[**2016**] JMSC Civ 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. P. 1219/ 2004

In the Matter of **ROBERT CHARLES MORRISON**, deceased late of 9 Hopkins Avenue, Kingston 20 in the parish of Saint Andrew

AND

In the Matter of the Intestates' Estates and Property Charges Act

IN CHAMBERS

Miss Verleta Green for the applicant
Miss Roxann Mars instructed by Knight Junor and Samuels for the respondent

April 23 and 24 and July 9, 2013; February 12, 2016

Intestates' Estate and Property Charges Act – Definition of Spouse – Meaning of Cohabitation in law as if husband and wife – The relevant factors used to test cohabitation - Validity of copy will - Part 11.18 of the Civil Procedure Rules- Application to set aside Orders – Delay and Prejudice

D. FRASER J

BACKGROUND TO THE APPLICATION

[1] The respondent Olga Drummond had an intimate relationship with Robert Charles Morrison, deceased for some time. The duration and extent of that relationship is in dispute. The applicant Linda Myers Hall is the sister of the deceased. She resides in Canada. Mr. Morrison died in June 2000 and a Will

was produced by the respondent to the applicant as the original and last Will of the deceased. In that Will three persons including the respondent and the applicant are named beneficiaries with the latter being the sole Executrix. The respondent kept a copy of the Will.

[2] After the deceased was buried, the applicant returned home to Canada. On October 6 2004, a Caution was lodged in the Supreme Court on behalf of the respondent prohibiting any Grant in the estate of the deceased without notice to the respondent. In April 2005 the respondent obtained a Citation against the applicant to accept or refuse a grant of Probate. The respondent subsequently obtained an Order from the Court permitting service by way of advertisement of a Notice of Citation in the Daily Gleaner circulating in Quebec, Canada.

[3] On January 15, 2008 the respondent obtained an Order admitting to proof the photocopy Will until the original is brought into the Probate Division of the Civil Registry. On December 29, 2009 the respondent obtained an Order declaring her to be the spouse of Robert Charles Morrison, deceased. Both of these orders were obtained in the absence of the applicant.

[4] On November 11, 2010 a Caution was lodged in the Supreme Court on behalf of the applicant prohibiting any Grant in the estate of the deceased without notice to the applicant.

THE APPLICATION

[5] By Notice of Application for Court Orders dated May 10, 2011, the applicant sought the following Orders:

i. That the Order granted on the 15th day of January 2008 that the photocopy Will of the deceased **ROBERT CHARLES MORRISON** dated May 28, 2000, exhibited to the Affidavit of Kenneth Clennon dated 21st November 2007 be admitted to proof until the Original is brought into the Probate Division of the Civil Registry of the said Court; and

ii. That the Order granted on the 29th day of December 2009 that Olga Drummond is declared the spouse of **ROBERT CHARLES MORRISON**, deceased and late of 9 Hopkins Avenue, Kingston 20 in the parish of Saint Andrew;

be set aside.

[6] At the time for commencement of the application counsel Ms. Jacquline Wilcott from the Administrator General's Chambers was in attendance. However it was agreed that as the issues were entirely between party and party the Administrator General did not need to be present. Counsel thereafter withdrew.

ISSUES

[7] The following issues arise for determination:

I. Is the document purporting to be a Will dated 28th May 2000 the Original and last Will and Testament of the deceased Robert Charles Morrison?

II. Did the respondent, Olga Drummond live and cohabit with the deceased as if in law they were husband and wife for not less than five years immediately preceding his death?

III. Should the Order granted on the 15th January 2008 admitting to proof the photocopy Will of the deceased Robert Charles Morrison dated 28th May 2000 in the Probate Division of the Civil Registry, be set aside?

IV. Should the Order granted on the 29th December 2009 declaring Olga Drummond to be the spouse of Robert Charles Morrison, deceased, be set aside?

Issue I

Is the document purporting to be a Will dated 28th May 2000 the Original and last Will and Testament of the deceased Robert Charles Morrison?

Law

[8] Section 6 of the **Wills Act** provides that no Will shall be valid unless:

i. It is in writing;

ii. It is signed at the end foot or end thereof by the testator or by some other person, in his presence and by his direction

iii. Such signature should be made or acknowledged by the Testator in the presence of two or more witnesses present at the same time;

iv. Such witnesses shall attest and subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

[9] "*A party seeking to propound a will must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator,"* per Parke B ***in Barry v Butlin*** (1838), 2 Moo P.C. at pages 482-483**.** This is particularly crucial where the party seeking to propound the will is a beneficiary therein.

The Submissions in Summary

[10] Counsel for the applicant submitted that the only finding open to the Court based on the evidence of the expert and the contradictions in the respondent's case is that the copy document is not a copy of the true Last Will and Testament of the deceased Robert Charles Morrison.

[11] Counsel for the Respondent submitted that the Court ought to find on a balance of probabilities that the Will in issue is the valid Will of the deceased made in writing and duly executed in accordance with Section 6 of the Wills Act. Further,

the opinion of the expert that the signature does not match ought to be rejected because of the wide span of time between the making of signatures on documents made in the 1960s and the signature made in June 2000.

Discussion and Analysis

[12] The applicant contends that it was her son who gave her a copy of the Will and that it is fraudulent. She states that the deceased never discussed the content of his will with her save and except he told her that he made a will and everything he decided to do would be on his Will in a safety deposit box, the location of which was known to her, she had a key and knew where his key was kept. She said that she was shocked when the so called Will was handed to her and she made the following observations:

(a) Her address spoke to Montreal and she lived in Quebec, (it is her evidence that the deceased always wrote to her in Quebec).

(b) The spelling of “Morison” (the use of 1 “s”)

(c) I noticed the words “unlawful wife” that again was a shock

(d) The signature was not his signature

[13] The respondent asserts that the Will is a photocopy of the original and last Will and Testament of the deceased. In her evidence she states that she found the Will in a drawer in a chest of drawers and informed Mr. Neville Morrison, the brother of the deceased, who instructed her to give it to the applicant. But before so doing, she made a copy of the said will.

[14] Shirley Grant in her evidence states that Ms. Drummond showed her a document which she said was the deceased’s will and that she read the document and found that it was not signed. She told the respondent that it was not signed and the respondent was that she would get someone to sign it. In her Affidavit at paragraph 10 she avers that the document was not on a will form and did not contain the name Linda Hall. Under cross examination, she stated that it just said

that the house and all my belongings to Olga Drummond and it was written on a piece of paper like a book leaf. This evidence was left largely unchallenged by the respondent. The court notes however that the copy will submitted is not on a piece of paper like a book leaf.

[15] Amado Samuels said that he had become very acquainted with the deceased's manner and character of hand writing and the Will was the true and proper hand writing of the deceased. Under cross examination however, he admitted that he was really not sure if the will was written by the deceased. Counsel for the respondent at that point conceded that the will may not have been written by the testator but maintained that it was signed by him.

[16] Mr. Claudius Taylor in his Affidavit filed on January 4, 2008 averred that the deceased signed the Will both in his presence and that of Kenneth Clennon. In cross examination, he contended that he has been living at 42 Westminster Ave from the 1990s with his family and no one should have had a difficulty locating him in 2007 as his name and numbers are listed in the directory, contrary to what the respondent stated. This witness had a difficulty recalling pertinent information and stated that in 2007 when he attended the law office of Mr. Bert Samuels, to attest to his signature and that of the deceased, he was much stronger.

[17] He identified his signature on the document but did not remember where the document was signed. He then said that it was Neville Morrison, brother of the deceased, who asked him to witness the will and that Neville took him to the house of the other brother (the deceased). He stated that he did not know the brother (the deceased) before but a man was at the house to which he was taken and Neville told him that it was Charles Morrison and he did not ask for any identification. Earlier, he stated that he could not recall if he was told the name of the deceased.

[18] It was his evidence that when he arrived at the house, the will was already written up and he witnessed the will and left. He did not recall if he saw the deceased signed but he was certain that he would not have signed unless he

had seen the deceased sign. He did not re- read the document and did not recall the deceased doing the same. He stated that he did not know Olga Drummond and she was not at the house when the document was signed.

[19] He informed the court that he did not know the other attesting witness Kenneth Clennon and did not remember if anyone else signed the will or was present at the time of signing other than himself, Neville and the deceased. He tried to contact Ms. Olga Drummond twice after he found out that the applicant was involved but she never came.

[20] This witness although appearing to be genuine, clearly did not have an adequate recollection of the facts. He also did not know the deceased before and never asked for identification. Kenneth Clennon, the other attesting witness was not subject to cross examination and so his evidence will not be considered.

The Expert Evidence

[21] Part 32.3(1)and (2) of the Civil Procedure Rules, 2002, provide that it is the duty of an expert to help the Court impartially on the matters relevant to his or her expertise and this duty overrides any obligations to the person by whom he or she is instructed or paid.

[22] An expert is expected to aid the court impartially by furnishing information so that the tribunal can make its own independent assessment by applying the information to the facts as proved in the case. In ***Davie v Edinburgh Magistrates,*** [1953] SC 34 at page 40, Lord President Cooper stated that *"their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence."* Of course the court is not obliged to accept the opinion of an expert, even if it is uncontradicted.

[23] The applicant relied on the Expert Report of Beverley East. The report contains details of her extensive qualifications and experience. Ms. East explained that

the documents with which she compared the deceased's signature were dated 1961 and 1965 and that she used hand written notes of 1996 and 1999 for the purpose of comparing the deceased handwriting but did not list them as part of her report because they did not contain the formal signature.

[24] Counsel for the respondent took issue with the fact that Ms. East relied on samples that were far removed from May 2000. Ms. East in her response explained that hand writing can vary over time but will only vary if the person has been sick, has a stroke and they are on medication. In the event the person had any of these conditions the signature would change but not be so defined. Furthermore, her evidence was that usually as the person gets older there would be tremor in the handwriting and there is greater height and width of the letters but that the questioned signature doesn't have any of those components. She stated the signature would show in itself if the person was ill or not in the known. Concerning "not in the known" the court understood that to mean if the questioned signature contained features that were not in the known signature.

[25] She gave further evidence that with regard to the signature on the will, the "R" had been retraced, which is an indication of fraud because a person who is writing their name knows how to as they have been writing their name since 5 and they do not have to retrace any letter. A signature she states is an unconscious behaviour. In the questioned document the signature was drawn. The person who was writing had to stop collect him/herself and move onto the rest. There was no such occurrence in the known signature.

[26] Ms. East stated that the signature was magnified digitally and examined at 140 times magnification. She explained that anything over 40 magnification was sufficient to enable her to see microscopic characteristics. She stated that in her opinion the four major factors of the signature on the photocopy will which made it not authentic were the retracing, the overextended flourish, the formation of the "s" with the pen pause at the bottom of it and the spacing between the "s" and the

remainder of the letters. In cross-examination she stated that she had examined over 400 matters some with multiple signatures and she had never been objectively proven to be wrong.

[27] In the instant case, Ms. East's opinion evidence is to be weighed against evidence of fact of lay witnesses who claimed to have seen or had direct involvement in the purported signing of the Will. The respondent at paragraph 5 of her Affidavit sworn to and filed on the 21st September 2012, stated that the evidence of the expert witness, Ms. Beverly East was an opinion that could not replace or supersede the evidence of those who saw the testator sign the Will. The respondent sought and obtained an order permitting her to obtain the services of another hand writing expert. Having obtained the order permitting her to rely on expert evidence, she ultimately did not rely on an expert. The respondent also asked the court to have regard to the medical condition of the Testator at the time of his signing the will, but no evidence was forthcoming as to any such medical condition.

[28] It should also be noted that the respondent admitted that it was not true as stated in her affidavit filed on September 6, 2007 at paragraph 2 that she did know the present addresses of the Attesting witnesses as she had visited the address of Mr. Claudius Taylor.

[29] Having carefully considered the evidence I find the conclusions of the expert witness to be cogent, lucid and on the facts of this case unassailable. On a balance of probabilities I accept that the findings of the expert of inconsistencies in the signature, slant, number and letter formation, and spacing in the questioned document when compared to the known writings lead to the conclusion that the photocopy Will dated May 28, 2000, produced by the respondent was not written by the deceased, was not signed by him and is not his last true will and testament. This conclusion is also supported by the observations made by the applicant about the will which initially caused her to doubt its authenticity.

Issue II

I. Did the Respondent, Olga Drummond live and cohabit with the deceased as if in law they were husband and wife for not less than five years immediately preceding the death of the deceased?

The Law

[30] Section 2 (1) of the **Intestates' Estates and Property Charges Act** in defining a spouse provides that :-

I. "spouse" includes-

i. 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; and

ii. a single man who has lived and cohabited with a single woman as if he were in law her husband for a period of not less than five years immediately preceding the date of her death;

II. " single woman" and "single man" used with reference to the definition of "spouse" include a widow or widower as the case may be or a divorcee.

[31] The Submissions in Summary

I. Counsel for the applicant submitted that on the evidence, the court could come to no other conclusion than that Olga Drummond did not reside at 9 Hopkins Avenue with the deceased as husband and wife for a period of five years or at all.

II. Counsel for the respondent submitted that Ms. Drummond was single and was the spouse of the deceased who was also single because on her evidence she resided with the deceased from late 1994 until June 2000 and the deceased referred to her as his unlawful wife in his Will.

[32] The fundamental consideration for the court is whether the respondent and the deceased both satisfy the requirements that would enable each to be the spouse of the other within the meaning of the **Intestates' Estate and Property Charges Act**. The onus is on the applicant to satisfy the court on a balance of probabilities as a matter of law and fact, that the respondent was not the spouse of the deceased at the material time.

Was the respondent a "single" woman and the deceased a "single" man?

[33] The first pre-condition that must be satisfied for a man and a woman to fall within the definition of spouse is that they both must have been single during the period of the alleged cohabitation. The deceased was a widower. The applicant under cross examination stated that the deceased never discussed another woman after the death of his wife. The respondent in her evidence referred to the deceased as single. This evidence was not challenged by any of the witnesses for the applicant and there is no evidence before the court to suggest that the deceased was intimately involved with any person other than the respondent.

[34] Concerning her status, the respondent stated that she was the common law wife of the deceased, that they shared an intimate relationship, and during the period in which they cohabited they did so as a single man and a single woman. Her son Amado Samuels stated in cross examination that he and the respondent were bouncing all over the place until she met Bob (the deceased) and they settled down.There is no evidence that the respondent was involved with another man other than the deceased.

[35] There was ultimately no challenge to the fact that the deceased and the respondent were both single. The contention surrounds whether or not the second pre-condition of cohabitation as husband and wife for not less than five years immediately preceding the date of death of the deceased has been satisfied.

Did the deceased and the respondent cohabit as husband and wife for five years immediately preceding the date of death of the deceased?

[36] The second pre-condition for parties to fall within the definition of spouse is that a single man and a single woman must live and cohabit together as husband and wife for at least five years immediately preceding the date of death of the deceased. It is on this limb that the applicant hopes to succeed contending that there was no cohabiting between the deceased and the respondent for at least five years before his death.

Did the deceased and the respondent cohabit as husband and wife?

[37] The first concern is whether or not the deceased and the respondent were in law cohabiting. After this is determined the duration of any such cohabitation will need to be ascertained. In ***Millicent Bowes v Keith Alexander Taylor*** 2006HCV05107 (January 19, 2009) McDonald-Bishop J (as she then was) examined the meaning of the term "cohabit" as defined in the **Property Rights of Spouses Act** (PROSA). The term is not defined in the **Intestates' Estates and Property Charges Act**. However the definition of the term spouse to include the concept of cohabitation is conceptually the same in both pieces of legislation, but for the fact that the threshold timeline in the PROSA is in relation to the time of institution of proceedings while in the Intestates' Estates and Property Charges Act it is in relation to the date of death. The analysis of McDonald-Bishop J can therefore be usefully applied in this case.

[38] At paragraph 26 the learned judge noted that in section 2(1) of the Property Rights of Spouses Act "cohabit" as used in reference to a spouse is defined as "living together in a conjugal relationship outside of marriage", and that the term "cohabitation" is to be construed accordingly. At paragraph 38 the learned judge stated that *"It stands to reason therefore that for a relationship to qualify as a conjugal relationship outside of marriage within the meaning of the Act, it must be a relationship that bears a likeness to a marriage or being the equivalence of a marriage."*

[39] At paragraph 39 of her judgment the learned judge continued:

> The learned authors of Bromley's Family Law, 10th edition p. 100 after a review of some relevant authorities, observed that there are problems inherent in determining what living as husband and wife entails. Nevertheless, in an attempt at a definition they state at page 102:
>
> > "To live together as "husband and wife" implies some quality in the arrangement which differs from, say, that of landlord and lodger, or flat sharing friends or even family members of different generation. It goes to the essence of the relationship, but what does it entail?"

[40] The learned judge reviewed several authorities which showed that the question of whether or not a man and woman were cohabiting as husband and wife was subject to many different considerations. At paragraph 49 she stated:

> In examining the question before me against the background of the authorities I have had the opportunity to review, I too will agree that no single factor can be conclusive of the question whether a man and woman were living together as if they were in law husband and wife. I have come to the conclusion too that there is not (and there might never be) a closed and exhaustive list of criteria that may be used to determine the question. It requires, to my mind, a thorough examination of the circumstances of the parties' interaction with each other as well as their interaction with others while bearing in mind that there will always be variations in the personalities, conduct, motivations and expectations of human beings. The court, indeed, will have to make a value judgment taking into account all the special features thrown up by a particular case to see whether the lives of the parties have been so intertwined and their general relationship such that they may be properly regarded as living together as if they were, in law, husband and wife. It has to be inferred from all the circumstances.

[41] McDonald-Bishop J ultimately adopted the "signposts" developed by Tyrer J in ***Kimber v Kimber*** [2000] 1 FLR 383 and after analysis found that the claimant had not established that she had cohabited with the defendant as if they were in law husband and wife. ***Kimber v Kimber*** was relied on by counsel for the applicant. The signposts outlined in ***Kimber v Kimber*** are:

(1) Living together in the same household;

(2) A sharing of daily life;

(3) Stability and a degree of permanence in the relationship;

(4) Finances;

(5) A sexual relationship;

(6) Children;

(7) Intention and motivation;

(8) The opinion of the reasonable person with normal perceptions.

[42] In evaluating the case at bar, the court is mindful that no single factor is necessarily conclusive and that each case will turn on its own facts. I will now consider the evidence under each signpost

Living together in the same household:

[43] It was the evidence of the applicant and her witnesses that the parties never lived together in the same household. Mrs Myers Hall avers that she is aware that the deceased met Ms. Drummond in or about 1997 or 1998 and she visited him at 9 Hopkins Avenue but they did not live together. This information would have been gleaned by the applicant from a letter from the eventual deceased which she stated she received on November 22, 1999. It was received in evidence as exhibit 1. The main contents of the letter may be summarised as follows:

I. I have a woman friend who is 33 years younger than me and she has two grown daughters and a 13 year old son going to school;

II. Met her at the Wharf when I was down there about 18 months ago;

III. She does everything for me, wash cook and keep the place clean;

IV. She is a Security Officer and her name is Olga

V. Without her I do not know how I would manage;

VI. She does not live here but comes very regularly;

VII. She is a Christian and a real fine person;

VIII. She does not like how we are living and would like us to get married, but how in God's name can I do that under this condition.

[44] It was the applicant's testimony that she had visited Jamaica in 1994, 1996, 1998 and 2000 and during her stays, of on average 4 to 6 months, she regularly visited her brother. She stated that on two occasions she stayed overnight. When she visited the deceased in February of 2000, no one else was at his home

[45] Shirley Grant, a tenant at the premises since 1994 stated that the parties never lived together at 9 Hopkins Avenue. Under cross examination she said the respondent came mainly on a Friday, but sometimes also during the week and slept over a few times. She saw Ms. Drummond wash, sweep and tidy up the house. She also saw her leaving for work after 4. From the context of her answer that would be after 4 a.m. At other times she would awake to find Miss Drummond at the premises. Her view was that the deceased Bob and Olga could have been in a relationship.

[46] Ann- Marie Grant's Shirley's sister stated that she was also a tenant at the premises since 1994/1995. He evidence was that the respondent never lived at 9 Hopkins Avenue. She mainly visited at nights and would leave the next day. When cross examined she recalled seeing the respondent at the premises in the evenings about 6 or 7 when she was coming from work but did not recall seeing her before 8 o clock in the mornings. She acknowledged that it was possible that Ms. Drummond could come to the premises at nights or leave early in the morning and she would not know.

[47] Huldah Heron a long time friend of the deceased stated she used to cook for the deceased after his wife died. She said in 1994 she still used to cook for him. The deceased gave her his key so she could go in and put in the food and take out his clothes. She sometimes resided in England but when she was in Jamaica she would go to see him 3 – 4 times a week. She stated that she met the respondent on two occasions. Her evidence was that no one lived with the deceased and the respondent did not move in. She stated that the second room in the house had been occupied by a nephew of the deceased and after he left she packed some barrels in that room. She denied that the respondent's son lived with the deceased and stayed in that second room. She stated the deceased didn't like children.

[48] Elaine Peart stated that knew the deceased for over 30 years and they shared a good relationship as social friends. She had been visiting him at 9 Hopkins avenue for 25 years. She said she never met Ms. Drummond but that once she glimpsed a person and when she asked the deceased about it, he smiled. The deceased was living alone before he died. When he was to be admitted to the University Hospital she lent him she lent him a travelling bag which she packed for him. She maintained there was no one else in the house on the night before he went to the hospital.

[49] The respondent Ms. Drummond in her affidavit stated that she had been cohabiting with the deceased since 1992. Under cross-examination she however admitted that it might have been a mistake and 1994 was the correct time at which she began to live with the deceased. In any event, it was her evidence that she had an intimate relationship with the deceased for over 6 years as they resided together at 9 Hopkins Avenue.

[50] Amado, the son of the respondent in his evidence in chief stated that he resided with the deceased for many years and that Ms. Drummond lived with the deceased at 9 Hopkins Avenue, Kingston 20 in the parish of Saint Andrew for over six years as man and wife.

[51] Ashley Smith stated that he knew the deceased from 1985. Further that he and the deceased lived in the same community and in or about 1996 when he visited the deceased's home he observed that the Respondent and her son lived there. He further stated that during day and night when he visited the home the Respondent was there and he formed the view that they were living as man and wife from 1996 until the time of the deceased's death. He had a very good and cordial relationship with them and that the parties lived together as man and wife for over six years and that the deceased died in 2000.

[52] Under cross examination, Mr. Smith experienced significant difficulties with recalling dates, even simple ones that were not in issue. He stated that the deceased died in 2002 but that he was willing to accept 2000 and that he dropped Olga and the deceased home somewhere in 1996 or 1997.

[53] The evidence of both sides contains significant variance. The letter sent from the deceased to the applicant is however telling. In it he clearly states that the respondent did not live here but visited very regularly. I was also more impressed with the demeanour of the witnesses and the cogency of the evidence of the witnesses for the applicant than I was with the witnesses for the respondent. The applicant's witnesses spoke to seeing the respondent there on occasion but not living there. It is clear from all the circumstances that the parties had some relations which caused the Respondent to regularly visit the deceased. I find however that they did not live together in the same household.

A sharing of daily life;

[54] While the witnesses for the applicant stated that the respondent did not live at the premises 9 Hopkins Ave Amado stated that persons admired the pride with which the deceased cared and provided for his family. However, on cross examination he was unable to speak definitively as to whether or not he or the respondent was present on the night when the deceased went to the hospital. He testified that it was more than likely that he spent the night before the deceased went to the hospital at his house and that more than likely it was the respondent who

packed the deceased's bag. It would be expected that such a significant event would have been remembered definitively.

[55] Mr Smith testified that he would take the respondent home on occasions so that she could prepare something for the deceased to eat before he came home or the deceased would ask him to drop her home. He further stated that the parties attended work functions together and he would drop them home afterwards. The respondent however stated that she is not family to go out, she goes from church to work to home and she did not recall attending any work or church function with the deceased.

[56] Shirley Grant recalls seeing the respondent doing household duties. Huldah Heron and Ann Marie Grant stated that they did the household chores for the deceased, and Miss Heron stated that she had a key to his house. Elaine Peart states that on the night the deceased went to the hospital, she packed his bag for him.

[57] The previous finding that the respondent and the deceased did not live together would make it very unlikely that the parties would have shared daily life in a way indicative of being a husband and wife. The evidence of the respondent, Amado and Mr. Smith having been undermined in cross-examination I find does not support a finding of a sharing of daily life. There was some sharing of life but the evidence does not support a finding that this was a daily occurrence.

Stability and a degree of permanence in the relationship;

[58] Amado on cross examination stated that after bouncing all over the place, they settled down with Mr. Bob (deceased) and the respondent resided with him for over 6 years. The respondent's evidence is also that she was living with the deceased for at least 6 years. This was supported by Ashley Smith who stated that the parties lived together as man and wife for over six years and that the deceased died in 2000.

[59] Shirley Grant stated that on seeing the respondent performing household chores, she perceived them to be in a relationship. Ann-marie Grant spoke to the respondent overnighting.

[60] On the evidence which I accept that the respondent visited the deceased's home on a regular basis, stayed over some nights and did household duties, I find that the relationship between the parties was stable and had a degree of permanence.

Finances;

[61] In exhibit 1 the deceased speaks to the parlous state of his finances indicating that his pension was inadequate to pay his utility bills and outlining the struggle he had to buy food every day. The applicant testified that she was the only sibling making financial contributions to the deceased's welfare. Amado stated that he did not know the financial affairs of the deceased as it was his mother who provided for him.

[62] There is therefore no evidence on either side of the pooling of resources or the handling of finances in the management of the household.

A sexual relationship;

[63] The deceased referred to the respondent in the letter as "woman friend". She was seen at his home at nights and early mornings and he was very coy when asked about her by Huldah. Furthermore, the respondent stated that she shared an intimate relationship with the deceased. That evidence is uncontroverted and accepted by the court.

Children;

[64] The union produced no children.

Intention and motivation;

[65] From his letter to the applicant, it is clear that the deceased did not intend to marry under what he termed as this “condition”. The respondent visited him regularly, cooked, washed and clean and he seemed contented with that, stating in the letter that without her, he did not know how he would have managed.

[66] The letter also indicates however that the respondent had a different intention and wanted to get married. The respondent under cross-examination stated that she was not family to go out. That suggests that as a Christian she wanted to be formalised in her position.

[67] It does appear that the parties had different intentions and motivations.

The opinion of the reasonable person with normal perceptions.

[68] Shirley Grant, Ann-Marie Grant, Huldah Heron and Elaine Peart each fit into this category. What did they perceive? The Grants were tenants of the deceased and they observed the respondent being present on the premises at certain times of the week. They recall seeing her do household duties but taking the circumstances in its entirety, they did not perceive her to live with the deceased as if in law they were man and wife. Huldah and Elaine were close friends of the deceased who assisted him in various ways. Huldah’s evidence was that she had a key to the house and that she cooked and did other household duties for the deceased until in 2000 when she left Jamaica but she only saw the respondent on two occasions. Ms. Peart said that she only glimpsed the respondent.

[69] Amado Samuels and Ashley Smith have given evidence to the contrary. The inconsistencies in their evidence however have significantly diminished the weight to be given to their evidence.

[70] In the circumstances therefore, I finds that a reasonable person with normal perceptions would not perceive the parties to have been living together as if in law they were man and wife.

[71] From the foregoing, in an application of the tests laid down in ***Kimber v Kimber***, I am satisfied that the reality is that the parties did not cohabit in law as husband and wife. There was a degree of permanence and they had sexual relations, but in essence they led separate lives and had a visiting relationship.

The Five Year Threshold

[72] The finding that the relationship shared by the respondent and the deceased did not pass the "cohabitation test" is determinative of the fact that in law the respondent and deceased could not be properly viewed as spouses. However I will also go on to consider the issue of whether in any event the five year threshold for cohabitation would have been met.

[73] A good starting point is exhibit 1, the letter that was received by the applicant from the deceased November 22, 1999. In it the deceased stated that he had met the respondent 18 months before. That time frame is in keeping with the evidence of Shirley Grant, whose evidence was that the deceased lived at the house with his nephew who migrated in 1996 and she met the Respondent in the latter part of 1998 when she was introduced to her by the deceased.

[74] Ann-Marie Grant supported her sister's evidence in that she maintained that she did not recall seeing Ms. Drummond at the premises between 1994 to1995 but instead she also met her somewhere between 1997 and 1998 when the deceased introduced her as his young lady.

[75] Both Huldah Heron and Elaine Peart maintained that the deceased had lived alone.

[76] Ms. Drummond in her evidence in chief stated that she had been cohabiting with the deceased since 1992 but under cross examination, she admitted that it might have been a mistake and 1994 was the correct time at which she began to live with the deceased. She also gave evidence that she was with him when he retired but could not recall the date at which he retired. She testified that she

started working on the Wharf in June 1998 but met the deceased while working as a Sales Representative at Winners Wholesale.

[77] Mr Ashley Smith in his evidence in support of the respondent stated that the deceased died in 2002 but that he was willing to accept it was 2000. He also stated that he dropped Olga and the deceased home somewhere in 1996 or 1997.

[78] Amado stated that he resided with the deceased for many years and that Ms. Drummond lived with the deceased at 9 Hopkins Avenue, Kingston 20 in the parish of Saint Andrew for over six years as man and wife.

[79] Under cross examination, he stated that he went to high school in 1997 and at that time he lived at 9 Hopkins Avenue. He lived at Hopkins Avenue for four or five years and the deceased died when he was in third form. He knew of the deceased and the Respondent living together as man and wife from about 1995 when he was in about grades 5 to 6.

[80] It was Ms. Drummond's evidence that Amado was born February 12, 1985. Significantly, she stated that at the time he took GSAT she was still living at Windward road and that he took the GSAT at age 10 to 11 or 11 or 12, one of the two. If he took GSAT when he was 11 the year would be 1996 and if he was 12 it would be 1997. Counsel for the applicant highlighted that from the combined evidence of the respondent and Amado he would have been in 3rd form in 2000 and 1st form in 1997. This was significant as on their evidence they never started to live at 9 Hopkins Avenue until the Amado was in high school. Counsel pointed out that even if Amado took GSAT at 11, the earliest they could have started to live at 9 Hopkins Ave would have been 1996 not 1994 as maintained by the respondent.

[81] From the evidence for the applicant therefore the respondent would have started to come to the premises sometime in 1998. On the respondents case the evidence would suggest the earliest they could have been there was 1996 even

though they had sought to suggest it was from 1994. Therefore, even if there was evidence of cohabitation, which I have already found there was not, it would not have established that the respondent and deceased had cohabited as if in law they were husband and wife for not less than five years immediately preceding the death of the deceased. Accordingly the applicant has established on a balance of probabilities that the respondent was not in law the spouse of the deceased.

Issues III & IV

Should the Orders granted on the 15th January 2008 admitting the photocopy Will of the deceased Robert Charles Morrison dated 28th May 2000 to proof In the Probate Division of the Civil Registry and on the 29th December 2009 declaring Olga Drummond to be the spouse of Robert Charles Morrison, deceased, be set aside?

Law

[82] CPR 11.18 provides:

1) A party who was not present when an order was made may apply to set aside that order.

2) The application must be made not more than 14 days after the date on which the order is served on the applicant.

3) The application to set aside the Order must be supported by evidence on Affidavit showing:

    a) a good reason for failing to attend the hearing;

    and

    b) that it is likely that had the applicant attended some other order might have been made.

The Submissions in Summary

[83] Counsel for the applicant submitted that:

a) The applicant had satisfied the criteria set out in Rule 11.18 of the Civil Procedure Rules, 2002 (CPR) as:

I. there is no evidence before the Court that any correspondence or notice was directed to the applicant's former Attorney-at-Law;

II. None of the final orders sought to be set aside was served on the applicant so her application could not be out of time;

b) There were good reasons set out in her affidavit for the delay in making the application;

c) the applicant acted promptly in obtaining the expert opinion of Miss Beverley East to assist the Court in determining the validity of the document purporting to be a copy of the will

[84] Counsel for the Respondent submitted that:

a) the court ought to refuse the application because of the inordinate delay between the grant of the said orders and the date of the application to set aside;

b) the applicant in coming to the court at this late time had not provided the court with a good reason to exercise its discretion in her favour;

c) the granting of the application would be prejudicial to the respondent who had already been exercising the benefits under the grant and was now experiencing difficulty locating witnesses; and

d) The proper recourse should be an application for revocation of grant pursuant to the rules.

Discussion and Analysis

[85] Pursuant to CPR 11.18 the applicant seeks to have the orders of 15th January 2008 and 29th December 2009 set aside.

Absence from the hearing

[86] It is common ground that CPR 11.18 (1) has been satisfied as the applicant was not present at either hearing when the orders sought to be set aside were made.

Service of the Orders

[87] The second requirement pursuant to CPR 11.18(2) is that the application to set aside should not be made more than 14 days after the date on which the order is served on the applicant.

[88] An attempt was made to serve some documents on the applicant. The affidavit of service of Beverley Myers, Clerk to counsel for the respondent, indicates that on the 8th of October 2009 by registered post, she sent to Mrs Hall at her last known address 4033 Rue Gertrude, Verdun, H4G 1R7 Quebec Canada, the following documents:

(i) Amended Notice of Application for Court Orders dated 23rd February 2009 (Application to be declared a spouse);

(ii) Affidavits of Amado Samuels and Ashley Smith in support of the Application;

(iii) Three Affidavits sworn to by Ms. Drummond;

(iv) Attested Copy of the Order dated 25th June 2009 permitting service on the Applicant by way of registered mail sent to her last known address.

[89] The applicant in her affidavit dated May 10, 2011 stated that since 2006, she has been residing at 8413 rue Boursier, LaSalle, Quebec H8N 2T8 Canada. There is however no need to debate whether the documents were sent to her last known address. It was accepted that the final order of the 15th January 2008 was not

among the documents served on the applicant. It is also accepted that the order of 29th December 2009 was also never served on the applicant.

[90] The effect of CPR 11.18(2) was considered by Brooks J (as he then was) in ***Carl Wyndham V Calvin Terrilonge and Winsome Davis Terrilonge,*** CL 1994/ W124 (27th May 2005), a matter which commenced before the advent of the CPR but where the CPR was in force at the time of the application. In that case the claimant in an effort to satisfy his judgment obtained an order for sale of property the defendants owned as joint tenants. Mrs Davis-Terrilonge applied to have the order for sale set aside. The evidence disclosed that the Notice of the hearing was mailed by registered post on the April 11, 2000 for a hearing on the April 13, 2000. Mrs. Davis-Terrilonge therefore did not receive notice prior to the time for hearing or indeed at all as she had previously removed from the premises to which the Notice was directed. The order for sale was brought to Mrs. Terrilonge's attention in November 2000 but was not served on her. In considering Rule 11.18(2) Brooks J held at page 4 of the judgment that, "*In light of the non- service, I find that there cannot be a time bar to Mrs. Davis-Terrilonge's application..."*

[91] Accordingly due to non-service of the orders there could not be a time bar in relation to the requirements of CPR 11.18 (2) in relation to the application in the instant case.

Good reason for failing to attend the hearing

[92] The evidence from the applicant is relevant to the consideration under CPR 11.18 (3) as well as in relation to the submission from counsel for the respondent that the applicant has exhibited inordinate delay in making this application which causes prejudice to the respondent.

[93] The applicant in her affidavit indicated that days after the funeral she received a copy of a document purporting to be the last Will of the deceased with her appointed as Executor, the validity of which she doubted because of a number of

inconsistencies. She consulted attorney-at-law Helen Birch. She was unable to take the matter further at that time as she had to return to Canada to take care of her brother Ivanhoe Morrison and his wife Enid Brown Morrison and to attend court on their behalf.

[94] Between 2001 – 2003 she dealt with various legal and medical issues for Ivanhoe and his wife. Ivanhoe died in 2003 after which she had to care for Enid who was paralysed and required palliative care. Under the legal mandate she had undertaken Enid had to be cared for in her home and could not be put in any institution for care. Enid died in Canada in February 2007 and she took her body back to Jamaica to be interred with her husband Ivanhoe.

[95] During the time she was caring for Enid she also had to care for her daughter Margaret Hall who at times required hospitalisation. Also in 2008 she fell in the Metro and sustained head injuries requiring hospitalisation. In February 2009 she suffered a mild stroke and was hospitalised.

[96] Concerning notice of proceedings in this matter, in April 2004 she received a letter advising that Bert Samuels Attorney-at-law acted for the respondent and requesting the name of her attorney at law. That letter was sent to Ms. Helen Birch and a copy returned to Mr. Samuels along with a business card of Ms. Birch.

[97] There has been no evidence that any documentation was sent to Ms. Birch in relation to this matter. On October 26, 2009 she received a bundle of documents from Knight Junor Samuels. She made contact with an Attorney at law in Jamaica but was unable to give full instructions. She also did not come to Jamaica as she was under medical supervision

[98] On July 2, 2010 she received information that the court had granted an order declaring Olga Drummond the spouse of the deceased Robert Charles Morrison. On the 23rd July 2010 she received a Notice of Intention to apply for a grant of Administration with Will Annexed in the estate of Robert Charles Morrison.

[99] She wrote to the Administrator General requesting that no further action be taken as she was challenging the facts put forward by the respondent. The Administrator General's Department advised by letter dated August 13, 2010 that as Executor she could apply for Probate. The applicant returned to Jamaica in October 2010 and the application to set aside the orders was made in May 2011.

[100] There is no evidence that the applicant had any notice of the hearing of 15th January 2008 when the order was made in respect of the Will. Only the Administrator General and the respondent were represented at that hearing. In respect of the hearing of December 29, 2009 the applicant has admitted receiving a bundle of documents from Knight Junor Samuels on October 26, 2009 but said she was unable to give full instructions to an attorney. She indicated she was also unable to return to Jamaica because she was being followed up for medical attention.

[101] There appears to have been a good reason for the applicant not to have attended the hearing of the 15th January 2008. While the reason for missing the hearing of the 29th December 2009 is not as compelling as the reason in respect of the hearing of 15th January 2008, I find it qualify as a good reason as she was being followed up for medical attention. In any event given the merits of the application, the applicant should not be denied a remedy on this procedural ground.

[102] The main procedural challenge to the application was not in fact CPR 11.18(3) but the indication that the delay in the applicant seeking to deal with the deceased's estate would be prejudicial to the respondent as she could have communicated with any lawyer in Jamaica before the orders were granted. There was also a submission that the respondent had already been exercising benefits under the grant However no grant was exhibited and at the start of the hearing when asked by counsel for the applicant about the grant, counsel for the respondent indicated she did not see that on the file. It would, it seems, have been surprising if a grant had actually been obtained, given that the applicant

had written to the Administrator General requesting that no further action be taken indicating as she was challenging the facts relied on by the respondent.

[103] Counsel for the applicant submitted that an executor who has doubts about the validity of a will may not be obliged to apply for probate. The court notes that the applicant after learning of the orders in July 2010 came to Jamaica in October 2010 and applied for the orders to be set aside in May 2011. Though the applicant could have moved with more dispatch the delay in making the application was not inordinate as to make the application prejudicial. The court also has to take account of the merits of the application.

Likely that had the applicant attended the hearings some other orders might have been made

[104] Counsel for the applicant relied on the case of ***Evans v Bartlam*** [1937] 2 ALL E R 646 from which the following principles may be distilled:

(1) Unless and until the Court pronounces a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure;

(2) The Rules of Court give to the Judge a discretionary power to set aside the default Judgment which is in terms “unconditional” and the Court should not lay down rigid rules which deprive it of jurisdiction;

(3) The primary consideration is whether the Defendant has a defence to which the Court should pay heed and;

(4) There is no rigid rule that the Defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the Court will have regard in exercising its discretion to set aside a default Judgment.

[105] In ***Evans v Bartlam*** specific Rules of Court were being interpreted however the general principles outlined have been applied in several cases subsequently that concern rules that allow for the setting aside of orders.

[106] Counsel also relied on ***Grimshaw v Dunbar*** [1953] 1 ALL ER 350 where Jenkins L.J. stated at page 355 that:

> [A] party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the Court. If by some mischance or accident a party is shut out from that right and an order is made in his absence then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the Court and present his case, no doubt on suitable terms as to costs...

[107] The outcome of the first two issues shows the cogency of the applicant's case. The court has found that the photocopy Will admitted to proof was forged and that the respondent has failed to satisfy the criteria in law to be properly declared the spouse of the deceased. It is therefore likely that had the applicant attended some other order might have been made in respect of both orders.

DISPOSITION

[108] The personal circumstances of the applicant have been taken into consideration in the assessment of the delay on the part of the applicant in bringing this matter. However the impact on the respondent of the length of time the applicant took to challenge the orders has to be taken into account especially in light of the dicta in ***Grimshaw v Dunbar***. In all the circumstances therefore even though the applicant has been successful, it seems appropriate that each party should bear their own costs.

[109] In light of the foregoing, I hereby order that:

(1) the Order granted on the 15th January 2008 by Master Lindo admitting the photocopy Will of the deceased Robert Charles Morrison dated 28th May 2000 to proof in the Probate Division of the Civil Registry; and

(2) the Order granted on the 29th December 2009 by Lawrence- Beswick J declaring Olga Drummond to be the spouse of Robert Charles Morrison, deceased,

are set aside;

(3) Each party to bear her own costs.