

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 000119/2004

BETWEEN GLORIA THOMPSON CLAIMANT

AND CHERRY IGBINEDION DEFENDANT
(Executrix of the estate of
Lyndell Allister Thompson deceased)

IN CHAMBERS

**Ingrid Clarke Bennett and Pamela Shoucair Gayle instructed
by Pollard Lee-Clarke and Bennett for the claimant**

**Dr. Lloyd Barnett and Maurice Frankson instructed by
Gaynair and Fraser for the defendant**

October 18, December 11 and 17, and January 7, 2008

**SECTIONS 4, 6, 7 AND 19 OF THE INHERITANCE
(PROVISION FOR FAMILY AND DEPENDANTS) ACT,
SECTIONS 70 AND 71 OF THE REGISTRATION OF
TITLES ACT**

SYKES J.

1. This is an application under section 6 of the Inheritance (Provision for Family and Dependants) Act ("the Act") made by Mrs. Gloria Thompson, the widow of the deceased, Mr. Lyndell Thompson, who died on September 3, 1995. The couple met in 1978, began living together in February of 1980 and were married on August 17, 1985.

2. It is the contention of Mrs. Thompson that her husband, by his will, failed to make reasonable financial provision for her out of his estate. She has come to this conclusion because of what I am about to describe. There is a will dated July 12, 1994. The will has been probated and no issue is raised as to its validity. By that will Mr. Thompson appointed his daughter, Lady Cherry Igbinedion, and Mr. Kenrick Thompson, his son, executors and trustees. Under the will, Mr. Thompson devised 28 Halifax Avenue, Kingston 6, to his daughter and another property located at 2 Fairdene Avenue, Kingston 19 to his son. The residuary clause left real and personal estate to his wife absolutely. On the evidence, there was no real estate in the residuary estate. The residuary estate consists of furniture, a motor car that has now been stolen and two bank accounts. One of these accounts is said by Mrs. Thompson to be exhausted. She has not provided any proof of this. The state of the other account is not known.

3. Mrs. Thompson seeks to remedy this failing by her husband by a fixed date claim form in which she is asking for the following declaration and orders:

a. A declaration that:

i. The disposition of the estate of Lyndell Thompson deceased, the claimant's late husband, effected by his will is such as not to make any or any adequate financial provisions for the maintenance of the claimant.

b. an order that:

i. The claimant be granted specific permission by the court to make application under section 6 of the Inheritance (Provision for family and Dependents) Act.

- ii. Adequate provision be made for the claimant out of the assets of her deceased husband to wit: she be given one half interest in property situate at 28 Halifax Avenue, Kingston 6 by the deceased at the date of his death.
- iii. The court makes such further or consequential order as shall be necessary and equitable in the circumstances.
- iv. The estate of the deceased bears the costs of this application.

4. Lady Igbinedion responded with her application for court orders in which she wants these orders:

- a. The claimant be ordered to pay to the defendant the sum of fifty thousand dollars (\$50,000) per month being mesne profits pending the claimant's occupancy of the premises situate at 28 Halifax Avenue, Kingston 6 in the parish of St. Andrew and registered at volume 1057 folio 418 of the Register Book of Titles from 9th day of April 2001.
- b. The claimant quit and deliver up possession of the said property to the defendant within ninety days of the date hereof.
- c. The claimant whether by herself or her servants and agents be restrained from renting or letting any part, portion or section of the property.

d. The claimant deposit all rental collected by her from the property in a bank account in the defendant's account.

e. The claim made by the claimant be dismissed for want of prosecution.

f. Such further or order as this Honourable Court deems just; and

g. Costs of this application and costs thrown away to be the defendants.

5. Lady Igbinedion is not pursuing her application to dismiss for want of prosecution. I should say as well that the claimant was granted permission to pursue her claim out of time by another judge of this court and that is no longer an issue be decided.

6. Mrs. Thompson filed an additional affidavit on the morning of October 18, 2007, the date the hearing commenced. Dr. Barnett objected to the affidavit and the objection was upheld. These are the reasons for upholding the objection.

7. The hearing of this matter was set for October 18, 2007. It was scheduled to last the entire day. The date was set on May 1, 2007 by Campbell J. At the time the date was set, the claimant was represented by counsel as was the defendant. The defendant does not live in Jamaica. She lives in Nigeria and maintains a home in London, England. She flew to Jamaica specifically for this hearing. According to Mrs. Ingrid Clarke Bennett, counsel for the claimant, the affidavit serves three purposes. The first is to update the figures given in the 2004

affidavit. Second, to disclose things that needed to be disclosed and third, to respond to the defendant's affidavit.

8. There is no affidavit evidence explaining this very late filing of the affidavit. Mrs. Clarke Bennett submitted that permission to bring this claim was granted only in February 2006. That may be true but the defendant filed her affidavit in response to the claimant's as well as her own notice of application for court orders on February 9, 2007. Lady Igbinedion served her affidavit on Mrs. Thompson on February 13, 2007. Therefore when the matter came before Campbell J. on May 1, 2007, the defendant's application and supporting affidavit were already on the file and there is no complaint that it was not served. In other words when the matter came before Campbell J., Lady Igbinedion's affidavit had been filed at least ten weeks before. That is more than sufficient time to respond to the contents of Lady Igbinedion's affidavit. There is no evidence that the claimant did not know of the defendant's affidavit before now.

9. Mrs. Clarke Bennett said that her client left the island on March 25, 2007, and returned to the island on October 3, 2007, that is to say, approximately six weeks after she was served with the defendant's affidavit. If she chooses to leave the island without responding to the affidavit that is her choice but it has consequences. She had an opportunity to respond to the affidavit before she left. She chose not to do so. Even after she left Jamaica she could have responded to the affidavit. While abroad she could have given her attorneys instructions. She could have communicated by post or by courier or even by email. She could have returned to Jamaica earlier. She chose none of these possibilities. Even after her return on October 3, 2007, knowing that the hearing was set for October 18, 2007, she did not rouse herself to complete her affidavit by, for example, October 10

so that the defendant may have had the ability to hear of its contents and instruct her attorneys accordingly before her arrival in Jamaica.

10. It was also said that Mrs. Thompson's ailing condition prevented her from giving instructions. I am not impressed by this submission since ailing is not a synonym for inability. The fact that one is ailing, in itself, cannot mean that it is impossible or even difficult to give instructions.

11. I see no good reason to admit an affidavit that contains new information that may precipitate an adjournment in circumstances where the defendant has come to the island from Nigeria at significant expense. She may need time to respond if the affidavit were admitted which may add to the costs. I do not believe a costs order against the claimant would be appropriate. There is no evidence that either Mrs. Thompson or the estate of Mr. Thompson has liquid assets to pay the costs of the defendant.

12. The claimant next applied for an adjournment which was refused. Tardiness in preparation or lack of instructions to one's attorney when the capacity and the means to give such instructions exist is not a reason to grant an adjournment. I go to the law on the matter.

General observations on the law

13. It is obvious that the Jamaican Parliamentarians were influenced greatly by the English statute, The Inheritance (Provision for Family and Dependents) Act, 1975 as well as the ancestor of that legislation, namely, the Inheritance (Family Provision) Act, 1938. The original English legislation was amended several times between 1938 and 1975. Influence, however, is not a synonym for reproducing. The Jamaican legislation does not make a distinction between spouses and

other applicants - a distinction that is made by the 1975 English Act. I say this to say that I do not believe that counsel for the applicant took sufficient note of the difference in the statutory wording regarding spouses. This distinction limits the effectiveness of English cases that deal with spouses. The cases that would be of greater assistance are those cases not involving spouses.

14. The court in Jamaica cannot make an order for anything greater than maintenance in respect of spouses whereas the English courts, in respect of spouses (and spouses alone), may make an order that goes beyond what is strictly required for the maintenance of the spouse. The English statute has a definition of reasonable financial provision (which is not in the Jamaican Act). The definition states in the material part of section 1 (2) (a): "*such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance*" (My emphasis).

15. I shall reinforce the point by referring to the decision of *Re Coventry* [1980] Ch. 461 decided by Oliver J. (as he was at the time). This case went on appeal (see [1980] Ch. 461). In that case, the applicant for maintenance was a son and not a spouse. In coming to his decision, Oliver J. said at page 468 - 469:

*The former legislation was restricted to the making of reasonable provision for the maintenance of the applicant and at first sight the reference to "reasonable financial provision" makes it look as if, in the current legislation, the legislature had in mind a very much wider approach than heretofore. **Section 1(2)(a)** however makes it clear that this is*

indeed so in the case of a surviving spouse, because it expressly provides that the financial provision is not restricted to that required for maintenance. In the case of any other application, however, the section provides as follows, and I read the material part:

"In this Act 'reasonable financial provision' ...

*(b) in the case of any other application made by virtue of subsection (1) above," -
- and I pause to remark that "other" means other than an application by a surviving spouse -- "means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."*

*So on an application by anyone **other than a surviving spouse**, one is brought back to the same criterion -- that is to say, reasonable provision for maintenance of the applicant -- as was applicable under the former legislation. (My emphasis)*

16. Oliver J.'s approach to the interpretation of the provision was confirmed by the Court of Appeal. At page 484 - 485 Goff L.J. (as he was at the time) said:

*So that whatever be the precise meaning of the word "maintenance" - and I do not think it necessary to attempt any precise definition - it is clear that it is a word of somewhat limited meaning in its application to any person qualified to apply, **other than a husband or a wife**. (My emphasis)*

17. It means, therefore, that in England, under the relevant legislation the courts there, because of the wording of the statute, can take a more generous approach with respect to spouses and spouses alone. The law expressly states that maintenance in respect of spouses is not restricted to what is required for maintenance. In Jamaica, the legislature opted to place all applicants, including spouses, on the same footing. There is no special dispensation under Jamaican law in favour of spouses. Thus I am confined to considering what is reasonable provision for the maintenance of Mrs. Thompson, assuming of course, that I have come to the conclusion that the will of Mr. Thompson did not make reasonable provision for her maintenance.

18. There is a further corrective to the submission made by Mrs. Thompson's counsel that is necessary. The submissions tended to suggest that the court has the power to rewrite the testator's will. Indeed, Mrs. Clarke Bennett went so far as suggesting that I should sit in the seat of the testator and look to see whether what he did was reasonable. This submission seems to have been prompted by the exceptionally generous view taken of the word "maintenance" by Mr. Vivian Price Q.C. sitting as a Deputy Judge of the High Court in *In Re Christie* [1979] Ch. 168. For the reasons given by Oliver J. in *In Re Coventry* and Goff L.J. in the same case when it went on appeal I would not adopt Mr. Price's approach.

19. In any event, it is clear from the case law that the court does not sit to rewrite the testator's will. The restriction on the right of disposition is not a licence for any judge to swing a wrecking ball at the testator's will because he disapproves of how the testator disposed of his property. The power given to the court is a very restricted one. In fact, it is a discretionary power that is safely and securely locked behind the gate keeping provisions. The discretionary power only

emerges when the correct key is inserted in the gate. Even after the gate is opened the discretionary power emerges it is not free to roam as it wills. It has to be exercised in accordance with the statutory criteria. Assuming the statutory criteria are met the judge can only make an order for the maintenance of the spouse and not make an order for the spouse's general benefit and welfare. In other words, the judge cannot say, "This disposition is unfair" or "I would have disposed of the property differently" or "I would have made this or that provision for the spouse" or "This is good for the spouse's benefit and welfare." The judge can only look at the disposition of the deceased's estate, whether by will or by the laws of intestacy, and ask whether the disposition made reasonable provision for the maintenance of the spouse. If the answer to this is yes, then even if the judge thinks that the overall disposition of the property is unfair in the broad sense of the word he cannot interfere (see for example, *Re Inns* [1947] 2 All ER 308). If no, then the judge may exercise his discretion in favour of the spouse.

20. This view just expressed is supported, once again, by Oliver J. in *Re Coventry* where he said at pages 474 - 475:

It seems to me, however, that in regarding the circumstances and in applying the guide lines set out in section 3, it always has to be borne in mind that the Act, so far as it relates to the applicants other than spouses, is an Act whose purpose is limited to the provision of reasonable maintenance. It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, [a Jamaican] still remains at liberty at his death to dispose of his own property in whatever way

he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position. (My emphasis)

21. Freedom of disposition is still the prevailing legal norm in Jamaica subject to statutes that curtail that right. The court is not to adjudicate on the deceased's parsimony or munificence. The exercise undertaken by the court is objective. To the same effect is the dictum of Megarry J. (as he was at the time) in *In Re Goodwin* [1969] 1 Ch. 283, 287 - 288:

The statutory language is thus wholly impersonal. The question is simply whether the

will or the disposition has made reasonable provision, and not whether it was unreasonable on the part of the deceased to have made no provision or no larger provision for the dependant. A testator may have acted entirely reasonably; he may have taken skilled advice on the drafting of his will, intending to make a fully reasonable provision; and yet through some blunder of the draftsman (perhaps as to the incidence of estate duty), or by some change of circumstance unknown to the testator in his lifetime, the provision in fact made may prove to be wholly unreasonable. Conversely, the testator may have acted wholly unreasonably in deciding what provisions to insert in the will, but by some happy accident, such as the lapse of a share of residue which then passed to the widow as on intestacy, the provision in fact made may be entirely reasonable. In my judgment the question is not subjective but objective. It is not whether the testator stands convicted of unreasonableness, but whether the provision in fact made is reasonable.(My emphasis)

22. This passage from Megarry J. emphasises why it is not the reasonableness of the testator that is relevant. The testator may have acted with the highest and purest of motives. He may have done what he thought was the best he could do. Yet his best may, on an objective assessment, have failed to make reasonable provision for his spouse or other beneficiaries. Conversely, he might have deliberately set out to be as tight-fisted as he could, yet his best efforts at being stingy might have in fact resulted in reasonable provision

being made for his spouse. All this explains why the test must be objective.

23. Since the power conferred on the court is discretionary, it is entirely possible that the court may decline to make an order in favour of the applicant (see *In Re Joslin* [1941] Ch 200, where Farwell J. declined to make an order in favour of the spouse on the grounds that she had an income whereas the persons to whom the testator's property was willed were penniless. The testator made absolutely no provision for his wife).

24. The Jamaican law, unlike the English statute, does not define the expression "reasonable financial provision". The Jamaican law, like its English counterpart, does not define the word *maintenance*. One of the key questions is, what is the meaning of the word *maintenance*? In answering this question I must refer to Goff L.J. who makes a very forceful point in *Re Coventry*. His Lordship indicated that a claimant cannot succeed merely by showing that he is in need of assistance. Mrs. Thompson cannot succeed by reason only of establishing her need for assistance. Being in need of assistance does not necessarily mean that the deceased failed to make reasonable financial provision. It could be that reasonable provision was made but the lack of frugality on the part of the beneficiary may have resulted in the dissipation of his provision.

25. Having examined the authorities, it would seem to me that maintenance connotes the idea (without attempting to give an exhaustive definition) of something more than subsistence. The word is not so wide as to include the idea of all that may be beneficial for the applicant to have. Maintenance includes putting the claimant in a position to meet his or her recurring living expenses (see Goff L.J. in *Re*

Coventry at 485; Browne-Wilkinson J. (as he then was) in *In Re Dennis deceased* [1981] 2 All E.R. 140, 145).

26. During the submissions, Mrs. Clarke Bennett made reference to other statutes such as the Intestates' Property Estates and Property Charges Act and the Property (Rights of Spouses) Act. She also cited the case of *Williams v Mavaou* (2000) 61 W.I.R. 302 from the Supreme Court of Jamaica which considered the Act under consideration in this matter. As I understood her submission, she did this to show what Mrs. Thompson would have been entitled to under the statutes to which I have just referred. The purpose of this demonstration was to say that those statutes can be a guide in the current application, that it to say, I can look at what she might have received had those statutes applied and make an order in keeping with her entitlements under those statutes.

27. There is a danger in this position and I do not accept it for these two reasons. I give the first reason. This suggests that the court is to embark on an asset redistribution programme because of some perceived unfairness. As I have already pointed out that approach is wrong. Regarding the case of *Williams*, there is a passage in the judgment of Harrison J. (as he then was) that is capable of suggesting that since the wife applicant was entitled to a beneficial interest in the property that necessarily meant that the testator's disposition of the property was ipso facto unreasonable (see page 316). If this is a possible interpretation of the passage then, respectfully, I cannot adopt it for the reasons given below.

28. Entitlement to a beneficial interest in property and what is necessary to provide reasonable financial provision are two separate and distinct legal concepts. One has its origins in

equity and the other originated in the bosom of Parliament. They are directed to different ends. It is entirely possible that a person's beneficial interest may be less than what is necessary to provide reasonable financial provision for that person's maintenance. A claim to a beneficial entitlement in property has nothing to do with a claim under the Act. The lack of any beneficial entitlement to any of the deceased's property cannot prejudice the claim under the Act any more than a beneficial entitlement enhances one's chances of success under the Act. Indeed, the Act makes no reference to any claim that the applicant may have against the property. If any claim to a beneficial interest in the estate which an applicant may have is to be taken into account then such a consideration may possibly be accommodated under section 7 (1) (j) where the court is at liberty to take account of any other matter which the court may think relevant in the particular case - and even then, it requires more than ordinary ingenuity to accommodate such a consideration under this provision of the legislation. Having regard to the purpose of the Act, the fact that a person may have a beneficial entitlement to the property does not mean that he or she is entitled to maintenance.

29. This is the second reason for not accepting Mrs Clarke Bennett's proposition. Mrs. Clarke Bennett's submission was undoubtedly influenced by cases such as *Moody v Stevenson* [1992] Ch. 486. In that case, the court dealt with an application under the 1975 English Act. That Act has this provision as the second part of section 3 (2):

and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the

provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

30. In **Moody** Waite J. (as he then was) said in several passages the following at page 498:

The objective is that the acceptable minimum posthumous provision for a surviving spouse should correspond as closely as possible to the inchoate rights enjoyed by that spouse in the deceased's lifetime by virtue of his or her prospective entitlement under the matrimonial law.

And at page 499:

In other words the Act of 1975, when stripped down to its barest terms, amounts to a direction to the judge to ask himself in surviving spouse cases: 'What would a family judge have ordered for this couple if divorce instead of death had divided them; what is the effect of any other section 3 factors of which I have not taken account already in answering that question; and what, in the light of those two inquiries, am I to make of the reasonableness, when viewed objectively, of the dispositions made by the will and/or intestacy of the deceased?' If the judge finds those dispositions unreasonable, he will go on to ask himself: 'What, in the light of those same inquiries, would be a reasonable provision for

me to order for the applicant under section 2?

And at page 503:

The starting point when fixing an appropriate provision under section 2 of the Act will, as already explained, be a consideration of the presumed entitlement of the husband under a notional divorce.

31. The impact of these passages in England has been significantly curtailed by the judgments of Nourse L.J. and Cazalet J. in *In Re Krubert* [1997] Ch. 97. There was anecdotal evidence to suggest that *Moody v Stevenson* was not working well particularly in small estates. Nourse L.J. said at page 104:

Moreover, we have some anecdotal evidence that the approach adopted in Moody v. Stevenson [1992] Ch. 486 may indeed have caused confusion at that level, especially in cases of small estates. I can understand that, if only because on a divorce there are two parties to be provided for, whereas on an application under the Act of 1975 there is only one.

32. Indeed the very point I made above that an interest under those statutes may result in less than what is reasonable maintenance was made eloquently by Cazalet J. at page 106:

As Nourse L.J. has indicated, confusion can arise in cases under the Inheritance (Provision for Family and Dependents) Act 1975 in seeking

to determine what weight should be given to the provision which an applicant might have expected to have obtained on divorce: see the later part of section 3(2) of the Act. One unsatisfactory aspect of placing too much emphasis on the award which would have been made on the hypothetical divorce is that, where the spouses are living together at the date of death, such an approach may well, in what may be described as small asset cases, produce financial provision below reasonable financial provision within the meaning of the Act of 1975. This is because the funds available cannot provide satisfactorily for two homes as opposed to one and support the couple living apart. However, because the court in claims under the Act is concerned with one spouse and not two, as contrasted with the divorce situation, the entitlement which the deceased would have received or obtained on divorce can be brought into consideration as potentially available to ensure that reasonable financial provision for an applicant under the Act is made available.

33. The Jamaican statute has no such provision as section 3 (2) of the English statute. *Moody v Stevenson* was already reported by the time the Jamaican legislation became law in 1993. The Jamaican legislature made a deliberate choice not to include the second part of section 3 (2) of the English legislation. It would be safe to conclude that the Jamaican legislators did not wish to introduce that element of English law into Jamaica. For all these reasons, any reference to what Mrs. Thompson would have been entitled to had she made a claim under the Property (Rights of Spouses) Act or what she

would have received under the Intestates' Estates and Property Charges Act is irrelevant.

34. There is one further point. Dr. Barnett, in his written submissions, suggested that I could not alter the disposition of the testator because of sections 70 and 71 of the Registration of Titles Act. According to Dr. Barnett, the property in which Mrs. Thompson is claiming a half interest is already registered in the name of Lady Igbinedion. Lady Igbinedion, it is said, has an indefeasible title. I believe Dr. Barnett's submissions on this point are not correct. The Act is not about challenging the indefeasible of title. The Act permits the court to make such orders as are necessary to give effect to the conclusion of the court on an application under the Act. Dr. Barnett's submission is incompatible with section 6 (1) (c) of the Act which permits the court to order "the transfer to the applicant of such property comprised in that estate as may be so specified." Property is defined in the Act. It means all property (whether movable and immovable) - (a) in Jamaica or elsewhere, where the deceased was domiciled in Jamaica; or (b) in Jamaica, where the deceased was not domiciled in Jamaica. It seems to be that the legislature deliberately chose the words *movable* and *immovable* because it may be that at some point a case may arise that involves property in a civil law jurisdiction which has these concepts. If the court needs to order a transfer in order to make provision for the maintenance of the applicant then the court will do so.

The Jamaican legislation

35. The controlling law is found in the Act. Section 4 (1) permits an application for an order section 6 "on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial

provision for the maintenance of the applicant." Section 4 (2) (a) permits the wife or husband of the deceased to apply.

36. Section 6 (1) authorises the court to make any of the orders specified in paragraphs (a) to (f) in section 6 (1) if the court is satisfied that the will or intestacy laws failed to make reasonable financial provision for the maintenance of the applicant.

37. Section 7 (1) sets out the matters to be considered by the court when it is determining the question of whether the will or the laws of intestacy in relation to the deceased's estate have failed to make reasonable financial provision for the applicant's maintenance. The considerations are set out in paragraphs (a) to (j). The list is not exhaustive and this is made clear by paragraph (j) which provides that the court may have regard to "any other matter which, in the circumstances of the case, the court may consider relevant."

Is Mrs. Thompson a proper applicant?

38. The first issue to be determined is whether Mrs. Thompson is a proper applicant under this Act. The evidence is that she is the wife of the deceased and therefore falls within section 4 (2) (a) and is therefore entitled to make this application.

Has the will failed to make reasonable provision for the maintenance of Mrs. Thompson?

39. The second issue is whether the disposition effected by Mr. Thompson failed to make reasonable financial provision for his wife. This requires an examination of the actual disposition of his estate. The purpose of this examination is two fold. The first is to determine whether any provision was actually by the will made for the maintenance of Mrs. Thompson. The second is to determine whether the provision,

if any, made reasonable financial provision for Mrs. Thompson's maintenance. The result of this examination will determine whether the court ought to interfere with the testator's disposition.

40. The disposition effected by the will has been referred to already. It has been noted that the two pieces of real estate were devised to Mr. Thompson's daughter and son (see clause 5 (a) and (b)).

41. The clause numbered 11 is the residuary clause. I say numbered 11 because it should have been numbered clause 10. There was an error in the sequential numbering of the clauses of the will. The clauses were numbered correctly up to clause 7 which ought to have been followed by clause 8 but was in fact followed by a clause numbered 9. The residuary clause states that "all the rest residue and remainder of my estate both real and personal whatsoever and wheresoever situate I give devise and bequeath to Gloria Daucella Hewitt absolutely."

42. Mrs. Thompson was Hewitt before she was married to the testator. Also her correct middle name, as stated in her birth certificate is Drucilla and not Daucella as stated in the will. The residuary clause, despite the error in the name, is clearly referring to Mrs. Thompson. In any event no issue is being made of this. On the face of it, the will does make provision for Mrs. Thompson. I can therefore conclude that the first purpose of the examination has been met. The second purpose of the examination identified above cannot be completed without reference to section 7 (1) of the Act.

Was the provision for maintenance reasonable?

43. I shall set out the opening words of section 7 (1) of the statute because a proper understanding of what it says is

vital to the resolution of this case and applications under this statute. Section 7 (1) says :

Where an application is made for an order under section 6 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters ---

44. These opening words make it clear that the matters listed under paragraphs (a) to (j) of section 7 (1) are relevant to doing two assessments. The first assessment is whether the disposition of the estate made by the will or the intestacy laws made **reasonable** provision for the applicant. The second assessment, using the same criteria, is whether the court should exercise its powers under the Act, assuming that the court concludes that the disposition did not make reasonable financial provision for the applicant.

45. I now list the criteria under section 7 (1). These are:

- (a) the size and nature of the net estate of the deceased;
- (b) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

- (c) the financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased;
- (e) any physical or mental disability of any applicant for an order under the said section 6 or any beneficiary of the estate of the deceased;
- (f) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (g) the deceased's reason so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will;
- (h) the conduct of the applicant towards the deceased;
- (i) the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime;
- (j) any other matter which in the circumstances

of the case, the court may consider relevant.

46. From an examination of this list it is obvious that not all the matters will arise in a given case. What is necessary is that the court goes through the list in a systematic way and then applies the outcome to the facts of the particular case. I now embark on this exercise. I shall examine the evidence under the paragraphs of section 7 (1).

The size and nature of the net estate of the deceased

47. Net estate is defined in the legislation. I need not repeat it here. The essential idea, which is sufficient for present purposes, is that the estate is what is left after expenses, debts, liabilities, including transfer or other tax are taken out. According to Mrs. Thompson, her husband's estate comprises the two pieces of real estate devised to Mr. Thompson's two children and any property caught by the residual clause of the will. No inventory of the estate was placed before the court. Mrs. Thompson also states that she and her husband had a bank account in International Merchant Bank Limited. This account had JA\$100,000.00 which she said was spent on funeral expenses, his medical bills as well as on surgeries performed on her since her husband's death. A car which was owned by her husband was stolen.

48. There is evidence from Lady Igbinedion that the deceased held two bank accounts jointly with the claimant. This was not been refuted. If this is correct then there is another bank account other than the one which the claimant has said is now exhausted.

The financial resources and financial needs which the applicant has or is likely to have in the foreseeable future

49. Under cross examination, Mrs. Thompson accepted that she receives £226 from her husband's English pension which

converts JA\$30,962.00 per month. She also receives JA\$2666.00 per fortnight from the National Insurance Scheme. There is evidence that she collects \$20,000.00 from a tenant at 28 Halifax Avenue.

50. Mrs. Thompson also accepted that she receives interest on two savings accounts with National Commercial Bank held jointly in the names of her daughter (not Lady Igbinedion) and herself. One account has a balance of JA\$410,000.00 and the other has JA\$200,000.00. She receives interest income from both accounts. There is no evidence showing what the amount of interest is from each account. It is not clear whether these accounts, although in the joint names of the claimant and her daughter, were nonetheless for her benefit exclusively. In other words, it would have been helpful if there were more evidence about these accounts. Be that as it may, she receives interest income from both. Such is the evidence relating to the financial resources of the claimant. I now turn to her financial needs.

51. When the application was first filed in 2004, it was stated that her expenses exceeded her then income of JA\$20,000.00. From this income she would need to purchase food, clothing and medication including insulin. She would need to pay transportation, domestic assistance, water rates, telephone bills and undertake minor repairs to the property. Regrettably, these expenses were not itemised when the application was first made in 2004 and have not been itemised since. It cannot be overemphasised that there really ought to be detailed information on the issue of expenses, current and future. Despite the paucity of current information and the absence of information about future expenses, the court can take account of the well known fact that the Jamaican currency has fallen sharply against all major international

currencies. It is now well known that food prices have risen very sharply in the last few months.

The financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future

52. Based on the available evidence there is not likely to be any other applicant.

Any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased

53. Other than Mrs. Thompson whose needs were met by Mr. Thompson before he died, there is no other beneficiary which falls to be considered under this head. Mr. Thompson has two adult children who by all accounts have done well for themselves and do not seem likely to need to take advantage of these statutory provisions.

Any physical or mental disability of any applicant for an order under the said section 6 or any beneficiary of the estate of the deceased

54. Mrs. Thompson has had two cataracts removed from her eyes. She has undergone knee surgery because of torn ligaments. She has arthritis in the knee and hip. She is a diabetic and she has "trouble with her eyes." At one point she developed back pains from having to lift and move her husband before he died. There is no evidence of any mental disability. During the hearing, I observed that Mrs. Thompson gets around with the use of cane. She is now over seventy years old. Again, none of the other beneficiaries of the estate arises for consideration. There is no evidence about their physical or mental condition.

The financial resources and financial needs which any beneficiary of the estate of the deceased's has or is likely to have in the foreseeable future

55. The only other beneficiaries in view are Lady Igbiniedion and Mr. Kenrick Thompson. As stated already, these two persons do not appear to be person who may need to rely on this statute and there is no evidence that their apparent prosperity is likely to alter any time in the foreseeable future.

The deceased's reasons so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will

56. There is no clear evidence indicating why the deceased did not make any other provision for his wife. It may well be that he thought that the provision under the residuary clause may have been sufficient. There is no evidence to suggest that Mr. Thompson would have made a deliberate decision not to make reasonable financial provision for his wife.

The conduct of the applicant towards the deceased

57. There is not much issue here. Mrs. Thompson met her husband in 1978 and the relationship between them began in 1979. She said that in February of 1980, after much persuasion, she moved into 28 Halifax Avenue. They were married on August 17, 1985 and 28 Halifax became the matrimonial home.

58. Mr. Thompson was diagnosed with cancer in 1992 and died on September 3, 1995. It is well established, on the evidence, that Mrs. Thompson was nothing other than a faithful and devoted wife. She nursed her husband during his fatal illness. During the final stages of his life, there is nothing to suggest

that her devotion was lacking. The evidence is that the couple shared a wonderful relationship before they actually married and afterwards. They were separated only by death.

The relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime

59. The claimant is the wife of the deceased. The relationship between the two was exemplary. Other than her small pension from her employer (the sum was not stated) and what she received from her husband and daughter, she had no other regular source of income. The unchallenged evidence from Mrs. Thompson is that her husband took care of all her needs. When she was laid off in 1982, her husband would not countenance the idea of her working ever again. He provided her with a house and took care of all her expenses. From the available evidence the relationship between Mrs. Thompson and her husband was excellent.

60. The couple rented the small side of 28 Halifax Avenue to a tenant and the rent was used to supplement their income.

Any other matter which in the circumstances of the case, the court may consider relevant

61. On the whole I found Lady Igbinedion to be quite a reasonable person. Even at the hearing she maintained and she explicitly said that she had instructed her lawyers to the effect that she has no difficulty with Mrs. Thompson residing in the small section of the house with the larger section of the house being made available for the defendant's use when she comes to Jamaica. The defendant paid compliment to Mrs. Thompson's care for her father during his illness prior to his death.

62. What the defendant is saying is that she wishes to benefit from the sacrifice her mother and father made in England that enabled them to purchase the properties that they owned. I see nothing inherently wrong with that. She wishes to pass on the property to her children. Again, nothing is wrong with that.

63. Mrs. Thompson still lives on the large side of the house and rents the small side of those. There is no evidence that she entertains many persons and is therefore in need of the larger side as distinct from merely desiring to live on that side of the house. There is no evidence that the small side of the house would be inadequate for her accommodation at this point.

Assessment and conclusion

64. I have already stated that the criteria listed in section 7 (1) (a) - (j) are used to deal with the two issues of (i) whether, in this case, the will made reasonable financial provision for the maintenance of Mrs. Thompson and (ii) if no, what provision ought to be made for her.

65. It seems to me that when viewed objectively, the testator in this case did not make reasonable financial provision for his wife. The motor car, furniture and the bank accounts are not sufficient to provide for her. She has no other home but the one in which she is which was devised to Lady Igbinedion. Her life style before her husband's death was not extravagant but neither was she living in a parlous condition. Reasonable financial provision means that she lives neither luxuriously nor miserably.

66. I have to take into account not only to her current needs but also her needs in the foreseeable future. I must say that the information concerning her expenditure is not the best.

Figures were given but those were filed sometime ago. It might even be said that this aspect of the case is non-existent but nonetheless there is evidence that she has arthritis of the knee and hip. She is a diabetic and her vision is not the finest. She indicates that she is no longer able to work. At her advanced age (she is now seventy three years old), it is unlikely that her mobility will increase. Sufferers of arthritis tend towards decreased mobility with consequential increased reliance on other persons to provide care and assistance. All this costs money.

67. Her income is not great and her needs are likely to increase over time. We know that her monthly income is at least approximately JA\$56,294.00. This is the sum of the converted £226 converted to Jamaican currency at a rate of approximately JA\$137.00 (JA\$30,962.00), the JA\$20,000.00 she collects from the tenant and the total monthly National Insurance Scheme benefits which is JA\$5332.00. She also receives the interest income from the two accounts at National Commercial Bank. As stated above, this amount is not known.

68. It would seem to me that the case for a half interest in 28 Halifax Avenue has not been established. The evidence does not support the submission that the award of a half interest in the property would be reasonable for the maintenance of Mrs. Thompson. It may be good and beneficial to have a half interest but that is not the statutory test. It would seem to me that an order for Mrs. Thompson to live at the property for the rest of her life would be a better solution. That would take care of her immediate need for security of occupation. I also take into account that the legal work necessary to have the certificate of title altered to reflect the proprietary interest would come from the estate and from the evidence presented the estate does not have

any liquid assets to cover those costs. Mrs. Clarke Bennett has been at pains to stress Mrs. Thompson's lack of financial resources. This means that there is no reasonable possibility of Mrs. Thompson paying the necessary costs conveyancing costs. I have no legal basis for ordering Lady Igbinedion to pay those costs.

69. There is no evidence that the small side of the house would be unsuitable for Mrs. Thompson's accommodation. There is a tenant on that side of the house. Mrs. Thompson should move to that side of the house. The larger side of the house should be rented and part of the income be given to her. This would replace the \$20,000 that would now be lost consequent on moving to the small side of the house. Taking into account Mrs. Thompson's ailments, and her anticipated needs, I think that a proportion of the rental income should be given to her such that her monthly income is not below JA\$80,000.00 per month. The balance of the rent should go to Lady Igbinedion.

70. It may be said, with some justification, that the sum of JA\$80,000.00 is not supported by the evidence. However, there is no denying that the currency in Jamaica has undergone significant devaluation against the United States, Canadian and English currency. One of the ripple effects of that fact is a corresponding rise in the cost of living. I wish to emphasise that claimants under this Act ought to produce reliable evidence of current and anticipated expenditures on which they base their claim. Rather than having multiple applications from an estate that does not have much liquid assets, I have decided on this figure which I believe is reasonable in all the circumstances of this case.

71. Under section 6 (1) (a) the court has the power to make an order for payment to the applicant out of the net estate

of the deceased of such periodical payments and on such terms as may be specified in the order. Section 6 (2) makes provision for the amount of the payments to be determined in a manner stipulated by the court. The difference between what she receives from her husband's pension and the NIS payments should come from the rent when the large side of the property is leased. This is how the JA\$80,000.00 is to be determined.

72. In view of the order that I have made, it follows that I decline to make an order for Mrs. Thompson to quit and deliver up possession of the property. On the question of mesne profits, Lady Igbinedion asks for JA\$50,000.00 per month from April 9, 2001. This figure was not determined in a reliable way. In cross examination, Lady Igbinedion said that she made enquiries in the neighbourhood where the property in question is located. There is no evidence indicating the persons from whom she received this information. Did she receive the information from tenants, landlords, or other knowledgeable persons? The basis then for this sum has not been established. I therefore decline to make any such order.

73. I now refer to section 19 of the Act. Under that section any order made pursuant to section 6 shall have effect as from the date of the deceased's death or any other date specified in the order. The order in this case is to have effect from the date of judgment.

74. For the avoidance of doubt let me make it clear that Mrs. Thompson does not have the power of sale of a life tenant. She has only a right to live at the property for the rest of her life. I would also suggest that each party bears their own costs of this application rather than for the costs to come from the estate.

75. Finally, I should explain why the matter took so long to be completed after it began on October 18, 2007. This happened because I was assigned to the criminal courts outside of the Kingston and St. Andrew for the months of November and December. I thank counsel for their patience and understanding. Counsel are asked to prepare a draft order to give to this judgment.