

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 0760 of 2015

BETWEEN

BARBARA CORBIN

CLAIMANT

AND

ALICIA BECKLES

DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

**2019: March 14
May 10**

**Mr. Brian L. Weekes, Attorney-at-Law for the Claimant.
Mr. Hal McL. Gollop, Q.C., Attorney-at-Law for the Defendant.**

DECISION

Introduction

[1] The Claimant is the owner of a property at No.11 Brighton Crescent, Brighton, St. Michael. The Defendant resides at that property with her minor son. The Claimant wishes to have possession of the property, but the Defendant is claiming an interest in the property.

Background

- [2] The Claimant is the sister of Peter Beckles (“the Deceased”). The Deceased married the Defendant in April 2012. He was the previous owner of the property, but he conveyed it to the Claimant by a Deed of Conveyance dated 09 January 2012. The Claimant then rented the property to the Deceased from that same date, for 3 years at a monthly rental of BDS\$10.00. The tenancy was terminable by one month’s notice in writing.
- [3] In February 2013, the Deceased brought civil proceedings against the Claimant, in an attempt to invalidate the conveyance. Both the High Court and the Court of Appeal dismissed the proceedings.
- [4] The lease to the Deceased terminated on 09 January 2015, and the Deceased passed away on 21 February 2015. The Claimant issued a notice of termination of the tenancy, dated 03 March 2015, to the estate of the Deceased. Effectively the Defendant was required to vacate the property by 09 April 2015. The Defendant refused to move, and the Claimant filed these proceedings in which she claims:
1. possession of the property;
 2. damages for loss of use;
 3. interest; and
 4. costs.

[5] The Defendant filed her affidavit in reply to the fixed date claim form on 12 December 2016. She asserted an interest in the property on the basis that she had lived at the property with the Deceased in a union other than marriage for approximately six years and four months before their marriage; and for approximately six years before the Deceased conveyed the house to the Claimant.

The Law and Legal Principles

[6] The Family Law Act, Cap.214, defines a “union other than marriage” or a “union” as:

“...the relationship that subsists between a man and a woman who

(a) are not married to each other; and

(b) subject to subsections (2) and (3), have cohabited continuously for a period of 5 years or more, and have so cohabited within the period of 12 months immediately preceding the institution of the proceedings”. (See s.39 (1) (as amended by the Family Law (Amendment) Act, 2014-14, s.4)).

(7) Individuals who cohabit in a union other than marriage may acquire property rights in the property of their partner. Cap.214 allows the court to declare the property interests of individuals in a union (s.56), or to alter the property interests of those individuals (s.57).

[8] Notably, a union cannot be established if there is no cohabitation within the

year immediately preceding the institution of the proceedings. (See **Shepherd v. Taylor (1987) 22 Barb. L.R. 118**). Since the enactment of the Family Law (Amendment) Act in 2014, the Court may extend the 12 month period. Section 39 now provides that:

“(3) Upon an application of any party to proceedings between parties to a union other than marriage or a union, the court may extend the period of 12 months of such a union, mentioned in subsection (1), by such longer period as the court thinks fit where the court is satisfied that the party to the proceedings or a child of the union will suffer hardship if the extension is not granted”.

[9] Whether or not parties cohabited in a union other than marriage for 5 years is a question of fact to be decided by the court. (See **Thompson v. Layne (1985) 20 Barb. L.R. 85** at 86). The burden of proof is on the person alleging cohabitation. In the **Thompson** case, Williams J, as he then was, decided that “...in all the circumstances [the applicant] has on a balance proved cohabitation”. (At p.87 of judgment). And in **Re BR (Proof of Facts) [2015] EWFC 41**, Jackson J opined in a civil proceeding, where it was alleged that a baby was injured by its parents, that:

- “6. The burden of proving a fact rests on the person who asserts it.
7. The standard of proof is on the balance of probabilities: *Is it more likely than not that the event occurred?*”.

[10] The statements as to the burden and standard of proof in these two cases are to be preferred to the judgment of CS Husbands J, as he then was, that:

“...because of the rights and gravity of the obligations with attendant consequences which [Cap.214] imposes on parties to a union, the proof required to establish such a union must approach the standard of certainty demanded in criminal cases”. (In **Adams v. Clarke (1991) 26 Barb. L.R.371**, at 372).

With respect, the criminal standard of proof should not be imported into family proceedings.

[11] In **Shepherd v. Taylor** (supra at para.[8]), the learned Judge relied on Australian and English precedents, and held that cohabitation in Cap.214 “is regarded as virtually synonymous with consortium”. (Page 120 of judgment; see also **Saunders v. Saunders (1976) FLC 90-096**, and **Thomas v. Thomas [1948] 2 KB 294**). He concluded that “In my opinion these authorities are useful as illustrating the approach to be taken in deciding issues relating to cohabitation under [Cap.214]”. (Page 120 of judgment).

[12] Belgrave J found that the parties in **Phillips v. Alleyne (1989) 24 Barb. L. R. 1**, were cohabiting for the requisite period. He was “satisfied that the relationship between the parties was a serious relationship and that there was a family commitment to each other during the existence of that union”. (At page 2 of judgment). And in **Adams v. Clarke** (supra at para.[10]), CS

Husbands J observed that a union other than marriage is a relationship “clearly distinguishable from a casual or visiting association, however intimate”. (At page 372 of judgment).

[13] This Court will also refer to Karen Nunez-Tesheira’s seminal text “**Commonwealth Caribbean Family Law: Husband, Wife and Cohabitant**”, where she identified seven elements of *consortium vitae*. They are:

1. the duration of the relationship;
2. whether or not a sexual relationship exists;
3. the degree of financial dependence or interdependence, and any arrangements for financial support between the parties;
4. the degree of mutual commitment to a shared life;
5. the care and support of children, if any;
6. the performance of household duties; and
7. the reputation and public aspects of the relationship.

(Pages 59-60 of text). These principles were considered in **Worrell et al v. Alleyne, CV No.2409 of 2005, Hgh. Ct. B’dos., decision dated 25 January 2017**, where this Court found that the Defendant was not a spouse as defined by section 2(3) of the Succession Act, Cap.249.

[14] The Defendant in this case is also relying on section 64 of Cap.214 to set aside the conveyance to the Claimant. Section 64 provides that:

“(1) The court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in any proceedings under this Part for costs, maintenance or the declaration or alteration of any interest in property or which, irrespective of intention, is likely to defeat any such order.

(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale shall be paid into court pending an order of the court.

(3) The court shall have regard to the interests of, and shall make an appropriate order for the protection of, a purchaser in good faith or other interested person.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party, or of a purchaser in good faith or other interested person of an incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, “disposition” includes a sale and a gift”.

The Issues

[15] There are two issues for the Court to decide, and these are:

1. whether the Defendant and the Deceased were in a union other than marriage prior to the execution of the conveyance; and

2. if so, whether the conveyance should be set aside.

The Evidence

[16] The Defendant offered three affidavits to support her contention that she and the Deceased were in a union other than marriage from December 2006 to April 2012. Two of the affidavits were filed by the Defendant. She gave no oral evidence, but counsel for the Claimant agreed to accept her affidavit evidence.

[17] The Defendant's first affidavit was filed on 12 December 2016. In this affidavit she speaks to meeting the Deceased in March 2006, and developing an intimate relationship with him:

“3. We commenced an intimate relationship shortly thereafter and round or about December 2006, I moved into his residenceAlthough we were not married at the time, I undertook the duties of wife, namely, washing, cooking and cleaning even while I worked as an auxiliary nurse.

4. I lived with [the Deceased] in his residence in a union other than marriage from December 2006 to April 2012 when we got married....”.

[18] The Defendant's second affidavit will be considered after the evidence of the Claimant and her two witnesses are assessed. The other affidavit filed in support of the Defendant was from her mother Donna Quintyne. This affidavit cannot assist the Defendant because it contains no eyewitness

details of the alleged domestic arrangement between the Deceased and the Defendant, at the home of the Deceased, post December 2006. This is a surprising omission, given that Ms. Quintyne alleged that she worked as a nurse with the ageing mother of the Deceased, at his home, until his mother died in October 2007. This would have allowed Ms. Quintyne approximately ten months to observe any domestic arrangements between the Defendant and the Deceased. More importantly, Ms. Quintyne was not available to be cross-examined by counsel for the Claimant.

[19] The Claimant and her two witnesses refuted any suggestion that the Defendant and the Deceased were in a union other than marriage, before the Deceased conveyed his home to the Claimant. In her affidavit filed on 23 June 2017, the Claimant deposed that she did not see or believe that the Defendant and the Deceased were living together at the property in 2006 and 2007. (See para.7). She also pointed out that during the court action initiated by the Deceased against her, neither he nor the Defendant indicated that they had lived together, before their marriage, in a union other than marriage. (See paras.4 and 5).

[20] The essential points of the Claimant's oral evidence are that:

“I visited [the home of the Deceased] regularly as my mother was there. I met the Defendant when she and my brother were married. They lived a short time together before the marriage, after our

mother's death. She lived there for a short time before they got married. I can't remember how long. I only went and see her there a number of times, and she was his friend. I suspected there was something more.....

The Defendant and I never had a big conversation or relationship. There was always a block....

The transfer of the property did not happen while they were in a relationship”.

[21] The Claimant admitted that the Defendant and the Deceased started living together after her mother died in October 2007. However, she did not say how soon after her mother's death the cohabitation began. What is implied by the Claimant's oral evidence is that the Deceased and the Defendant were living together for less than 5 years, before the property was conveyed to the Claimant.

[22] Malcolm Howitt is a medical doctor and the Claimant's son-in-law. He was a regular visitor to the home of the Deceased, both as a family member and in his capacity as a doctor. His evidence is that Defendant was not living at the Deceased in 2006 or in 2007 up to when his mother Elsie Beckles died. (See affidavit filed on 31 May 2017, at para.5). Dr. Howitt's oral evidence is that:

“I visited the [Deceased's] household quite regularly as a doctor and a member of the family.... I was there intensely more so between 2006 and 2013 in a medical capacity. It is not true

that between 2006 and 2007 I never visited often. I had to see Ms. Elsie until she died.... In addition I would see [the Deceased]..... Of course [the Defendant] could have been around but I don't think there was any permanence there. I would have expected to see some evidence that she was there. It was a nurse who was there who would call me. There were different nurses. I saw nothing to suggest that someone else was there. I was surprised when [the Deceased] got married. From the time [the Defendant] was there we were not allowed to go there”.

[23] The final witness for the Claimant was Diane Yearwood. Ms. Yearwood worked as a helper for the mother of the Deceased from 2001 until her death in October 2007. Ms. Yearwood's duties included cooking, cleaning and “anything else that [Ms. Elsie] needed at any time”. (See para.4 of affidavit filed on 19 October 2017). She also worked for the Deceased from 28 July 2008 until 25 October 2011. Ms. Yearwood testified that, during these two periods, she “had never known the Defendant to be living in the house with [the Deceased]”.

[24] The Defendant filed her second affidavit on 06 September 2017. In this affidavit she claimed that, between December 2006 and the date of her affidavit, Dr. Howitt did not often visit the home of the Deceased. When he did visit on special occasions, and to provide care for Elsie Beckles, his visits were no longer than 10 to 15 minutes. (Para.2 of affidavit). She insisted that she moved in with the Deceased from December 2006. (Para.3).

Was there a Union?

[25] Quite apart from a determination on actual cohabitation, the Court is constrained to find that there was no cohabitation between the Defendant and the Deceased within the year immediately preceding the institution of the Claimant's action. Proceedings are defined by section 2(1) of Cap.214 as meaning:

“a proceeding in court, whether between parties to a marriage or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding”.

[26] The Defendant's claim to an interest in the Claimant's property, by virtue of a union other than marriage, was filed in a proceeding brought by the Claimant. Therefore, the Defendant had to adhere to the timeline set by the section 39 definition of a union other than marriage. (See para. [6] supra). She has not done so.

[27] The 2014 amendment to Cap.214 allows the Court to extend the 12 month period if the Court is satisfied that the Defendant would suffer hardship if an extension was not granted. (See para.[8] supra). The Defendant has offered no evidence of hardship either to herself or her son. And it is questionable whether the Defendant could have presented evidence of hardship to her son. The child is not the child of a union. He is the child of her marriage to the Deceased.

[28] Neither the Defendant nor the Deceased pleaded any interest of the Defendant in the property in the previous action against the Claimant. There is no evidence that a union other than marriage was alleged at that time. The Defendant is unable to establish a union in these proceedings because there was no cohabitation with the Deceased within the year immediately preceding the institution of the proceedings. (See **Shepherd v. Taylor**, supra at para. [8]). It is too late for the Defendant to claim an interest in the property that the Deceased conveyed to the Claimant.

[29] The Court will for completeness analyse the evidence so as to determine whether the Defendant proved, on a balance of probabilities, that she cohabited with the Deceased for 5 years prior to the execution of the conveyance. The Court finds that there was indeed a sexual relationship between the Defendant and the Deceased prior to the date of the conveyance. However, apart from the Defendant's affidavit evidence that she began to cohabit with the Defendant in December 2006, there is no other credible evidence to support this allegation.

[30] There is no evidence from either friends, family or associates of the Defendant and the Deceased, that confirms that they were seen living together in 2006 or early 2007. But the Court is prepared to accept that they began to live together at the house after the death of the mother of the

Deceased. This would have been too late to establish the existence of a union other than marriage before the Claimant became the owner of the property.

[31] While a sexual relationship under the same roof is an indicator of cohabitation, other elements of *consortium vitae*, referred to by Nunez-Tesheira, are absent. (See para. [13] supra). There is no evidence of the degree of financial dependence or interdependence between the Defendant and the Deceased, or of any arrangements for financial support between them. Also absent is any evidence as to the reputation and public aspects of the relationship. For example, did the Deceased and the Defendant shop together or attend social events together as a couple? Secret relationships do not support the existence of a union other than marriage.

[32] The Defendant has not satisfied this Court that, on a balance of probabilities, she cohabited with the Deceased in a union other than marriage. The Court is reminded of the caution from Williams J that:

“Union obligations can be more difficult to enforce than marital obligations. It is relatively easy to prove a marriage. Attorneys in union cases should bear in mind that union obligations only arise where a union is proved to have come into existence and they should ensure that the question is dealt with in a satisfactory manner and not left to conjecture”. (In **Thompson v. Layne**, supra para. [9] at p.87).

[38] Having concluded that there was no union other than marriage, the setting aside of the conveyance does not arise for consideration by this Court.

Disposal

[34] Judgment is entered for the Claimant. The Court will hear counsel on the matter of costs.

**Dr. Sonia L. Richards
Judge of the High Court**