

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Claim No. CV 0185 of 2019**

**STEPHNA BOWEN**

**CLAIMANT**

**AND**

**ANDRE WICKHAM**

**DEFENDANT**

*Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court*

**Dates of Hearing: 2019 July 9, 30, 31**

**August 12**

**Date of Decision: 2020 September 22**

**Appearances:**

**Mr. Pearson J. Leacock Attorney-at-Law for the Claimant**

**Mr. Derrick Oderson Attorney-at-Law for the Defendant**

## **DECISION**

### **INTRODUCTION**

[1] Anthony Wickham (“the deceased”) died on 5<sup>th</sup> December 2018. At the time of his death he resided at 511 London Bourne Towers with Stephna Bowen (“the claimant” or Ms. Bowen).

[2] The deceased is survived by two children, Andre Wickham (“the defendant”) and Antoine Wickham.

[3] Ms. Bowen is claiming that she was the common law spouse of the deceased, for in excess of the period required by law, and is entitled to apply for a grant of letters of administration to the estate of the deceased.

### **The Pleadings**

[4] On February 11, 2019 the claimant filed a fixed date claim accompanied by a statement of claim and several affidavits. The relief sought in the claim was stated therein as:

*“(1) A Declaration that the Claimant is the Common Law Spouse of the deceased within the meaning of the Family Law Act Cap 214 of the Laws of Barbados and as such is the person entitled to conduct the affairs of the estate of the said deceased and to share in the said Estate.*

*(2) An injunction restraining the defendant from intermeddling in the Estate of the deceased and or to desist from doing so whether by himself his servants or agents or by any other beneficiary of the said estate.”*

[5] Although the prayer for relief incorrectly asks for a declaration that the claimant is the common law spouse of the deceased within meaning of the Family Law Act, Cap 214, the statement of claim makes it clear that Ms. Bowen is claiming a right to apply for letters of administration ahead of the defendant, who is a child of the deceased. The statement of claim alleges

that the claimant resided with the deceased for a period of 16 years up to the death as his wife.

[6] The affidavits filed on behalf of the claimant are sworn by:

1. The claimant herself, on February 11, 2019.
2. Beverley Wickham, the deceased's sister on February 11, 2019.
3. Wesley Wickham, the deceased's brother on February, 2019.
4. Harriett Roach, a resident of London Bourne Towers on March 8, 2019.
5. Margaret Johnson, a resident of London Bourne Towers on March 8, 2019.

[7] There is a very striking similarity in the content of the affidavits. In each affidavit it is alleged that:

- (a) the claimant and the deceased lived together for 16 years or from a period of just beyond the year 2000 until his death in 2018;*
- (b) the defendant had taken steps to prevent the claimant from obtaining what "she is rightfully entitled to" regarding the deceased's estate;*
- (c) the claimant cared for the deceased as he battled skin cancer.*

[8] Remarkably, the claimant filed four amended affidavits on May 21, 2019 respectively of Beverley Wickham, Margaret Johnson, Wesley Wickham and the claimant herself. These affidavits all now allege that the claimant had resided with the deceased for 9 years instead of 16 years.

[9] Five witnesses, including the defendant swore affidavits on behalf of the defendant. They are as follows:

affidavit of defendant filed April 18, 2019; affidavits of Antonie Wickham, Keith Forde, Dwayne Jones and Shirley Allman, all filed June 14, 2019; affidavit of Angela Lythcott filed on June 27, 2019; and affidavit of Sean Mayers filed July 8, 2019.

- [10] Generally, the defendant's witnesses depose that the claimant resided with the deceased for about 4 years, commencing sometime in the middle or towards the end of 2014 and continuing until 2018.

### **The Relevant Law**

- [11] Although it is clear that the claimant is seeking a declaration that she is the spouse of the deceased for the purposes of applying for administration of the deceased's estate, counsel for the claimant has sought to invoke the provisions of **section 39 of the Family Law Act, Cap. 214** in support of the application. That section defines a "union other than a marriage" or "union" as

*"the relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of 5 years or more and have so cohabited within the year immediately preceding the institution of proceedings"*

- [12] This is not the first trial in these courts that counsel have sought to rely on the provisions under the **Family Law Act** which define a "union other than marriage" in aid of a contested administration matter. In **Butcher v Lashley suit 1684 of 2001**, date of decision **July 21, 2009, Chandler J.** at paragraphs 41 to 44 of his judgment, discussed a similar issue and held that the relevant

legislation is the Succession Act, Chapter 249 (“the Succession Act”). In that case, the learned judge observed that one can usually discern which statute is applicable by considering the purpose of the statute.

[13] The long title to the Succession Act describes it as:

*“An Act to consolidate the laws relating to succession to the property of deceased persons .. and distribution on intestacy of such property.”*

This case is concerned with the succession to the property of the deceased and its distribution on intestacy. The relevant statute is therefore the Succession Act. If the claimant is the spouse of the deceased then the deceased’s property shall be distributed in accordance with **section 49(3)(b)** below; if not, it will be distributed between the two children of the deceased in accordance with **section 49(5)** and **49(6)**.

[14] **Section 2(3)(a)** of the **Succession Act** defines a “spouse” to include:

*“a single woman who was living together with a single man as his wife for a period of not less than 5 years immediately preceding the date of his death.”*

[15] **Section 49(3)(b)** provides:

*“if an intestate dies leaving a spouse and children, the spouse shall take one-third of the estate and the remainder shall be distributed among the children in equal shares.”*

[16] **Section 49(5)** and **49(6)** provide respectively:

*“(5) If an intestate dies leaving issue and no spouse, his estate shall be distributed among the issue in accordance with sub-section (6).*

*(6) If all the issue are of equal degree of relationship to the deceased person, the distribution shall be in equal shares among them, if they are not, it shall be per stirpes.*

[17] In order to take a share in the estate of the deceased the claimant must prove that she was the spouse of the deceased at the date of his death. To do so the claimant must establish on a balance of probabilities that she was cohabiting with the deceased as his wife for a period of at least five years immediately preceding his death.

[18] In **Katrina Smith v Albert Anthony Peter Selby [2017] CCJ 13 the Caribbean Court of Justice (“the CCJ”)** was afforded an opportunity to interpret the provision of **section 2(3)(a)** of the **Succession Act**.

[19] In that case the issue before the CCJ was whether the appellant, Katrina Smith (“Katrina”) who had been living with Albert Michael Selby (“the deceased”), as man and wife for a period in excess of five years immediately preceding his death was his spouse as defined in **section 2(3)(a)** of the **Succession Act** even though for a portion of the last five years the deceased had been married to another.

[20] The CCJ while accepting that the parties must have been cohabiting for five years, held that the term “single” was descriptive of the status of the parties at the time of the death of the deceased. At paragraph 30 of the judgment of the court, the CCJ give its decision and also its interpretation of section 2(3). The CCJ said:

*“The most important consideration to determine who is entitled to inherit as spouse is the period of cohabitation immediately preceding death. The law clearly prescribes that cohabitation for five years is the statutory period which give inheritance rights. It also prescribes that the court cannot declare a single woman to be the spouse of a married man. We have concluded that the assessment of marital status for the purpose of rights under the Act is made immediately preceding the death of the deceased. We therefore conclude that Katrina, being a single woman who was living together with the deceased as his wife a period of not less than five years immediately preceding the date of his death, the deceased, then being a single man who had been divorced from his wife, is entitled to the benefit of inheritance as his spouse.”*

[21] As far as the status and the nature of the cohabitation between the claimant and the deceased are concerned, there is no dispute between the parties. It is agreed between the parties that the claimant was cohabiting with the deceased as man and wife at the time of his death; it is also agreed that the deceased was a single man at the time of his death and the claimant was a single woman.

[22] It therefore, follows that the only issue that the court must resolve, is whether the claimant lived together with the deceased for a period of not less than five years up to the date of his death.

## The Claimant's Case

[23] The oral evidence presented on behalf of the claimant was given by the claimant, Ms. Bowen and the deceased's siblings, Beverley Wickham and Wesley Wickham.

[24] All three witnesses testified that the deceased lived together with the claimant at 511 London Bourne Towers for a period of 9 years prior to the deceased's death on 5<sup>th</sup> December 2018. The three witnesses when asked to explain the discrepancy concerning the period of cohabitation (they had all filed affidavits initially claiming that the period of cohabitation between the deceased and the claimant as 16 years) all explained that the discrepancy was a result of grief following the deceased's death.

[25] This is how the claimant explained it in an amended affidavit filed May 21, 2019:

*"I met Anthony Wickham (deceased) sometime early in 2009 and we fell in love shortly thereafter and lived together at number 511 London Bourne Towers, Bay Street in the parish of Saint Michael. I remember this clearly now because it was close to my birthday. I was mistaken before in my first affidavit due to the fact that my sweetheart Anthony had just died and I was in a state of grief and not clear in my mind on that particular point. He was a divorcee and we continued to reside together in circumstances as Husband and Wife at the said address until his death on the 5<sup>th</sup> day of December 2018."*

[26] Interestingly, Margaret Johnson who filed an amended affidavit on May 21, 2020 also changed her initial testimony and deposed that the deceased and Stephna Bowen, the claimant lived together for 9 years at 511 London Bourne Towers, Bay Street, St. Michael. She had in a previous affidavit said that she came to London Bourne Towers in 2012 and that she met the claimant and the deceased there in March 2012 and they continued to live at 501 London Bourne Towers, Bay Street, St. Michael.

[27] In the initial affidavit of all deponents on behalf of the claimant including Ms. Bowen herself, the address of the deceased at his death was given as 501 London Bourne Towers.

[28] The similarity in the content of the affidavits filed on behalf of the claimant is remarkable to the point of being ridiculous. For example, Wesley Wickham and Beverley Wickham, who are siblings of the deceased, swore affidavits and amended affidavits that were all identical in content except for the word “brother” in the case of Wesley Wickham, and the word “sister” in the case of Beverley Wickham.

[29] On cross-examination, the claimant stuck to the account of the facts of the cohabitation set out in her amended affidavit. She said that she moved into London Bourne Towers in November 2009. She said that she remembered the

month because it was close to her birthday. She reiterated that the reason why she had misstated the year of commencement of cohabitation as 2002 was because of grief at seeing her partner in pain and later dying. Her mind was now clear and that she was sure that she lived together with the deceased for 9 years instead of 16.

[30] On further cross-examination, Ms. Bowen was unable to remember when she quit the apartment at 511 London Bourne Towers; she was also unable to remember when the deceased was buried.

[31] Ms. Bowen seemed unwilling to disclose that she was evicted by the National Housing Corporation (“NHC”) from London Bourne Towers. She eventually admitted however, that she moved to Richmond’s Gap, St. Michael where she is a tenant. She alleges that she was evicted from the apartment of London Bourne Towers by the NHC because her neighbours told the NHC that she was not living there and only use to visit the apartment.

[32] It was also revealed in her oral testimony that the claimant had misstated the age and date of birth of the defendant in her affidavit of February 11, 2019. In that affidavit she mixed up the details relating to the defendant, Andre Wickham with those relating to his brother, Antoine Wickham.

[33] Wesley Wickham, the brother of the deceased, gave oral testimony. Despite having filed two affidavits, he was unable to recall the date on which the claimant moved into London Bourne Towers. In his affidavit filed February 11, 2019, he had deposed that the claimant had lived together with the deceased for 16 years. In his amended affidavit of May 21, 2019, he testified that the claimant had moved into London Bourne Towers to reside with the deceased from November 2009 until his death on 5 December, 2018.

[34] Wesley Wickham was only able to recall the date when he was shown his affidavit filed in May, 2019 but he insisted that the information in his second affidavit was correct.

[35] When asked by counsel for the defendant to explain the difference between the first and second affidavit sworn by him with respect to the period of cohabitation, Mr. Wesley Wickham said that he was grieving from the death of his brother, the deceased, and his head was not clear.

[36] Beverley Wickham gave oral testimony to support her affidavits previously filed. Those affidavits were in identical form and substance to those filed by her brother, Wesley Wickham.

[37] When asked to explain the difference between the two accounts of the period of cohabitation between the claimant and the deceased, 16 years in the first

affidavit, and 9 years in the second, she also explained it as resulting from grief. She said that she “was grieving because of the condition in which he died and the pain.”

### **The Defendant’s Case**

[38] The defendant filed an affidavit on April 28, 2019 in response to the claimant’s application. There were additional affidavits filed on behalf of the defendant by Antoine Wickham, Keitha Forde, Dwayne Jones, Shirley Allman, Stephna Bowen, Angela Lythcott and Sean Mayers.

[39] In his affidavit filed on April 18, 2019 the defendant, among other things, deposed that:

- (a) he lived with his parents (i.e. with the deceased and his mother (named Jennifer Bartlett)) in Allamby Gap, Spooners Hill in the parish of Saint Michael in this Island up to until 1999, where his parent’s relationship ended, and his father moved to Bush Hall, St. Michael, then to Whitepark Road, St. Michael, then to 511 London Bourne Towers with Shirley Jones sometime in 2000;
- (b) the deceased and Shirley Jones got married on February 10, 2001;
- (c) the deceased and Shirley Jones divorced in 2012;
- (d) Antoine Wickham, informed him that the claimant moved into the address with the deceased sometime in 2014;
- (e) the claimant, his uncle Wesley Wickham and his aunt Beverley Wickham conspired against him and his brother, since they were never loving or welcoming towards either of them.

[40] In his affidavit on June 14, 2019 Antoine Wickham deposed that:

- (a) Shirley Jones is his mother;
- (b) the deceased and Shirley Jones separated sometime in 2009-2010;
- (c) following the separation of the deceased and Shirley Jones, he and the deceased continued to live at 511 London Bourne Towers by themselves, until sometime in July 2014 when the claimant moved in with them;
- (d) the claimant ill-treated him and was emotionally abusive towards him. He moved out of the Address sometime in 2017, since he could no longer handle the claimant's ill-treatment and emotional abuse;
- (e) the claimant made concerted efforts to prevent him from communicating with the deceased after he moved out of the address.

[41] Four witnesses give oral evidence for the defendant. These were the defendant, his brother, Antoine Wickham; Shirley Jones; the ex-wife of the deceased; Andre Wickham; and Angela Lythcott, who lived at 522 London Bourne Towers.

[42] Neither Andre Wickham nor Shirley Allman was able to give evidence of the date when cohabitation at London Bourne Towers commenced between the deceased and the claimant. However, Shirley Allman confirmed that she had resided with the deceased at London Bourne Towers until 2009.

[43] The evidence of Angela Lythcott is very important. She is his only witness who resided at London Bourne Towers, that gave oral testimony. She testified

that the deceased first resided at London Bourne Towers with his wife, Shirley. Having come to London Bourne Towers in 2000, Ms. Lythcott demonstrated significant knowledge of the area.

[44] First, she noted that the apartment at 511 adjoined hers and she could hear what went on there. She testified that she first saw Ms. Bowen in 2014 and that she (Ms. Bowen) moved to 511 London Bourne Towers sometime in 2015.

[45] Ms. Lythcott also mentioned that you needed to have resided in London Bourne Towers for at least 5 years in order to qualify to stay if the tenant had died.

[46] Ms. Lythcott was a very confident witness, she was very proud of her apartment at London Bourne Towers where she could look at the sea. She took an interest in matters related to London Bourne Towers and felt that she knew everyone who lived at that address.

[47] Ms. Lythcott as an independent witness who has no interest in the estate of the deceased is a very believable witness. Her testimony is consistent with that of Antoine Wickham who also resided there with her father after his marriage to his mother had broken down.

## **The Submissions**

[48] Counsel for both parties made oral submissions to the court. Mr. Leacock for the claimant, sought to rationalise the change in the period of cohabitation from 16 years to 9 years as the result of unbearable grief at the loss of a loved one.

[49] In his written submissions filed on September 7, 2019 Mr. Leacock also explained the change of testimony, which initially stated that Ms. Bowen and the deceased lived together at London Bourne Towers from 2002 to 2018, to the evidence given in a second affidavit and in oral testimony to 2009 to 2018 as the result of grief. According to Mr. Leacock, the witnesses were all under the yoke of heavy grief.

[50] Mr. Leacock saw all the other witnesses who testified to the contrary as liars.

[51] Counsel for the defendant, Mr. Oderson on the other hand, felt that it was simply unbelievable that all his witnesses for the claimant, including Ms. Bowen herself, could suddenly remember that the claimant and the deceased resided together from 2009 to 2018 (for 9 years) instead of 2002 to 2018 (16 years).

[52] Counsel submitted it is more likely that the stories were concocted after it was recognised that the deceased got married in 2001 and would have been living together with his ex-wife Shirley in 2002.

[53] Mr. Oderson saw the claimant's case as a trumped up story to get a benefit from the estate of the deceased. He submitted that on a balance of probabilities the case fell short.

[54] He submitted that the claimant did not know where she lived. She gave her address initially as 501 London Bourne Towers. She also did not know how long she lived there. Initially, she said that she lived there from 2002 and later changed it to 2009.

[55] Counsel also submitted that the claimant and the witnesses filed affidavits which read like photocopies of each other. Counsel, therefore, submitted that the case should be dismissed.

### **Evaluation of the Evidence**

[56] I have heard the evidence of seven witnesses and I have read the affidavits filed by all persons in this matter.

[57] It is the responsibility of the claimant to prove on a balance of probabilities that she has lived with the deceased as his spouse for not less than 5 years immediately preceding his death.

[58] The evidence presented by the claimant and her witnesses was implausible. Three witnesses misstated the period of cohabitation to be 16 years, only to recognize later that it was 9 years. Apparently, all three witnesses were suffering from such unbearable grief that it had an identical effect on each of them. Though it would somehow permit the institution of proceedings within 3 months of the deceased's death, it would be so numbing that all three could not initially remember how long the deceased and the claimant lived together, only for each to later miraculously recall that it was 9 years.

[59] It is quite significant also that both of the supporting witnesses, who testified before the court on behalf of the claimant, filed identical affidavits and identical amendments to the initial affidavit filed.

[60] Having read the affidavits and heard the claimant and her two witnesses, I have concluded that the evidence does not rise to the level that would permit a court to hold that the burden of proving her case has been discharged.

[61] By contrast, having listened to the defendant; and witnesses for the defendant, I have found their testimony to be credible and consistent with the oath that

they took to tell the truth. For example, the defendant did not pretend to know the date on which the claimant commenced cohabitation at London Bourne Towers. It was clear that he was relying on his brother, Antoine Wickham, who resided there for this information.

[62] Significantly, the evidence of each witness seemed to be independently given, both with respect to the affidavits filed and the oral testimony. In this regard, Ms. Lythcott testified that the start of cohabitation at London Bourne Towers was 2015 and not 2014 as suggested by two other witnesses. This type of discrepancy is expected when witnesses attempt to give honest testimony.

[63] On the central issue of the period of cohabitation, I am persuaded that the claimant did not reside with the deceased for the minimum period of 5 years.

## **DISPOSAL**

[64] As a consequence of the foregoing, I declare that the claimant is not the spouse of the deceased,

### **IT IS ALSO ORDERED THAT:**

- (1) the claimant's application is hereby dismissed;
- (2) the defendant and his brother Antoine Wickham are entitled to apply for a grant of administration to the estate of their father; and

(3) the defendant shall have his costs of this action to be assessed, if not agreed.

A handwritten signature in black ink, appearing to read "Cecil N. McCarthy". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping tail.

**Cecil N. McCarthy**

**High Court Judge**