to take account of any agreement or understanding reached at that time between the parties (whether or not in writing);
>
> (iv) They may be modified to take account of the dealings between the parties during the course of their relationship, so far as casting light on their presumed intentions in relation to their shares in the property.
>
> (v) The division should not depend on past agreements or understanding, but should be determined by reference (partly or wholly) to the future needs and expectations of the parties."

The Policy Factors of the Property (Rights of Spouses) Act 2004

To what extent can it be said that PROSA has made policy choice selections and has solved this conundrum relating to matrimonial property? The Act sought to do make three paradigm shifts:

1. "[B]y its definition of 'spouse' it has recognized and given effect to the prevalence of so called common-law relationships in our country. This recognition will have fundamental and salutary consequences as between 'spouses' hereafter, following the termination of 'man and wife relationships' not evidence by traditional legal criteria.'[14]
2. It gave recognition to a limited but significant specie of 'family property' in the form of the 'family home' and provided an 'entitlement' upon separation or divorce to a half share, except where, in the circumstances it would be unreasonable or unjust for each spouse to be entitled to one-half the family home. The Court may in such a case upon application by "an interested party"[15] make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including
    a. that the family home was inherited by one spouse;

[14] Per Cooke JA [5]

[15] Includes a spouse, relevant child or any other person whom the Court is satisfied has sufficient interest in the matter (s7(2))

b. that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;[16]
c. that the marriage is of short duration.

3. It gives the court re-distributive powers over property on the breakdown of marriage or separation 'as it thinks fit' based on five factors
    a. The contribution, financial or otherwise,[17] directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has , since the making of the financial contribution, ceased to be 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

There is no doubt that PROSA is of revolutionary purport as it seeks to replace the paradigm of the common law principles by which ownership and entitlement are determined. Significantly, section 4 declares:

> 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 transactions between spouses in respect of property and, in cases for which provisions is made by this Act, between spouses and each of them, and third parties.

The success of the provision is not determined by the paradigm but the methodology of its implementation which takes it out of the quagmire of the very common law and equitable principles that it has declared is no longer the governing guide. The question is whether PROSA has achieved this level of certainty. This answer is complex and deserves a much longer analysis to do it justice that time allows and so this paper merely gives an introduction, as it were.

PROSA and the Courts

[16] S. 7(1)
[17] S 14(3) gives a comprehensive list of things and actions that may be counted as contribution and ss (4) makes it clear that "there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution."

An examination of the decisions on PROSA leads to two conclusions. First, the drafting is not as tight as it could be in the circumstances and, second, that it has not led to a simpler and more predictable outcome that avoids extended litigation and encourage settlement.

Reviving the dead man's statute

The first failure of the drafting of the Act was its ineffective statement of its application. The first provision relates to death and it is rather curious. It provides that the provisions of the Act shall not apply after the death of either spouse "and every enactment and rule of law or equity shall continue to operate and apply in such case as if this Act had not been enacted."[18] This seems to be bringing to life in PROSA what we call in New York the "Dead Man's Statute". This is provided for by the NY Civil Procedure Law and Rules s. 4519 and is said to carry forward the common law rule of evidentiary incompetency based on interest where the testimony is that of an interested witness concerning a transaction or communication with a decedent or mentally ill person. Such testimony is presumed untrustworthy **as a matter of law**. The effect of s 3(1) of PROSA is that any right that a spouse may have can only achieved through litigation against a another living spouse and not his estate or other 3rd party under the Act, even where it is not sought to support the claim with testimony concerning a transaction or communication with the decedent. In that regard it is more radical than the dead man's statute. The other effect that this provision has is that PROSA does not give any vested rights prior to a declaration of that right by the court. The Act therefore takes away a significant right of the surviving spouse since the provisions on intestacy or under will or may not be as significant as an entitlement under the Act. While it may be regarded as unfair to allow testimony regarding issues that the sealed lips of the dead spouse cannot respond to, there is also potential unfairness to the surviving spouse, in

[18] Section 3(1)

situations that are beyond her control. The issue should resolve itself as one of proof of facts and this is where the courts come in. The provision seems unnecessary.

Therefore, in a case in which death of one of the spouse seems imminent and there are advantages to be gained because the rights in property were not settled, it would seem that the Act requires that an action be immediately commenced since s3(3) provides that if the spouse dies while the proceedings are pending then the proceedings may be continued and be completed.

Retroactivity

But by far the most controversial matter in relation to the Act is whether it is retroactive to events that occurred prior to its promulgation or to divorce, separation or cessation of cohabitation that occurred before the coming into force of the Act. The Supreme Court was quite clear that it did not. Justice Sykes in his characteristic orthodox analysis gave a resounding 'no' in *Stewart v Stewart*.[19] The learned judge upheld counsel's submission that no rights accrued and the court had no jurisdiction under the Act if the triggering events stated in section 13 and relied on to support the right to make the application took place before the Act came into force. The court also held that the discretion of the court to extend the time within which to bring a claim, a and could not give a jurisdiction that did not exist in the first place. The triggering events relied on by the wife were section 3(1)(c) "where a husband and wife have separated and there is no reasonable likelihood of reconciliation."

The analysis of the court reveals the antithesis of this provision to the aims of the statute. The Supreme Court went into a long discussion regarding when the couple in fact separated, the

[19] Carilaw JM 2007 SC 113. This was followed by other decisions, notably *Boswell v Boswell* 2006/HCV 0327 31/7/08, but by implication several other cases wherein the common law was relied on rather than the provisions of PROSA, and perhaps counsel would have been reluctant to advance a case in the Supreme Court in light of the strong decision in *Stewart*.

meaning of separation and what 'no reasonable prospect of reconciliation' means. To demonstrate how subjective the excursion into the intimate personal lives of the couple was, the court held that the husband's visits to his wife and sexual relations with her after the physical separation, in addition to his promise to fix the house in which she was residing, "are not sufficient to displace the conclusion I have come to on the issue of separation and the reasonable likelihood of reconciliation."[20] Then the court made the infamous pronouncement:

> The wording of section 13(2) also puts the matter beyond doubt. It permits an application under the Act when the specified events of section 13(1) have occurred. If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it came into force. Courts do not lightly conclude that a statute has retrospective effect. I conclude that Mr. Wilkin's submission that I have no jurisdiction to hear the matter, for reasons given, is well founded.

A close examination of this statement, in spite of its self-description of being logical, reveals that it is not. Permitting an application after the occurrence of an event bears no *sine qua non* relationship to a right to do anything after its occurrence. In fact, the only indispensible condition for the application is that the events have occurred. If they did not occur then there is no right to bring the application and the court, in finding that the events did not occur, is deprived of jurisdiction.[21]The deficiency with the judgment is self-evident in the quoted statement itself. The judge stated "Courts do not lightly conclude that a statute has retrospective effect;" not that courts never give statutes retrospective effect. The learned judge did not explore the exceptions to this general rule and it does not appear from the case that counsel addressed the court on the exceptions.

[20] Id. at [18]

[21] It would have been preferable for the learned judge to have based his decision (and counsel to have framed his argument) not on lack of jurisdiction but the lack of right of the claimant to bring the application. Jurisdiction is not reached if there is no proper application. The court has jurisdiction to strike out the claim.

Having failed to analyse the legal principles involved, it was therefore an easy thing for the Court of Appeal to supply the deficiency and to unanimously conclude, in my view, more convincingly as a matter of policy rather a textual interpretation, that the ameliorating aims of the Act mandated retrospective reach. While the judgments of the Court of Appeal disclosed not only the legal analytic brilliance of the three members of the Court, it also betrays a self-consciousness and perhaps even fear of our Caribbean judges to make pronouncements based on policy argument, a point that I have been making repeatedly. For example, Justice Cooke, delivering the lead judgment, merely said "It does seem somewhat curious that persons who were divorced or terminated their relationship in this 2 year period should be denied any benefit as provided by the Act."[22] But he failed to explore and evaluate his rhetorical statement by giving and the pros and cons of holding one way or another and thereby explaining why it is 'curious'.

Justice Morrison also confirms this Caribbean judicial conservative reluctance to place policy argumentation at the forefront of their decision-making, by preferring to rely on textual interpretation. That being said, it must be admitted that a close reading of his judgment does disclose a strong underlying policy analysis, when he started that,[23]

> In introducing the concept of the family home and the wide discretionary powers given to the court by section 14 of the Act, the two principal new features of the Act, it seems to me that the legislature in enacting it set out to remedy some of the perceived ills of the past and to usher in an entirely new dispensation in the adjudication of disputes between spouses in respect of matrimonial property.

His strongest policy indication came with regard to the statutory provision relating to the unmarried couple.[24]

[22] Id at [6]
[23] [72]
[24] [74]

> It seems to me that [the provision to include common law relationship in the definition of spouse] must have been intended to operate retrospectively, in the sense that as of the date when the Act came into force all persons who satisfied the new statutory criteria would become immediately entitled to take the benefit of the new provisions notwithstanding the fact that the requisite five year period had already elapsed from before the Act came into force. It would also follow from this that persons who had not yet completed the five year period as of that date would be able to count the time already elapsed in calculating the end of the period. To read this provision prospectively, it seems to me, would mean that persons in a common law relationship would be obliged to wait out the five year qualification period, reckoned as of the date the Act came into force, before being able to bring the proceedings under the new provisions. This is a result that I consider to be as startling as it would be unjust.

The point is well taken. But there is perhaps a stronger argument to be made with respect to the married couple (not limited to five years, but whose marriage could have gone back decades) who seeks to rebut the argument that the Act only applies to marriages which took place after the date of coming into force of the Act and certainly to contributions and other actions that were made thereafter. To so hold would entirely gut the effect of the Act and postpone its effective operation to many years into the future.[25]

Justice Morrison referred to the dictum of Lord Simon P in *Williams v Williams*[26] regarding "the desirability of a statue indicating in express and unmistakable terms whether (and, if so, how far) or not it is intended to be retrospective," and with uncharacteristic impatience, the learned judge quipped that **the good sense of this suggestion** "certainly does not appear to have commended itself to the drafters of the 2004 Act."

> There is therefore, so far as I have been able to discern, no express statement in the Act that it was intended to have retrospective operation. So the question is

[25] Of course the argument could be made that if I knew the law was such I would have acted differently, such as renting instead of purchasing a home, or renting out my home instead of living there. I was not given notice and co could not temper my actions.
[26] [1971] 2 All ER 764, 772

> whether such an intention can be derived by way of implication from the actual language used by the legislature.[27]

Taking all of that together, the legislature could not have intended anything else other than retrospective operation, no express language proscribes its retrospectivity and the court in *Brown* was doing what all courts are bound to do, that is, to give effect to the intention of Parliament. There was no necessity to strain language under the guise of constructing a textual argument. No further argument was necessary than to say that it was the intention of Parliament and obvious to the drafters that it was not necessary to include express words.

The Family Home

In the original draft, 'family home' was defined as[28]

> the dwelling-house that is 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.

The final version of the definition significantly differs.

> "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."[29]**

Jonathan Herring points out that:

> "the home is the most valuable asset that many people own. This is true not just in monetary terms but in emotional terms: to many people the home is of great psychological importance. A dispute over ownership of the home can therefore be particularly heated."[30]

[27] A height of the craft of reasoning from text is found in the judgment of Justice Phillips who at the end was convincing that indeed the statute had expressly provided for retroactivity.
[28] S 2(1)
[29] Emphasis indicate the added words.
[30] Id 157

Bromley's *Family Law* concurs:[31]

> "The family home may have two functions. Its primary purpose… is to provide shelter for the parties and their family. At the same time, if it is held in freehold or on a long lease, it will constitute the most significant asset that most couples own and is thus an extremely valuable investment. If the relationship breaks down, these two aspects may come into conflict. Both parties wish to continue in exclusive occupation (with or without children); alternatively, one may wish to do so while the other may wish to realize his or her investment. A party deprived of both the value of the home and the right to occupy it will often find it impossible to purchase other accommodation, and if the house is sold and the proceeds divided between them, both may face the same predicament."

There is no doubt that the share of the family home is the centre piece of PROSA and one that accomplishes the need for certainty and protection and avoids the turmoil of the acrimonious and difficulty questions that matrimonial property at common law and in equity engenders. Indeed, it is interesting to note that in many contested matrimonial cases since the Act, there is ready concession regarding the 50 percent share of the family home between the spouses.[32]

Nonetheless, there are many issues that the definition raises and it relates to how closely the drafter considered the definition against the background of the unique ways in which couples in Jamaica live. The *Stewart* case presents a poignant example in two respects. In *Stewart*, the claim involved two properties, one an apartment and the other a house. The house was the more substantial of the properties and that it was intended to be the place where the couple intended to set up their matrimonial home. However, because of the wife's daughter's allergy to the carpet at the house, the wife moved with her daughter to the apartment. The house remained central to the relationship of the husband and wife and the evidence was that she visited there every day and they may have even spent weekends there together. Some central family functions took place at the house. The apartment, however, was where most of the family activities took place. As

[31] Nigel Lowe and Gillian Douglas 10th edn (Oxford 2009) pp 145-146
[32] See, *Graham v Graham* Carilaw JM 2008 SC 36

Justice Sykes found "[The wife] left the apartment to go to the disputed property and then returned to the apartment. The apartment was her base of operation."[33] He therefore concluded that it was not the 'family home' within the meaning of the statute. The other problem was that the apartment was not wholly owned by the husband but was co-owned with a third party (who eventually got an order of possession of the apartment forcing the wife to leave). Therefore she could not make a claim for 50% of the apartment under section 6 as it did not fall within the definition.

The question then becomes: Was there a basis upon which the court could have come to the conclusion that the house was the family home? Not so, based on a severe literal interpretation of the statute used by Justice Sykes. Dissecting and parsing the definition of the term provided by the section, he reasoned:[34]

> It should be noted that the adjectives 'only' and 'principal' are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. Only means sole or one. Principal means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression family residence. Indeed, even the noun 'residence' is qualified by the noun 'family' which is functioning as an adjective in the expression family residence. Thus it is not any kind of residence but the property must be the family residence. The noun residence means one's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses.
>
> It is important to note that in this definition of family home it is vital that the property must be used habitually or from time to time by the spouses, as the only or principal family residence. The adverbs habitually and from time to time tell how the property must be used. The definition goes on to say that such a property must be used wholly or mainly for the household. Thus using the property in the manner indicated by the adverbs is crucial. The legislature, in my view, was trying to communicate as best it could that the Courts when applying this definition should look at the facts in a common sense way and ask itself this

[33] Id [32]
[34] Id [23]

> question, "is this the dwelling house where the parties lived?" In answering this question, which is clearly a fact sensitive one, the Court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items (c) if there are children, where do they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that the Court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items.

The problem in this case was that because the husband did not wholly own the apartment in which the court said was the family home, he was able to defeat the wife's claim under section 6 of the Act. Can one imagine facts where there are two family homes? Should the definition take into account the situation in which a couple has a house in the country but works in town where they rent and apartment but returns most weekends to their home in the country? Is there room for an interpretation of the section to include this? What of the phrase "from time to time" in the definition, could this in this unique situation make the house **the relevant family home** bearing in mind that it was the mutual intention of the parties for it to be the matrimonial residence but for the child's allergy. In a close case, does it matter which choice between two homes is made by the court as being the family home for the purpose of the statute where there is evidence that the couple did in fact cohabit? Justice Sykes was not prepared to mount the unruly horse of the purposive approach to statutory interpretation.

The statute's defeat of itself by its restrictive definition was also seen in *Elliott v Elliott*[35]where the home in which the couple resided as their principal dwelling-home was held by the defendant and a third party as joint tenants. The court in that case accepted that the house was bought

[35] Carilaw JM 2007 SC 94

before the marriage of the parties and that the joint tenancy was not a transaction to defeat the claimant's interest under the statute. [36]

Another interesting issue regarding the family home arose in the also captioned most recent case of *Stewart v Stewart*[37] Therein, Justice Lawrence-Beswick had before her a situation in which the married couple separated in 1994and the wife moved out of the home in 1996, "over a decade before the Act came into force." Nonetheless, the wife brought a claim in 2008 seeking 50% share of the home within a year of her divorce pursuant to section 11. Following *Brown* it was held that she was competent to bring such a claim. But apparently the point was never taken as to whether there is an expiration date to a house being the family home. The court held that the house in this case was, despite the long period of time since the couple lived there. It came to this conclusion without reason and apparently without argument:

> It is agreed that the Stewarts owned the house and lived as a family there until Mrs. Stewart left in 1996 and it is therefore a family home within the meaning of this Act.[38]

The actual argument that was made by counsel for the husband was therefore based on the section that it would be unreasonable and unjust give her 50% because he provided the down payment, mortgage and monthly payments with no assistance from the claimant and that he maintained the house and children with minimal assistance from her. In the end the court ordered that the wife was entitled to only 25% and the husband 75%.

There is much that is troubling about this case and the issue of the meaning of 'unreasonable and unjust' in section 7 of the Act, which gives the court the discretion to return to the unruly

[36] Note that the claimant could make a claim against the interest of her spouse to the jointly owned property under the non-family home property division scheme. The court applying the traditional substantial contribution to the acquisition that it is thought PROSA did away with, determined that the husband had no interest in the property as he made no contribution to the acquisition, there was no common intention to share and his actions were no more than the actions of a husband in the particular circumstances.
[37] 2008/HCV03634 January 10 2011
[38] Id [14]

lawlessness of the equitable and fault jurisdictions so long abandoned as inappropriate is deserving of comprehensive analysis at another time. Needless to say, the issue with which we are primarily concerned here is whether there is an expiration date on the description of a house as the 'family home' or once the family home always the family home, unless it has been replaced by another. This is a lacunae in the definition and given the varied ways in which couples live in Jamaica, including maintaining more than one residences, residing with the extended family member who may be added to the title, or the penchant for living in two different countries (as in the unsatisfactory case of *Wills v Wills,*[39]which makes it possible for rights given by the Act to be defeated by adverse possession) the definition of family home - the salutary section of the Act leaves much room for argument on appeal. If *Brown v Brown*[40] is to be taken as an example of the energy with which our Court of Appeal will look at this matter then there will be really good times ahead for appellate counsels. But can the couples afford it?

[39] [2002] UKPC 50
[40] [2010] JMC A Civ 12