

BARBADOS.

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT**

Civil Jurisdiction

No. 2323 of 2002

BETWEEN

REGINALD EVANSBURKE

(Plaintiff)

AND

DOROTHY EILEENBROWNE

(First Defendant)

ANTHONYSTEPHENSON MAYNARD

(Second Defendant)

ROGER O'NEALECATWELL

(Third Defendant)

ALDYTH FORDE

(Fourth Defendant)

ORVILLE HARCOURT PHILLIPS

(Fifth Defendant)

JULIAN PHILLIPS

(Sixth Defendant)

CORINE "BETTY" FORDE

(Seventh Defendant)

MIGNAL CATWELL

(Eighth Defendant)

JOAN CATWELL

(Ninth Defendant)

LINDA FORDE

(Tenth Defendant)

Before the Honourable Mr. Justice Sherman Moore, Judge of the High Court.

2003: June 26 and July 31.

Miss A. Richards for the Plaintiff.

Mr. V. O. Smith and Mr. N.G. Wilkie for the First Defendant.

Mr. Hal Gollop for the Third, Eighth and Ninth Defendants.

Dr. R. L. Cheltenham, Q.C. and Mr. W. Murrell for the Second, Fourth, Fifth, Sixth, Seventh and Tenth Defendants.

JUDGEMENT

[1] Herman Stephenson Maynard, (the testator/deceased) late of Monroe Road, Haggatt Hall, St. Michael, died in Barbados on the 13th day of January 2001. The testator's last will and testament, dated September 21, 1999 was probated on the 26th day of June, 2001 and Letters Testamentary were issued on the 17th July, 2001. The fourth, fifth and eleventh paragraphs of the said will are as follows:

"Firstly, I give and bequeath to my common law spouse DOROTHY EILEEN BROWNE the sum of sixty thousand dollars."

"Secondly, I give and devise my parcel of land situated at MONROE ROAD, HAGGATT HALL, ST. MICHAEL comprising one acre approximately, together with the wall building thereon to my son ANTHONY STEPHENSON MAYNARD to have and to hold absolutely after a period of two years occupation by my friend DOROTHY EILEEN BROWNE who presently resides there".

"Eighthly, I give to my friend DOROTHY EILEEN BROWNE one half of the chairs in my residence."

[2] On the 11th day of April 2001 the first defendant sent the following notice to the plaintiff:

"I, Dorothy Eileen Browne, of Monroe Road, Haggatt Hall, St. Michael, the spouse of the said Herman Stephenson Maynard, hereby give you notice that I elect to take the share of the estate of the deceased to which I am entitled as a legal right under section 93(2) of the Succession Act, Cap. 249 of the Law of Barbados, in lieu of the share of the said estate devised to me under the will of the deceased dated the 21st day of September, 1999.

Dated the 11th day of April, 2001".

[3] That notice to the plaintiff was supported by an affidavit sworn by Dorothy Eileen Browne on the 25th day of May 2001 containing the following paragraphs:

"1. I am the age of 61 years and a single woman.

2. The said Herman Stephenson Maynard and I cohabited as husband and wife for upwards of 20 years up to the date of his death on the 13th day of January, 2001.

3. Prior to the said period of our cohabitation the said Herman Stephenson Maynard was lawfully married to Jasmine Maynard.

4. The said marriage was dissolved sometime during the year 1976 and the said Herman Stephenson Maynard never remarried and remained a single person until the date of his death.

5. I make this affidavit for the purpose of establishing that I am the surviving spouse of the said Herman Stephenson Maynard in accordance with the provisions of the Succession Act, Cap. 249 of the Laws of Barbados, and that as such spouse I am entitled to a share of the estate as a legal right under section 93(2) of the said Act."

[4] Having received the Notice of Legal Right and supporting affidavit from the first defendant, the plaintiff took out an originating summons on the 28th day of October, 2002 seeking determination of the following questions:

"1. Whether the first defendant, Dorothy Eileen Browne, described in the Last will and Testament of Herman Stephenson Maynard, deceased as "my common law spouse" and "my friend" is the spouse of the deceased within the meaning of the Succession Act

2. If the answer to number 1 above is in the affirmative, whether the Notice of Legal Right dated the 11th day of April, 2001 made by the first defendant is a valid election pursuant to section 97 of the Succession Act.

3. If the answer to number 2 above is in the affirmative, whether the plaintiff is at liberty to sell the property of the deceased specifically devised and bequeathed by the said Will of the deceased and to distribute the net proceeds of sale of each item of property equally between the first defendant and the person to whom each such item of property has been specifically devised and bequeathed by the said Will of the deceased."

[5] The evidence contained in the affidavits of the several deponents is as follows:

(a) Michael Christopher Browne, nephew of the first defendant deposed, inter alia, as follows:

"(6) After my aunt the said Dorothy Eileen Browne ceased working at "the Civic" in 1980, she moved in to live with Mr. Herman Maynard at his residence and would visit our family home frequently. She and Herman Maynard lived and worked together as husband and wife although they never married taking care of the many animals they kept on his premises. She cooked for him, did all his laundry, paid his bills, such as land taxes, insurances, electricity and water. I myself used to go to Herman Maynard's home to help my aunt.

(7) Herman Maynard was first hospitalized on or about the 30th August, 1996 for 20 days during which time he underwent surgery. While he was in hospital, my aunt the said Dorothy Eileen Browne would visit him every day, would take care of all his laundry and maintained his home and

the animals. When he returned home from the hospital on the 20th September, 1996, my said aunt used to give him his shower/bath twice daily, used to feed him his meals and administer his medication and was always there for him at his bedside.

8) This situation and relationship between my aunt the said Dorothy Eileen Browne and Herman Maynard subsisted up to the day Herman Maynard died on the 13th January, 2001 after being hospitalized on the 9th January, 2001.”.

(b) Hortense Proverbs resided at Haggatt Hall from about 1970 to 1994 and she deposed thus:

“2 During the time that I resided in Roberts Road aforesaid I became acquainted with Mr. Herman Maynard (“Mr. Maynard”), who resided in Monroe Road, Haggatt Hall, St. Michael, and also with the first named defendant, Dorothy Eileen Browne (“Miss Browne”) who also resided in Monroe Road a very short distance from the residence of Mr. Maynard but on the opposite side of Monroe Road.

3. In Monroe Road and in the surrounding neighbourhood it was common knowledge that Mr. Maynard and Miss Browne had for many years carried on a permanent common law relationship as husband and wife, and I can vouch for this relationship from my own personal knowledge and observation.

4. During the period from about 1989 to 1994 I was employed by Mr. Maynard’s brother, Cleophas Maynard, who resided at his property in Monroe Road adjoining Mr. Maynard property. Mr. Maynard and his brother Cleophas together carried on a dairy. My normal work day commenced at 7.00 a.m., but on the days when milk was to be delivered to the Pine Hill Dairy, I would get to work as early as 6.00 a.m. On numerous occasions when I arrived at work I would observe Miss Browne still in her nightgown, sometimes in Mr. Maynard’s yard feeding the fowls and animals; sometimes she would be at the front door of Mr. Maynard’s house, and we would exchange greetings. Also during the course of the day I was able to observe that Miss Browne took care of all the household chores that a wife would normally do for her husband and family, including cooking all meals, cleaning the house and doing the laundry, in addition to helping Mr. Maynard with the stock and fowls and all the other outside chores.”.

(c) Roger Catwell is 47 years old and a nephew of the deceased. He resided in England from 1970 to 1985. He deposed that he always enjoyed a closer relationship with his uncle HERMAN who raised him when his mother emigrated to England where she still lives. He shared his uncle’s interests in the rearing and slaughter of animals for human consumption and on his return to Barbados in 1985 he assisted his uncles Cleophas and Herman with the dairy and sale of the carcasses of slaughtered animals. He further deposed as follows:

6. That it is to my certain knowledge that my uncle HERMAN had three (3) keys to his house. He kept one, I was given one and his lady friend, MS. DOROTHY BROWNE had the third.

7. That from very early in my boyhood, I became aware that DOROTHY BROWNE was my uncle HERMAN’S girlfriend. She lived at her own house in Monroe Road but visited my uncle daily.

8. That I used to sleep at my uncle before going off to England. Since my return I slept there on a few occasions only. I have never seen Ms. Browne sleep there.

(d) Orville Phillips deposed, inter alia, as follows:

2. I am fifty-three (53) years old and was born and grew up at my mother’s residence at the said Salters Tenantry Road, Haggatt Hall in the parish of Saint Michael in this Island.

8. My father was for forty (40) years and more friendly with a lady who lived about 30 yards away from him by the name of Dorothy Browne also known as “Clytie”.

9. I have never known Ms. Browne to be living at my father’s residence even though she visited him daily.

10. I have visited my father’s house on many nights and he was alone. He often reminded that I should as much as possible visit before “Clytie” goes over to her house as he locks up after she leaves and does not like to get up and open up for anyone.

11. In my father’s last illness, months before he died, I would regularly visit him on late evenings into the night. Often when there I met “Clytie” who on several occasions said good night to us all and left for her residence about 8:00 p.m. though on occasions later. My father slept by himself to my certain knowledge up until his death.

12. I used to clean the pig pens and cow pens as part of my assistance to my father with the stocks. Some mornings I cleaned them before going to work at the Grantley Adams International Airport where I am a Senior Superintendent of Works. When I get to my father’s residence about 5:00 a.m. or 5:30 a.m. at latest, I never saw “Clytie” there. On occasions when I remain there until 7:00 a.m. and after she would come over to my father’s house and assist in milking the cows.

13. In addition, I took my father to the doctor and the hospital and bought all of his medication.

14. Some time in the year 2000, I took Ms. Browne to Bridgetown in my motor car. In the course of the conversation she told me of her nephew’s son - Shane. She said that he is a big boy though still at Secondary School but when his cousin - Shawn - who lives at Ms. Browne is not at home, and Shane’s father - Michael - has to go to work, Shane sleeps with her in her bed.

15. I was present at my father’s bedside at the Queen Elizabeth Hospital in September, 1996 when my father dictated to Mr. Reginald Burke, the Plaintiff in this action, a Will. My father, in instructing Mr. Burke, referred to Ms. Dorothy Browne as his friend. I was surprised to see that when the Will was prepared Mr. Burke referred to her as “common law spouse”.

16. It is to my knowledge that my father had three keys to his house. He kept one; his friend Ms. Dorothy Browne had one also and my cousin - Roger Catwell - who lived next door to my father also had a key.

17. My father both in his Will of September, 1996, and again in his Will of September 21, 1999, made provisions for Ms. Browne to have the occupation and the uses of his house for two years after his death. He explained this provision to me as follows: He said that if she wants to build a wall house in place of her boardhouse, with the money she has and the \$60,000.00 which he was giving her under his will she would have his place at which to live while the wall house was being constructed."

(e) Selvin Mottley deposed as follows:

2. I am seventy years old and am a retired Carpenter/Chauffeur.

3. I have known the late HERMAN MAYNARD of Haggatt Hall, St. Michael at close range for over fifty years. He was my friend. I used to work with his family members - in particular, his brother - one Cleophas Maynard - also deceased. He owned trucks - one of which I drove for many years.

4. It is to my knowledge that Mr. Herman Maynard was an intimate friend of Ms. Dorothy Browne who lived in his neighbourhood. It is also to my knowledge that Ms. Browne visited Mr. Maynard's house on a daily basis.

5. Mr. Herman Maynard's brother - Cleophas - lived next door to him. As a friend of Cleophas I would regularly visit him early on mornings and on evenings into the night. On many occasions, I saw Ms. Browne leave Mr. Maynard's house around 6:30 to 8:00 at nights for her house.

6. When Mr. Herman Maynard became unwell in his last years and unable to provide for his animals, I played a role driving his pick-up ME-809 in the collection of grass - mostly from Stepney pasture or from Mr. Melville King's ground - Monroe Road or elsewhere in the neighbourhood. I also took milk in the pick up to the Pine Hill Dairy.

7. I have seen Ms. Browne on many mornings going to Mr. Herman Maynard's house.

8. On many occasions I drove Mr. Maynard when his son - Orville - was not available to take him to the doctor. Ms. Browne also known as "Clytie" always accompanied him but often when I got to Mr. Maynard's house he would tell me that I have to wait a little as "Clytie" had gone over to her house to dress.

9. It is a matter of common knowledge in the village that Clytie was a friend of Herman Maynard but that she lived at her house and he at his.

(f) The affidavit sworn by Hal Gollop is based on the notarised letter signed by the eighth and ninth defendants who reside in London. In that affidavit it is also denied that the first defendant and the deceased lived together.

[6] The following cases were cited:

Shepherd v. Taylor [1987] 22 Barbados L.R. 118;

Pavey v. Pavey [1976] FLC 75, 209;

In the Marriage of TODD (No.2) 9 ALR 401;

Wheatley v. Wheatley [1950] 1 KB 39;

In the Marriage of L and L 9 Fam. LR 1033

Roy v. Sturgeon [1986] NSWLR 455.

[7] Subsections (3) and (4) of section 2 of the Succession Act provide that for the purposes of the Act, reference to a "spouse" includes a single woman who is living together with a single man as his wife for a period of not less than seven years immediately preceding the date of his death; and a reference to a single woman or a single man includes a reference to a widow or widower or to a woman or man who is divorced. Sections 93 and 97(1) and 6 of the said Act are also relevant and provide as follows:

"93(1) If a testator dies leaving a spouse and a child who is a minor, or a child who is, because of some mental or physical disability, incapable of maintaining himself, the spouse shall have a right to one-quarter of the estate.

(2) If a testator dies leaving a spouse and no such child as is mentioned in subsection (1), the spouse shall have a right to one-half of the estate."

97(1) Where under the will of a deceased person who dies wholly testate, there is a devise or bequest to a spouse, the spouse shall elect within 6 months of the probate of the will to take either that devise or bequest or the share to which he is entitled as a legal right."

(6) The personal representative shall notify the spouse in writing of the right of election conferred by this section; but the right shall not be exercisable after the expiration of six months from the receipt by the spouse of such notification or from the first taking out of representation of the deceased estate, whichever is the later.

[8] The testator left no such child as is mentioned in subsection (1) of section 93 of the Succession Act.

[9] In order to answer the first question in the originating summons it is necessary to determine whether the first defendant and the deceased lived together as man and wife for the statutory period. The cases in which the principles of "living together" were enunciated were all matrimonial cases and not cases relating to succession. However the basic principles of cohabitation, in my opinion, can be no different and the authorities are useful to direct the approach to be taken in deciding the issues relating to 'living together' for the purposes of the Succession Act.

[10] In the Marriage of L and L Asche SJ, Fogarty and Nygh JJ. said at pages 1037 and 1038:

"This in our view assumes greater importance in determining the existence of a de facto relationship. Naturally it does not mean that a de facto relationship exists whenever parties happen to live under the same roof such as a lodger and his land lady. What is meant is whether the parties are living in a common household. As was said in *Wheatley v. Wheatley* [1950] 1 KB 39 at 43: 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 her husband rendering husband-like services to his wife. They must live together not merely as two people living in one house, but as husband and wife."

That involves a sharing of the physical facilities of the house, a sharing of the functions of the household such as washing, cleaning, cooking, gardening, etc. and a common use of resources to maintain the household. We do not mean to imply that all the sub-elements have to be present in every case. It may be possible for parties to live in a de facto relationship even if they keep their financial resources separate. Certainly they do not have to keep a common bank account. In many cases they may simply pay their share of the expenses or one party may pay for all the expenses. It is one of the several factors to be taken into account:

[11] The affidavits conflict on the point of the parties having lived together; the first defendant and her nephew deposing that she and the deceased lived together, and the other deponents denying that the parties lived together. However, there is no dispute that (a) she had a long standing relationship with the deceased, (b) she performed household duties for him: Hortense Proverbs deposed that she would sometimes see the first defendant at the house of the deceased early in the mornings dressed in her night clothes performing household chores and sometimes feeding the animals.

[12] The parties were not examined orally on their affidavits and in the circumstances I am of the opinion that it is necessary to examine how the deceased saw the relationship between himself and the first defendant, and, in particular, listen to the voice of the deceased from the grave. The deceased made his will on the 21st day of September, 1999 and in it he described the first defendant as "my common law spouse" and "my friend".

[13] There is a presumption of continuity of the relationship and there is no suggestion in any of the affidavits that the relationship terminated before the death of the deceased. The first defendant deposed that she cohabited with the deceased "as husband and wife for a continuous period of upwards of 20 years up to the date of his death on the 13th day of January, 2001".

[14] There is no suggestion that the testator was not competent to make a will. He signed the will which describes the first defendant as "my common law spouse" and "my friend". There is no dispute that the relationship was long standing and very public and that the first defendant was very often seen at the home of the deceased; in the words of Hortense Proverbs taking "care of all the household chores that a wife would normally do for her husband and family". In *Lamb v. Director General of Social Services* [1981] 38 ALR 405 at 413 the learned judge said, it is not necessary for the parties to live continuously under the same roof;" as Jacobs J pointed out in *Re Fagan* at 467

"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 relation."

The above passage seems to find expression in the affidavit of Hortense Proverbs in paragraph 2 of which affidavit she deposed that the first defendant resided at Monroe Road, a very short distance from the deceased, and in paragraph 3 of her affidavit she deposed that it was common knowledge that the deceased and the first defendant carried on a permanent common law relationship as man and wife. The deceased, in his will, having described Dorothy Eileen Browne as his "common law spouse", in the fifth paragraph of the said will devised a parcel of land together with the wall building thereon to his son, Anthony Stephenson Maynard, absolutely "after a period of two years occupation by "my friend Dorothy Eileen Browne who presently resides there." The deceased thereby contradicts those deponents who said that Dorothy Eileen Browne lived at her house nearby.

[15] In all the circumstances I find as a fact that the first defendant, Dorothy Eileen Browne, described in the last will and testament of Herman Stephenson Maynard, deceased as "my common law spouse" and "my friend" is the spouse of the deceased within the meaning of the said Act.

[16] With regard to the second question, the will was admitted to probate on the 29th day of June 2001, the Notice of Legal Right is dated the 11th day of April 2001 and the supporting affidavit is dated the 25th day of May 2001. The executor derives his authority from the will and an instrument purporting to be a will must first be proved before it can be accepted as valid.

[17] In *Cummins v. Hall* No. 548 of 1982 (Barbados) Williams J. said,

"In my opinion the determination of this issue depends on the construction of subsections (1) and (6) of section 97 of the Act. Under subsection (1) the spouse is required to elect "within six months of the probate of the will." This can only mean within the period of six months which commences with the probate of the will. Under subsection (6) the personal representatives are required to give to the spouse written notice of the right of election and the time for election is extended to a period of six months after the receipt by the spouse of notification under subsection (6).

In my judgment, having regard to these provisions, a notification given before probate is not an election within section 97 and has no effect under the Act. The provisions contemplate that the election is to be made within the prescribed period. They do not contemplate that an election can be made before probate of the will and there can be no election made to a person on the basis merely that he is named in the will as one of the executors. The will must be proved before an election can be made."

[18] In this case the notice of legal right was sent to the plaintiff before the will was proved. In the circumstances I hold that the purported notice of legal right is not valid.

[19] The answer to the third question is dependent upon the executor complying with subsection (6) of section 97 of the Succession Act and the first defendant's response thereto.

[20] Costs of and incidental to this application to be taxed and paid out of the estate.

Sherman Moore

Judge of the High Court.