



[2012] JMSC Civ 173

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 00168

IN THE MATTER OF THE INTESTATE'S ESTATE AND
PROPERTY CHARGES ACT

A N D

IN THE MATTER OF AN APPLICATION BY EVANGELINE
FORREST FOR A DECLARATION THAT SHE WAS THE
SPOUSE OF THE DECEASED LYNVAL EVANS WHO
DIED ON THE 28TH DAY OF FEBRUARY 2006

A N D

UNDER SECTION 2 OF THE INTESTATE'S ESTATE
AND PROPERTY CHARGES ACT

Ms. Simone Jarrett instructed by Kingston Legal Aid Clinic for the Applicant

Mr. Trevor Ho-lyn for the Defendants

Heard: November 21 and 29, 2012

*Declaration as Spouse
Intestacy Act*

Straw J

The Parties

- [1] The applicant, Evangeline Forrest has filed a Fixed Date Claim Form seeking a declaration that she was the spouse of the deceased Lynval Evans who died on February 28, 2006. She is alleging that she cohabited with the deceased as his wife from 1998 to the time of his death.
- [2] Mr. Lynval Evans [Jnr.], Ms. Kaia Evans and Mr. Beovanni Evans are the adult children of the deceased from his marriage to Paulette Evans. That marriage was dissolved in the Circuit Court of Florida on the July 21, 1994. The children are contesting the application of Ms. Forrest and contend that she commenced living with their father in 2003.
- [3] The application is made under the Intestate's Estate and Property Charges Act as Ms. Forrest wishes to benefit from the estate of the deceased who died intestate. Section 2 of the said Act provides that a 'spouse' includes:

"A single woman who has lived and cohabited with a single man as if she were in law his wife for a period of not less than five years immediately preceding the date of his death."

- [4] Ms Forrest has filed several affidavits in order to prove her claim. They are dated January 10, 2007, June 24, 2008, July 23, 2009, November 12, 2011, November 18, 2011 and May 25, 2012. However, the court has not seen any affidavit dated November 12. The affidavits of supporting witnesses, Jodian Forrest and Nicolas Gardener were also filed. All three (3) persons were present and cross-examined by counsel, Mr. Trevor Ho-lyn who represented the children of the deceased. Although all three (3) children filed affidavits, they were absent from the hearing. Mr. Ho-lyn informed the court that they all lived out of the jurisdiction and were not able to be in the island at this time.

The evidence before the court therefore consisted of the affidavits filed on behalf of the applicant and oral evidence elicited from cross-examination.

The Law

[5] Ms. Forrest has the burden of proving on a balance of probabilities that she has lived and cohabited with the deceased as his wife for at least five (5) years immediately preceding his death. It is appreciated, however, that the court must have due regard to the gravity of the consequences of making the declaration sought [per Jacobs J in **In re Fagan**, 23 SASR 454 at 456.]

[6] The Property [Rights of Spouses] Act [section 2 [1]], employs a similar definition of 'spouse' as the above Act but also defines the word 'cohabit':

"means to live together in a conjugal relationship outside of marriage and 'cohabitation' shall be construed accordingly."

The definition of cohabitation therefore refers to the conjugal relationship outside of marriage.

[[7] In **Millicent Bowes v Keith Taylor**, Claim No. HCV05107, Supreme Court of Jamaica, my sister, McDonald-Bishop J, referring to this definition, expressed the view that for a relationship to qualify as a conjugal relationship outside of marriage, it must be a relationship that bears a likeness to marriage or its equivalent.

[8] Jacobs J in **In re Fagan** [page 464] considered the definition of cohabitation by Lord Goddard in **Wheatley v Wheatley** (1949) 2 ALL ER 428 at 430:

"The cohabitation of two people as husband and wife means that they are living together as husband and wife, the wife rendering wifely services to her husband and the husband rendering husband like services to his wife. They are living together, not merely as two people living in one house, but as husband and wife."

Jacobs J then went on to say:

"It does not necessarily imply that they are always living together under the same roof, and there may be states of cohabitation where they see as much of each other as they can, and yet are not separated because there has not been any real suspension of their ordinary conjugal relationship. A man may be cohabiting with his wife even if he is away on a visit or on business because the conjugal relationship is not determined in any shape or form [Kay v Kay]."

- [9] The understanding that I extract from these passages is that the court is seeking to determine what is the pith and substance of the relationship between the parties. There is also guidance provided by decisions in other jurisdictions relating to similar statutory provisions.
- [10] In **Kimber v Kimber** [2000] 1 FLR 384, Tyrer J examined some of the authorities dealing with the term 'cohabitation' and drew some factors together, with the warning that it was impossible to provide a checklist or set of tests/criteria to cover every scenario [pg 391c]. These factors or signposts are as follows:
- Living together in the same household.
 - A sharing of daily life.
 - Stability and a degree of permanence in the relationship.
 - Finances [how are the finances handled].
 - A sexual relationship.
 - Children.
 - Intention and motivation.
 - The opinion of the reasonable person with normal perceptions.
- [11] As much as assistance is garnered from the case law in relation to specific criteria, the emphasis is to be placed on each set of circumstances which can be diverse and dissimilar. The paramount factor [in determining whether the relationship of husband and wife existed between two people] is the general relationship between the couple (per re J [**Income Support Cohabitation**] [1995] 1 FLR 660, a decision of the **Social Security Commissioner**).

[12] In the above case, [per paragraphs 10, 11] Commissioner Rowland expressed that financial support, public acknowledgement or a sexual relationship [although an important signpost] were not necessarily adequate to determine in every case whether such a relationship existed. He went on to say:

“Indeed it is arguable that it is the parties ‘general relationship’ that is of paramount importance and their sexual relationship, and their financial relationship are only relevant for the light they throw upon their general relationship.”

With this in mind, I will now go on to review the evidence and examine the relationship as revealed between Ms. Forrest and the deceased.

The Evidence

[13] A summary of the evidence of Ms. Forrest is recorded below.

Ms Forrest is a spinster residing at Point, Point P.O., in the parish of St James. She stated that she met the deceased in January 1996 and they had a visiting relationship up to July 1998. She would visit him at his house on Richardson Crescent, Mt. Salem, where he lived with his youngest child, Beovanni. She would, sometimes, remain there for a period of three (3) days. In turn, he would also come to her house at Point.

[14] In the month of July 1998, the deceased came to live with her (as husband and wife) at Point. By this time, Beovanni had migrated to live with his mother in Florida. The other two children had previously migrated. She has never met them. None of the children attended their father’s funeral service. Mr. Evans continued to live with her up to the time of his death in February 2006. Her two children, Alethia and Jevaughn Kelly [by a previous relationship] also lived in the household. Her parents also lived there. There were other children in the household. She indicated that there were six (6) children and three (3) adults. The house at Point had four (4) bedrooms.

[15] According to Ms. Forrest, the deceased had purchased a studio apartment through the National Housing Trust at Rosemount Gardens, Montego Bay, St. James in January 1996. The premises was purchased solely in the name of Mr. Evans. She admitted under cross-examination that the Certificate of Title speaks to the registration of Mr. Evans as title holder as of July 17, 2007 but maintains that the letter from the National Housing Trust referred to his acquisition as of January 10, 1996.

[16] She also stated that the house at Rosemount was never occupied by Mr. Evans. There was no light or water connected to the premises. In 2003, Mr. Evans moved his furniture from the rented premises at Richardson Crescent to Rosemount. However, he merely visited that location. Both herself and the deceased agreed he would continue to live with her at Point until he did additions to the premises at Rosemount. The additions were commenced in August 1998. They planned to move to Rosemount on the completion of the said addition, as they both worked in Montego Bay. Point was approximately 12 miles from Montego Bay. They were also planning to get married at that time. At the time of his death, the addition was approximately 70% complete.

Other Financial Details

[17] Ms. Forrest stated that during the construction work at Rosemount, she assisted with money to purchase materials and transportation of the material. She also indicated that both parties provided financial support in the home including the payment of utility bills during the period of cohabitation.

She acquired property at Greenpond, St James on May 30, 2003. A relative has been in occupation since 1997 although the title was not registered until 2003. She obtained a mortgage for the property from the National Housing Trust in 1997. Mr. Evans did not assist her with the acquisition and the title is in her name alone.

They never operated a joint banking account.

Daily Life and Care of Mr. Evans (the deceased)

- [18] Ms. Forrest stated that during the period of cohabitation, herself and the deceased shared the same bedroom. They also went to the market and did groceries together. She was invited to the wedding of his sister, Lola Granthier in New York in August 2005. However, due to financial constraints, Mr. Evans attended without her. Mr. Evans would visit with Lola in the USA during summer. His daughter, Kaia, actually lived with Lola. He would be away for two (2) months and then would return to Point.
- [19] In 2003, Mr. Evans became seriously ill and was diagnosed with kidney problems. He had to attend Cornwall Regional Hospital in Montego Bay for dialysis twice per week. He would make the journey from Point on each occasion and return there. She took him and stayed with him during the treatment period. She also received a diet sheet for him and prepared his meals separate and apart from the other members of the household. She secured the transportation to take him to and from the hospital and assisted him from the vehicle to her house which was situated on a hill. No member of his family offered assistance throughout his illness.
- [20] When he was admitted to hospital, she visited him daily with his specially prepared meals. His sister, Lola, attended the funeral. Both herself and Lola bore the funeral expenses.

Evidence of Jodian Forrest and Nicholas Gardener

- [21] Jodian is the niece of Ms. Forrest. She lived with her as a little girl and then at the age of 14 years [2002]. At a particular period in time she was living with both her aunt and Mr. Evans at the house in Point. During the time away from the said house, she made regular visits to the home.
- [22] She states that in 1998, while Mr. Evans was working on his house, he moved in to live with her aunt and lived with her till he took ill in 2003. He continued to live with her during his visits to the hospital, subsequent hospitalization and up to his

death in 2006. She speaks to assisting him up to the house after his return from the hospital as the pathway to the house was long and steep.

- [23] She also states that he would visit her aunt before 1998 and use to bring goodies for them (the children). She met his son, BJ [Beovanni] before Mr. Evans came to live with her aunt as the deceased would take him to visit. Mr. Evans and her aunt shared the same bedroom, and they would also go to the grocery shop and the market. Ms. Forrest did the cooking and laundry for Mr. Evans.

She supports the testimony of the applicant that she [the applicant] [prepared special meals and assisted Mr. Evans to the hospital and with his medication. She also speaks to a visit of Lola Granthier to Ms. Forrest's home in 2000 when he was living at the house in Point.

- [24] Mr. Gardener's evidence is that he grew up as a young boy living next door to Ms. Forrest in Point. Ms Forrest's son was the same age and he would, on occasions spend the night at the household.

During these times, he met Mr. Evans who came to visit Ms. Forrest. Mr. Evans introduced his son BJ to him during his regular visits to the applicant's home. He never saw or met any of his other children. Mr. Evans would come and go from the home until his son migrated in 1998. He then came to live with the applicant. He observed that Evans would be in the same bedroom as Ms. Forrest. He also spoke of the deceased travelling abroad and returning with gifts for himself and the other children.

- [25] In relation to domestic chores and the care of Mr. Evans, he supports the evidence of both Ms. Forrest and her niece. He also stated that Mr. Evans would return to the house in Point after each treatment at the hospital and that he would assist the applicant in obtaining a taxi to take him to the hospital. He also confirms the visit of Lola in 2000 and that she was the only family member who attended the funeral service.

Analysis of the Evidence

I now return to an examination of the factors outlined in **Kimber**.

Living together in the same household

- [26] There is no evidence to challenge the fact that Mr. Evans and Ms. Forrest lived together at Point between 1998 and 2006. Apart from the lack of challenge, the witnesses gave credible and compelling evidence in relation to this domestic arrangement. She was a spinster and he was divorced. They shared the same bedroom and some domestic responsibilities. She stated that they lived as man and wife, so a sexual relationship between the parties can be inferred. The applicant cared for him before and during his illness and even after death, taking some responsibility for his funeral expenses.
- [27] Although both parties owned property separate and apart from each other, there is no evidence to suggest there were two (2) separate households. In fact, it is the evidence of Ms. Forrest that improvements were being done to the property at Rosemount and that they were planning to move to that address. She gave his address at Rosemount as his usual place of residence at the time of registering Mr. Evans' death but this, by itself, does not negate the incontrovertible evidence of the domestic arrangements.

A Sharing of Daily Life

- [28] The evidence of all the witnesses speak to the sharing of domestic activities including groceries, meals and laundry. These activities continued during Mr. Evans' illness and up to his death.

Stability and a Degree of Permanence

- [29] Ms. Forrest and Mr. Evans lived together from 1998. In the year 2000, he took his sister, Lola, who was visiting from the USA, to meet the family at the house in Point. In 2005, she was invited to Lola's wedding. They never operated separate households up to the time of his death. They were only separated when he went on vacation and left the island.

Finances

- [30] There is a paucity of evidence in relation to the handling of their finances. They never operated joint accounts and they owned property separately. Ms. Forrest did state that she assisted Mr. Evans with some of the expenses related to the improvement of the property at Rosemount, but there is no documentary proof of this. I do bear in mind, however, that the emphasis is on the general relationship of the parties and not on the court applying a checklist of the factors identified above.

A Sexual Relationship

- [31] Ms. Forrest stated that they lived as man and wife and I am of the opinion that this is sufficient to draw the reasonable inference that the parties engaged in sexual relations.

Children

- [32] There are no children from the union between Ms. Forrest and Mr. Evans. Apart from the fact that Mr. Evans brought gifts for the children living in the household at Point, there is no evidence that he took on any responsibility for Ms. Forrest's two children.

Intention and Motivation

- [33] Ms. Forrest has stated that they planned to get married after the improvements to the house at Rosemount were completed. There is no other evidence to support or contradict what she has said.

The Opinion of the Reasonable Person with Normal Perceptions

- [34] Apart from reasonable inferences that may be drawn from the evidence of Ms. Forrest and Mr. Gardener, the applicant called no witnesses that could assist the court in this regard.

The authorities confirm that no single factor is conclusive [Kimber]. It is my opinion that the overall general relationship of Ms. Forrest and Mr. Evans, including her care for him during his illness, and their plans for the future,

supports her contention that she lived and cohabited with him 'as a wife' for the requisite period of time before his death.

[35] I will therefore grant the orders sought in the Fixed Date Claim Form as follows:

- i. That the late Lynval Evans, who died on the 28th day of February 2006 is declared to be the spouse of Ms. Evangeline Forrest by virtue of the Intestate's Estate and Property Charges Act.
- ii. That the costs of an incidental to this Applicant be paid out of the said estate of the said Lynval Evans.