[2021] JMSC Civ 169

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006 HCV 01807

BETWEEN	**LESLIE DIXON** **(Pursuant to Power of Attorney of DESMOND DIXON)**	**CLAIMANT**
AND	**SONIA JOY LOPEZ** **(Executrix of the Estate of GEORGE LOPEZ)**	**DEFENDANT**

Janeve Williams instructed by Nigel Jones & Co., Attorneys-at-Law for the Claimant.

Tavia Dunn and Allyandra Thompson instructed by Nunes, Scholefield, DeLeon & Co., Attorneys-at-Law for the Defendant.

Heard: 26th April, 30th July and 29th October 2021.

Inheritance - Intestates' Estate and Property Charges Law 1937 - Section 4 (3) Status of Children Act 1976 - Whether child born out of wedlock entitled to benefit from estate of father who died intestate in 1950.

Marriage - Whether "bamboo marriage/wedding" valid under Marriage Law 1897- Whether marriage to be presumed at common law.

C. BARNABY, J

INTRODUCTION

[1] This claim concerns the estate of Alfred Dixon who died intestate on or about the 23rd September 1950. The Claimant prosecutes the claim pursuant to a Power of Attorney granted to him by Desmond Dixon. Both are sons of Alfred Dixon. The Defendant defends the claim in her capacity as the Executrix of the Estate of George Lopez. George Lopez was the Executor of the Estate of Edith Dixon, the sister and Administratrix of the

Estate of Alfred Dixon, pursuant to a grant of Letters of Administration on the 26th May 1951.

[2] Desmond Dixon was born on the 25th September 1942 to Alfred and Rachel Dixon. On the 26th October 1992 a grant of Letters of Administration to Alfred Dixon's Estate was also issued to Rachel Dixon and she is described therein as his widow. It is alleged that they were married by way of a "bamboo wedding" in February 1941. It is the Claimant's position that this was a valid marriage under the **Marriage Law, 1897** or in the alternative, that a marriage between Alfred and Rachel should be presumed.

[3] It is convenient to refer to the various persons mentioned by their Christian names hereafter, unless the context requires otherwise.

[4] It is Desmond's contention that his late father's estate was comprised in several parcels of land, buses and truck which Edith and George possessed and administered, without benefit to Alfred's wife Rachel or his children, the rightful beneficiaries of his Estate. Most of the alleged beneficiaries including Rachel and Leslie were named as claimants previously but following on previous orders of the Court, only the claim by Desmond subsists.

[5] In substance, Desmond prays that the grant of Letters of Administration in the Estate of Alfred Dixon to Edith Dixon be revoked, annulled and renounced and that the grant to Rachel Dixon be recognised as the legal grant. It remains a mystery how two grants came to be issued out of these Courts in respect of the same estate. Desmond also seeks to recover the properties which comprise Alfred's estate or their value. It is his contention that in pursing the grant Edith had failed to disclose that he was Alfred's legitimate heir; and that the properties were held on statutory trust by Edith and George for his benefit.

[6] The Defendant concedes that Desmond is Alfred's child but denies that he is a legitimate heir; denies that Edith improperly obtained the grant of Letters of Administration; or that properties comprising Alfred's estate were held for him or for his benefit on statutory trust by Edith and/or George. This is on

the ground that prevailing laws at the time of Alfred's death in 1950 did not recognize Desmond as a legitimate child who was entitled to benefit from his intestate father's estate. This flows from the Defendant's contention that Rachel was not Alfred's wife.

[7] I am unable to find that there was a valid marriage between Alfred and Rachel under the **Marriage Law, 1897**; and I find that the evidence upon which the Claimant relies to found a presumption of marriage is insufficient for that purpose. Desmond is therefore to be regarded as a child born out of wedlock who the laws existing at the time of Alfred's death did not recognize as his father's "issue". There being no provision in law which entitled a child born out of wedlock to benefit from the residue of his intestate father's estate, it cannot be said that the properties constituting Alfred's estate were held on statutory trust for or for the benefit of Desmond by Edith and/or George. There is therefore no basis for concluding that Edith improperly pursed and obtained the grant of Letters of Administration to Alfred's estate as contended by the Claimant to warrant its disturbance. In these circumstances, and for reasons which are set out more fully below, I find that the claim should be dismissed and judgement entered for the Defendant.

ISSUES

[8] The following issues and sub-issues which I will address in turn determined the claim.

(i) Was the grant of Letters of Administration to the Estate of Alfred Dixon to Edith Dixon on the 26th May 1951 improperly issued to warrant its disturbance?

a. Was the claimed "bamboo marriage/wedding" between Alfred and Rachel a valid marriage under the **Marriage Law, 1897**?

b. Can a marriage between Rachel and Alfred be presumed?

c. Is Desmond Alfred's "issue" within the meaning of the **Intestates' Estate and Property Charges Law, 1937** and therefore entitled to benefit from his estate?

d. Did Edith fail to disclose that Alfred died leaving a wife and minor children who were lawful beneficiaries of his Estate when she pursued and obtained the grant of Letters of Administration?

(ii) What properties fell to be administered as a part of the Estate of Alfred Dixon?

(iii) Were the personal and real properties which comprised Alfred Dixon's Estate held on trust by Edith Dixon or George Lopez for Desmond or for his benefit?

REASONS

Issue (i): Was the grant of Letters of Administration to the Estate of Alfred Dixon to Edith Dixon on the 26th May 1951 improperly issued to warrant its disturbance?

a. Was the claimed "bamboo marriage/wedding" between Alfred and Rachel a valid marriage under the Marriage Law, 1897?

[9] It is the Claimant's submission that there was a valid marriage between Alfred and Rachel within the meaning of the **Marriage Law, 1897.** I find the submission to be without merit.

[10] The Claimant asserts that Alfred was married to Rachel at the time of his death in 1950. The marriage is said to have taken place on the 15th February 1941 in Cornwall, Montego Bay in the parish of St. James with a Pastor Pershad Singh as the Marriage Officer. No certificate in proof of marriage has been supplied in these proceedings. A letter from the Registrar General's Department dated 22nd January 2018 which was admitted into evidence by agreement of the parties advises that *"…a*

comprehensive search of our records was done and we were unable to locate a marriage entry for Alfred and Rachel Dixon."

[11] In urging the court to find that there was a valid marriage within the meaning of the **Marriage Law,** the Claimant relies on the indication in two unsigned statements made by George Lopez before his death, that what Alfred and Rachel had was a "bamboo marriage". The statements were entered into evidence by agreement.

[12] Section 3 of the **Marriage Law** provided as follows.

> *If both the parties to a marriage knowingly and wilfully acquiesce in the solemnization of the marriage ceremony between them –*
>
> *(a) by or before a person not being a Marriage Officer; or*
>
> *(b) otherwise than in the presence of two witnesses besides the Marriage Officer solemnizing or witnessing and registering the marriage***,**
>
> *the marriage shall be void.*

[13] Section 4 went on to say that

> *[e]xcept as aforesaid, and except as in section 37 of this Law provided with respect to marriages under that section [that is, marriages in articulo mortis], no marriage otherwise lawful which has been actually solemnized shall be declared void on the ground that any of the conditions by this Law directed to be observed have not been duly observed.*

It is trite that a void marriage is of no effect from its inception.

[14] When one considers the foregoing provisions of the **Marriage Law** and indeed the Law as a whole, it is clear that in order to give rise to a valid marriage thereunder, the marriage must have actually been solemnized by or before a Marriage Officer and in the presence of two witnesses. This is clear on a reading of the provisions at sections 27 to 34 of the **Marriage Law** in particular**,** which are reproduced or summarised as appropriate below.

27. *After the issue of a Civil Registrar's certificate or Civil Registrars' certificates, or a Marriage Officer's certificate, or Marriage Officers' certificates or a Civil Registrar's certificate in the case of one of the parties, and of a Marriage Officer's certificate in the case of the other party, or a licence from the Governor, or a licence by a Justice, the Clerk of the Resident Magistrate's Court, or a person appointed for the purpose by the Governor, the marriage may be solemnized between the parties described in the certificate or licence according to such form and ceremony as the parties may see fit to adopt:*

Provided that every such marriage shall be solemnized in the presence of a Marriage Officer and of two witnesses between the hours of six a.m. and eight p.m. with open doors:

Provided also that the certificate or certificates, or if the marriage is by licence, the licence shall be first delivered to the Marriage Officer by or before whom the marriage is solemnized:

Provided also that in some part of the ceremony or immediately before the ceremony, and in the presence of such Marriage Officer and witnesses, each of the parties shall declare -

I do solemnly declare that I know not of any lawful impediment why I, A.B. may not be joined in matrimony to C. D.

And each of the parties shall say to the other -

I call upon these persons here present to witness that I, A. B., do take (or have now taken) thee, C.D., to be my lawful wife (or husband):

Provided also that there be no lawful impediment to the marriage of such parties.

28. If the parties so desire they may, after certificate or licence duly granted, contract, and solemnize marriage in the presence of a Civil Registrar, and in the presence of two witnesses, with open doors, and between the hours of six a.m. and eight pm., making the declaration and using the form of words provided in section 27of this Law; but, in such case no religious service shall be used.

29. If the parties to a marriage contracted before the Civil Registrar or Marriage Officer desire that there shall be separately performed any religious service of marriage between them, they may present themselves to any acknowledged minister of religion, and such minister upon the production of a certified copy of the Register of Marriage as contracted before a Civil Registrar or a Marriage Officer, may, if he thinks fit, perform such religious service.

Nothing in the reading or celebration of such service shall supersede or invalidate any marriage previously contracted before the Marriage Officer, nor shall such ceremony be registered under this Law as a marriage.

30. The Marriage Officer by or before whom a marriage is solemnized shall ask the parties to be married the particulars required to be registered touching the marriage.

[15] Paragraphs 31 to 33 go on to make provision for the registration of marriages which have been solemnized, including that the duplicate register is to be transmitted by the Marriage Officer to the Registrar General who is required to file and safely preserve it in the General Register Office. Section 34 provides thus,

Where a Marriage is solemnized under the provisions of this Law, which, without fault of the parties thereto, has been omitted to be registered, or where the Register of a Marriage has been lost or destroyed, it shall be lawful for either of the parties, or in case of his or her death the issue or other lawful representative of such party, to apply to any Resident Magistrate for an order to have such marriage correctly registered.

The Resident Magistrate shall require notice of such application to be given to such persons as he thinks expedient.

If the Resident Magistrate is satisfied after hearing such evidence as may be adduced that such marriage has been proved, he shall make an order to that effect, and shall certify the same to the Registrar-General, who shall thereupon cause the marriage to be specially registered (in duplicate) in accordance with the terms of the order, in books to be kept for the purpose in the General Register Office, with a note of such order and the date thereof.

[16] The Claimant relies on the decision in **A v A (Attorney General Intervening)** [2013] 2 WLR where the court granted a declaration, supported by the respondent, that the marriage celebrated between the parties was valid under English Law at its inception. In that case there was evidence of a ceremony conducted by an imam in a mosque registered for solemnisation of marriages under the Marriage Act, 1941. Following the ceremony, the parties were presented with a document titled "Contract of marriage" which certified that the marriage contract had concluded in accordance with Islamic Sharia Law. The parties lived together after the ceremony and had children. When the wife attempted to obtain a marriage certificate however, it was discovered that the officiating imam was not an authorised person under the Act although such a person had in fact been present at the ceremony. While no notice was given to the registrar nor a certificate issued, which would have rendered the marriage void under the Marriage Act 1941, the court determined that what had taken place was sufficiently within the 1941 Marriage Act to enable the marriage to be regarded as valid under English Law.

[17] In that case there was evidence of the marriage ceremony which purported to ground the marriage, which in my view must be supplied when a court is being asked to find that a valid marriage within the meaning of the **Marriage Law** exists. This evidence enables the court to determine whether the requirements in the law have been met for as Moylan J stated in **A v A**,

> ***67*** *There is a well established line of authority to the effect that some ceremonies, even though they are or purport to be ceremonies of marriage, will not be sufficient to create even a void marriage. In other words, they are ceremonies which are not capable of creating a marriage recognised under English law.*
>
> ***68*** *In R v Bham* [1966] 1 QB 159 *the defendant had been convicted of an offence under section 75(2)(a) of the 1949 Act because he had conducted an Islamic ceremony of marriage in a private house in England. His appeal was allowed, at p 168:*

> *"It does not seem to the court that the provisions of the Act have any relevance or application to a ceremony which is not and does not purport to be a marriage of the kind allowed by English domestic law … That this was a ceremony under the Islamic law admits of no doubt … But unless the 'marriage' purporting to be solemnised under Islamic law is also a marriage of the kind allowed by English law it is not a marriage with which the* Marriage Act 1949 *is concerned …"*

And, at p 169:

> *"What, in our judgment, was contemplated by this Act and its predecessors in dealing with marriage and its solemnisation, and that to which alone it applies, was the performing in England of a ceremony in a form known to and recognised by our law as capable of producing, when there performed, a valid marriage. For the Act to have any application the ceremony, in our judgment, in agreement with Humphreys J and adopting certain of his words: 'must be at least one which will prima facie confer the status of husband and wife on the two persons.'…*

[18] That evidence as to the ceremony should be supplied is also evident on the decision of Bodey J in **Hudson v Leigh (Note)** [2013] 2 WLR 632 which was also cited and applied in **A v A**. In that case the court had to determine the effect of a ceremony held in South Africa which the parties intended would not be a valid marriage ceremony. Leigh sought a declaration that the ceremony had not effected a marriage while Hudson asked for a divorce, or alternatively for a decree of nullity of the marriage contracted by the ceremony in South Africa on the basis of non-compliance with the formal requirements of the laws of that country. The petitions for the parties were consolidated. Contrary to Hudson's challenge that there was no such thing as a "non-marriage", Bodey J after a careful analysis of the authorities, concluded that there was and that the ceremony in issue was to be so regarded. The following instructive dicta appears at paragraphs 70 to 77 of the judgment.

70 *I would find it unrealistic and illogical to conclude that there is no such concept as a ceremony or event which, whilst having marriage-like characteristics, fails in law to effect a marriage. Such is the ingenuity of human beings that we will always be able to come up with some sort of ritual or happening which one party claims created a marriage, but which the other says fell short of doing so…*

73 *So in my view the court must be able, in the rare cases where such a point arises, to rule that some questionable ceremony or event, whilst having the trappings of marriage, failed fundamentally to effect one, such that it neither needs nor is susceptible to a decree of nullity to determine its lack of any legal status: ie to find in convenient shorthand that it is a "non marriage" or a "non-existent marriage".*

…

77 *I am unconvinced that there is or can be any satisfactory definition to cover this sort of situation, for convenience described in shorthand as a "non-marriage" or a "non-existent marriage". Various formulations have been mentioned enroute to decisions reached on a case specific basis, for example: (a) whether a given ceremony would "prima facie confer the status of husband and wife on the two persons" (R v Bham [1966] 1 QB 159, 169); or (b) whether it "bore the appearances and hallmarks of a marriage and was assumed by the guests to be an ordinary Christian marriage" (Gereis v Yagoub [1997] 1 FLR 854); or (c) whether it "purported to be [a marriage] according to the Marriage Acts" (the A-M case [2001] 2 FLR 6, para 58); and/or (d) whether it was "deliberately conducted … outside the Marriage Acts and never intended or believed to create any recognisable marriage" (the A-M case again, para 55).*

78 *Having regard to the wide range of potential factual situations, there would be difficulties with any of these possible formulations, if they were regarded (as they were clearly not intended to be) as attempts to state definitively the circumstances when something which looks like a marriage should fail in law to be one. Reliance on the "hallmarks of marriage" alone may not in all circumstances be a satisfactory test, as it would not in fact be here. The ascertainment of intentions and beliefs will often be difficult and unreliable and their use alone could run into the problem of different participants in or at the ceremony intending and*

believing different things, as occurred here amongst the guests, although not as between the three main participants…

79 *In the result, it is not in my view either necessary or prudent to attempt in the abstract a definition or test of the circumstances in which a given event having marital characteristics should be held not to be a marriage. Questionable ceremonies should I think be addressed on a case by case basis, taking account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and (d) the reasonable perceptions, understandings and beliefs of those in attendance. In most if not all reasonably foreseeable situations, a review of these and similar considerations should enable a decision to be satisfactorily reached.*

[19] Having regard to the foregoing authorities, it appears to me that in determining whether or not there was a valid marriage between Alfred and Rachel under the **Marriage Law,** depends upon the presence of evidence which is capable of providing a response to the following question. Was a ceremony in a form known to and recognized in Jamaican law as capable of producing a valid marriage performed between Alfred and Rachel? An answer in the affirmative is impossible on the evidence before me.

[20] As stated previously, there is no certificate produced in proof of a marriage between Alfred and Rachel. That is not fatal however as the Act, pursuant to section 4, allows for late registration of a lawfully solemnized marriage. More significant and damning is the absence of any evidence as to the particulars of the ceremony on which the Claimant seeks to rely in contending that there was a valid marriage under Law.

[21] This brings me to the statements made by George Lopez on which the Claimant relies in part, for contending that there was a valid marriage. It is appropriate to reproduce the relevant parts of the statements made by

George in order to appreciate the context within which the words “bamboo marriage/wedding” were used. In exhibit 20A George stated as follows.

> *After the death of my Uncle Alfred Dixon Rachel Campbell went to court to get what she thought the said Alfred Dixon had left claiming that she was the wife of the said Alfred Dixon. The case was thrown out as the Judge said that the type of marriage was not recognized in Jamaica. This was claimed to be a (Bamboo Wedding). The court then turned whatever my uncle had which was not much at the time over to Alfred Dixon's mother who is Mrs. Bacarri-Dixon my grandmother. She in turned turned (sic) everything over to my mother Edith Dixon and Alfred Dixon's sister.*
>
> *Up to the time of Alfred Dixon's death I lived with my mother Edith Dixon, my grandmother Mrs. Bacarri-Dixon, and Alfred Dixon my Uncle. There was never any woman living at the house that could be called a wife.*

He stated thus in exhibit 20 B.

> *Rachel Campbell nee Dixon of Cornwall District is stating that she is the wife of Alfred Dixon.*
>
> *After the death of my uncle Alfred in the 1950s this said Rachel Campbell nee Dixon went to court to try and contest all that she thought that Alfred Dixon had. The matter was thrown out of court as it was found that she was not lawfully married as Jamaican law did not acknowledge the type of wedding (bamboo marriage) as legal, also everything was belonging to my mother Edith Dixon.*

[22] While I am mindful that the parties agreed that the unsigned statements are admitted into evidence, I observe that the maker does not say that he perceived the bamboo wedding/marriage for himself. It is not alleged that the sole witness for the Claimant observed it either. Consequently, the totality of the evidence in respect of a ceremony is that it is claimed to have been a “bamboo wedding/marriage”. There is absolutely no evidence of the particulars of the ceremony in which Alfred and Rachel may have engaged.

[23] Counsel for the Defendant have helpful supplied a number of articles which treat with the issue of "bamboo weddings/marriages" in the Caribbean. Although they are incapable of supplying the missing evidence as to the form of any ceremony between Alfred and Rachel, they illustrate in a general way, the history and nature of bamboo weddings and speak to their lack of legal recognition initially and then recognition as legal marriages within the region. I have gleaned from them that a "bamboo wedding" is a Hindu wedding ceremony. I have found particularly edifying the work of Lakshmi Mansingh & Ajai Mansingh, **Indian Heritage in Jamaica**, Jamaica Journal Quarterly of the Institute of Jamaica, Vol. 10 Nos. 2,3 & 4, page 10. They state in part at pages 15-16,

> *"The Hindus of Jamaica have proudly retained almost all the traditional wedding ceremonies and customs which are so common in their ancestral home…*
>
> *The wedding ceremony is performed in a special area called mandap, which is about 6 – 8 ft. square with four bamboo poles at each end and a central thick post: usually mandap is erected outside though some prefer indoors… The prayer area is in the centre and includes the Vedi or altar made of tray filled with earth on which are made floral patterns, along with OM or Swastika signs… Around or on the Vedi are jug if water, an earthen pitcher with water, on top of which is a small plate with an oil lamp and several food grains. Also present are a steel and earthen plate with burning charcoal and mango twigs and idols of Lord Ganesh and Lord Krishna. The five omnipresent elements - the sky, the earth, the air, the fire and the water are thus present in the mandap to witness the wedding vows.*
>
> *… Once the couple have accepted each other as partners for better or worse, [the bride] puts her hand on [the groom's] and the priest holds the other hand and makes the couple repeat the seven vows for everyone to hear… The exchange of rings and signing of marriage register… are western adaptations.*

> *… In Jamaica, Hindu marriages were not recognized until 1957 when the Hindu Marriage Law gave legal status to all the marriages since 1954 (sic).*

[24] The **Hindu Marriage Act** came into effect on the 19th December 1957. It makes provision for the conduct and solemnization of valid Hindu marriages and therefore gave legal recognition to these marriages for the first time. It also provides for the registration of any Hindu marriage entered into prior to the 19th December 1957 between Hindus domiciled in the island on the date of such marriage once the marriage subsisted and was valid according to Hindu law. It also legitimated children of those marriages as at the date of registration of the marriage under the Act. There is no evidence of registration of a valid Hindu Marriage between Alfred and Rachel.

[25] In the absence of evidence as to the ceremony which constituted the claimed "bamboo marriage/wedding" I am unable to determine as prayed by the Claimant, that there was a valid marriage between Alfred and Rachel under the **Marriage Law**.

b. Can a marriage between Rachel and Alfred be presumed?

[26] The Claimant also relies on the common law presumption of marriage in submitting that the court should presume that there was a marriage between Rachel and Alfred. This is also premised on George's indication in his unsigned statements that there was a "bamboo marriage/wedding"; that Rachel purported to be Alfred's wife, including on documentation for a grant of Letters of Administration; and that "Dixon" appears as Rachel's surname on Desmond's birth certificate and that of another child, Monica, who is now deceased. I find that I am unable to accept the submission.

[27] Even if it could be found that there was a "bamboo marriage/wedding" in the Hindu tradition between Alfred and Rachel, *"[a] known ceremony cannot give rise to a presumption of marriage if it is shown on the evidence not to have created a valid marriage":* **Halsbury's Laws of England** Vol. 72 (2019) para 9, Brexit Note. Until 1957, years after Alfred's death, bamboo marriages were not recognized as creating valid marriages in Jamaica.

[28] That is not lethal however as in the absence of positive evidence of a marriage ceremony, a finding of a presumed marriage at common law is still open to the court. This is possible where a man and woman have cohabited for a sufficient length of time and acquired the reputation of being man and wife. Where the presumption arises it can only be rebutted by strong and weighty evidence to the contrary. The learned Editors of **Halsbury's Laws of England** Vol. 72 (2019) para 8, Brexit Note have observed that while there is no definitive judicial statement on what constitutes a sufficient length of cohabitation to give rise to the presumption, it is thought to be considerably longer than seven or eight years.

[29] Moylan J also addressed the presumption in favour of marriage during the course of his judgement in **A v A**. He held that the presumption of marriage could not be applied to establish that the relevant but missing statutory requirements had been met in circumstances where there was clear and compelling evidence that some of the statutory requirements had not in fact been complied with. Justice Moylan cited with approval the dictum of Simon P in **Mahadervan v Mahadervan** [1964] P 233, 244 that

> *"[t]wo rules of law expressed in Latin maxims therefore come into play: omnia praesumuntur rite esse acta as regard the acts of the officials and omnia praesumuntur pro matrimonio. Where there is a ceremony followed by cohabitation as husband and wife, a strong presumption arises that the parties are lawfully married."*

[30] The decision in **Chief Adjudication Officer v Bath** [2000] 1 FLR 8 was also cited as a contemporary example of the application of the presumption of marriage. There Evans LJ stated,

> *31. … when a man and a woman have cohabited as man and wife for a significant period there is a strong presumption that they have agreed to do so, in proper form …* ***When there is, as there is in England, a legal requirement that the marriage ceremony shall take a certain form, then the presumption operates to show that the proper form was observed, and it can only be displaced by what I would call positive, not merely 'clear', evidence (see the authorities cited in***

> ***support of* Halsbury's Laws*, para 993). How positive, and how clear, must depend among other things upon the strength of the evidence which gives rise to the presumption - primarily, the length of cohabitation and evidence that the parties regarded themselves and were treated by others as man and wife.***
>
> [Emphasis added]

[31] In one of George's unsigned statements he indicated that up to the time of Alfred's death, he lived with his mother Edith, his grandmother Mrs. Bacarri-Dixon and Alfred, and that there was no woman living with them that could be called a wife. There is no evidence on the Claimant's part as to cohabitation between Alfred and Rachel and more so the length of any period of cohabitation.

[32] The Defendant's Counsel rightly submits that coitus which produces children is not the same as cohabitation as man and wife. I go further to say that a woman naming a man as the father of her children or putting herself out as having his surname or of being his wife is not evidence of them living as man and wife. I think it would present a great deal of difficulty to many a person and reduce altogether the sanctity of the institution of marriage if marriages are to be presumed on such slight evidence.

[33] Although said in the context of rebutting the presumption of marriage, I think the extract from the dicta of Evans LJ in **Chief Adjudication Officer v Bath** also makes it clear, by parity of reason, that evidence of the length of cohabitation and that the parties, and not just one of them, regarded themselves and were treated by others as man and wife is necessary in order to presume a marriage. There is no such evidence here. Accordingly, I do not find that a marriage between Alfred and Rachel can or is to be presumed.

c. Is Desmond Alfred's "issue" within the meaning of the Intestates' Estate and Property Charges Law, 1937 and therefore entitled to benefit from his estate?

[34] It is the Claimant's submissions with which I am unable to agree, that at the time of Alfred's death he was a legitimate minor child who was entitled to benefit from his father's estate.

[35] Pursuant to section 4 of the **Intestates' Estates and Property Charges Law, 1937** and so far as is relevant,

> *(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely: -*
>
> *(i) if the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of fifty pounds or a sum equal to ten per centum of the net value of the estate whichever may be the greater free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per centum per anum until paid or appropriated, and subject to providing for such sum and interest thereon, the residuary estate (other than the personal chattels) shall be held –*
>
> *(i) if the intestate leaves no issue, upon trust for the surviving husband and wife during his or her life;*
>
> *(ii) if the intestate leaves issue, upon trust, as to one-half for the surviving husband or wife during his or her life, and subject to such life interest, on the statutory trust for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but is those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life; …*

[36] In light of the foregoing, Desmond, as a child of Alfred, could only be regarded as entitled to benefit from the estate if he is proved to be an "issue" of the intestate within the meaning of the Law.

[37] "Issue" is not defined in the legislation and resort must therefore be had to the common law. Although not cited in argument before me and it being concerned with issues of custody and maintenance of an illegitimate child, I find the following observation of Fox JA in the Court of Appeal in **Finlayson v Matthews** (1971) 17 WIR 69, 76-77 instructive as to the approach to and the determination of the meaning of "issue" in the **Intestates' Estates and Property Charges Law**, **1937**.

> ***The cardinal rule referred to by VISCOUNT SIMONDS in the passage in* Galloway v Galloway ([1955] 3 All ER 429, (1956) AC 299) *quoted [below] applies equally in Jamaica as it is a rule of the common law. "Child" in our statutes* prima facie *means lawful child.*** *This may be demonstrated by reference to two statutes in which that word appears. In the Fatal Accidents Law, Cap 125 which came into force in 1845, it was enacted in s 4 that every action brought by virtue of s 3 "shall be for the benefit of the wife, husband, parent, and* child *of the person whose death shall have been so caused." The Legislature, obviously recognising the limited meaning of "child" in this section, in 1947 amended the law by adding a provision (see s 2 (2)) that for the purpose of the law "a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was only related to him illegitimately". Similarly,* ***in the Intestates' Estates and Property Charges Law, Cap 166, the word "child" appears in Part I of the law which deals with the distribution of the estates of intestates (see s 5). "Child" there clearly does not include an illegitimate child, as Part II of the Law is entitled "Illegitimacy and Succession" and enables an illegitimate child to succeed to his mother's estate and a mother to succeed to her illegitimate child's estate.***
>
> [Emphasis added]

[38] Viscount Simonds had said in ***Galloway v Galloway*** (1956) AC 299, 310-311

> *First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds, or Acts of*

> *Parliament that `child'* prima facie *means lawful child and `parent', lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as* `filius nullius'*…*

[39] George-Creque JA of the St. Vincent and the Grenadines Court of Appeal in **Mitchell and others v Jones** HCVAP 2006/016, a case cited by the Defendant puts it even more clearly when he stated, *"[t]he word "issue" at that time was construed to mean lawful issue, and as such excluded a child born out of wedlock."* He was referring to section 16 of the Intestates' Estates Ordinance, 1974 which like section 4 of the **Intestates' Estates and Property Charges Law, 1937** provided for the distribution of the estate of an intestate who died leaving "issue".

[40] Having found that Alfred and Rachel were not married within the meaning of the **Married Law** and that a marriage is not to be presumed, Rachel was not Alfred's wife. In the result Desmond could not be regarded as Alfred's "issue" within the meaning of section 4 of the **Intestates' Estates and Property Charges Law** and a minor entitled to a benefit from Alfred's estate at the time of his death in 1950.

d. Did Edith fail to disclose that Alfred died leaving a wife and minor children who were lawful beneficiaries of his Estate when she pursued and obtained the grant of Letters of Administration?

[41] It is contended on behalf of the Claimant that the grant of Letters of Administration to Edith Dixon in 1951 should be revoked on account that she failed to make provision for Alfred's wife or "legitimate" minor children. I cannot agree with the submission and entreaty which it provokes.

[42] Among other things which are not immediately relevant, section 12 of the **Administrator-General's Law, 1873**, which was in force at the time of Alfred's death in 1950 and the grant of Letters of Administration to Edith in 1951, provided that the Administrator General was entitled to apply for letters of administration to the estates of all persons who died intestate

without leaving a widower, widow, brother, sister or any lineal ancestor or descendant, or leaving any such relative. A widow of the deceased intestate would therefore generally be entitled to apply for letters of administration in priority to the intestate's sister.

[43] I say generally because the **Intestates' Estates and Property Charges Law, 1937** which governed succession to the residue of an intestate's estate at the time of Alfred's death made special provision for administration in certain circumstances, including where a minor was entitled to a share of the intestate's estate. Section 12 of the Act provided as follows.

> *Notwithstanding anything contained in the Administrator-General's Law, or any Law amending or substituted for the same, where the residuary estate of the intestate does not exceed five hundred pounds; or where it exceeds that sum and a minor is entitled to a share thereof, or where a testator does not appoint an executor or where the executor has died before the testator or renounces, it shall be the duty of the Administrator-General to apply for letters of administration to the estate and, unless the Court is satisfied that it would be for the benefit of the estate that letters of administration ought to be granted to some other person, letters of administration to such estate shall be granted to the Administrator-General.*

[44] Pursuant to the prevailing law as to administration of an intestate estate**,** if there were legitimate minor children, the Administrator General had a duty to apply for and receive letters of administration to Alfred's Estate. There is no evidence or indeed a suggestion, that that office failed to discharge its duty in circumstances where the law required its exercise. Likewise, there is nothing which demonstrates that the court in 1951 exercised the discretion reserved to it by refusing to grant letters of administration to the Administrator General in circumstances where minor children were entitled to benefit and in issuing a grant to Edith, on the basis that it would be for the benefit of the estate to do so or otherwise.

[45] I am not surprised by the absence of any such evidence having regard to the conclusions arrived at in respect of Rachel and Desmond's status at the

time of Alfred's death. The former was not his "wife" and the latter was not his "issue" within the meaning of the **Intestates' Estates and Property Charges Law**, **1937**.

[46] In these premises there cannot be said to have been any failure on the part of Edith to disclose that Alfred was survived by beneficiaries in the person of Rachel or Desmond when she pursued and obtained the challenged grant. Accordingly, the grant of Letters of Administration to Edith Dixon to Alfred Dixon's estate on the 26th May 1951 will remain undisturbed.

Issue (ii): What properties fell to be administered as a part of the Estate of Alfred Dixon?

[47] The Defendant accepts that assets owned by an intestate at the time of his death fall to be administered as a part of his estate. It is nevertheless contended that in order for a determination to be made as to the properties which existed and were to be so administered, regard must be had to the documentary evidence provided by the parties. The following represents the Defendant's position in respect of the following real properties in dispute.

(1) **Land part of Fernleigh Avenue**

These lands are admitted to be comprised in the certificate of title registered at Volume 543 Folio 7 of the Register Book of Titles and transferred from Alfred to Edith by transmission on 31st July 1952. It is the Defendant's evidence however that he was aware, through his late mother Edith, that Alfred did not own any beneficial interest in the property as she had provided the funds to acquire the same.

(2) **Lands part of Longville Estate**

It is the Defendant's submission that the property known as Longville Estate, registered at Volume 779 Folio 32 of the Register Book of Titles has endorsed upon it Edith Dixon as the

sole registered proprietor with not mention of it having been previously owned by or transferred from Alfred Dixon.

(3) **Land part of Rock River**

It is the Defendant's evidence that this property is now comprised in the certificate of title registered at Volume 655 Folio 95 of the Register Book of Titles and was transferred to Edith Dixon on the 28th June 1954.

[48] The lands at Bushy Park were not addressed on the Defendant's evidence or in the submissions made on his behalf.

[49] In respect of lands at Sevens Road (or Brownville), it is the Defendant's contention that the Claimant has failed to provide any evidence that Alfred died possessed of such property. It is acknowledged however that there is property known as Sevens Estate being the lot numbered 27 Block "A" and comprised in the certificate of title registered at Volume 1210 Folio 727 of the Register Book of Titles. This property was transferred to Edith Dixon and George Lopez on the 13th December 1988 from the Rural Areas Development Limited for consideration.

[50] Whatever the Defendant's explanation for how these properties came to be acquired and/or are currently registered, in following any property alleged to constitute a part of the Estate of Alfred Dixon into the hands of the Defendant, through the personal representative of Alfred's Estate, the best evidence which the court has appears to me to be that of the personal representative herself, Edith Dixon.

[51] While the law relating to spousal relationships, status of children and intestacy were vastly different at the date of Alfred's death on the 23rd September 1950 and today, there is one constant. The person to whom a grant of letters of administration is issued is required to identify the assets of which the deceased died possessed or entitled and administer the said estate.

[52] In fact, the Letters of Administration granted to Edith Dixon in claim P. No. 19 of 1951 in respect of Alfred's estate bears out this very thing on its face. It provides that

> *…she having been first sworn well and faithfully to administer the (estate) by paying his just debts and distributing the residue of his estate according to Law and to exhibit a true and perfect Inventory of all and singular the said estate and effects and to render a just and true account thereof whenever required by Law so to do.*

[53] In the "Inventory" sworn by Edith Dixon on the 13th April 1951 in these regards, she declared that *"… the deceased [Alfred] was at the time of his death possessed of or entitled to the following items of personal* and real estate as appropriate:

One motor car	*£ 250.0.0*
3 Motor Buses and One Truck	*2250.0.0*
Cash at Bankers	*83.12.8*
	£2583.12.8
Land part of Fernleigh	*£ 100.0.0*
19 ¾ acres of land part of Rock River	*250.0.0*
17 ½ acres of land part of Longville	*180.0.0*
13 acres of land part of Longville	*112.0.0*
1 lot of land part of Brownville May Pen	*110.0.0*
56 acres part of Bushy Park	*2000.0.0*
	£2752.0.0

[54] Having concluded that there is no basis to disturb the grant of Letters of Administration to Edith Dixon in the Estate of Alfred Dixon on the 26th May 1951, I find that the personal and real property of which Alfred Dixon died possessed of or entitled, and which were to be administered on intestacy, are those set out in the foregoing "Inventory".

Issue (iii): Were the personal and real properties which comprised Alfred Dixon's estate held on trust by Edith Dixon or George Lopez for Desmond or for his benefit?

[55] It is further contended on behalf of Desmond that Alfred's estate was held on statutory trust for him or for his benefit by Edith Dixon and George Lopez. The unsustainability of this contention is evident when one has regard to the succession laws on intestacy at the time of Alfred's death.

[56] The Claimant incorrectly relies on the "Table of Distribution" which now appears at section 4 of the **Intestates' Estates and Property Charges Act** following the passage of the **Intestates' Estates and Property Charges (Amendment) Act, 1988** which repealed and replaced section 4 of the principal Act. In the "Table of Distribution", the residuary estate of an intestate is to be distributed in the manner or held on trusts for the surviving spouse followed by the issue, parents and other eligible relatives. The Claimant relies on this order of priority in arguing that properties which comprised Alfred's estate were held on trust for him or for his benefit by Edith and/or George.

[57] At the time of Alfred's death in 1950 and for many years after, a father's intestate estate was distributed pursuant to section 4 of the **Intestates' Estates and Property Charges Law, 1937**, paragraph (1) (ii) to (v) of which prescribed that

> *(ii) if the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;*
>
> *(iii) if the intestate leaves no issue but both parents, then, subject to the interest of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;*
>
> *(iv) if the intestate leaves no issue but one parent, then, subject to the interest of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;*

(v) If the intestate leaves no issue or parent, then, subject to the interest of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely: -

firstly, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

secondly, on the on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; …

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown as bona vacantia, and in lieu of any right to escheat.

The Crown may, out of the whole or any part of the property devolving on the Crown as aforesaid provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

[58] On George's unsigned statement Alfred was survived by a parent, his mother Mrs. Bacarri-Dixon. In the absence of a "wife" or "issue", the residue of Alfred's estate would have been lawfully held by Edith Dixon as the Administratrix of the Estate, on trust for Mrs. Bacarri-Dixon absolutely, pursuant to section 4 (1) (iv) of the **Intestates' Estate and Property Charges Law**.

[59] The Claimant's lack of entitlement to a benefit from Alfred's estate could only have been altered subsequently if the **Status of Children Act 1976** applied retrospectively to disturb intestate distributions prior to its passage. It does not. While section 3 of that legislation ameliorated the harshness produced by the English common law's failure to recognize children born out of wedlock as legitimate, by providing that the relationship between a

child and his father and mother is to be determined irrespective of his parents' marital status, it is made subject to other provisions in the legislation including section 4. Section 4 (3) in particular provides that

> *[t]he estates of all persons who have died intestate as to the whole or any part thereof before the 1st day of November, 1976, shall be distributed in accordance with enactments and rules of law which would have applied to them if this Act had not been passed.*

[60] In consequence of the foregoing, neither Edith nor George can be said to have held property comprising the estate of Alfred Dixon on statutory trust for Desmond or for his benefit. Alfred having been survived by his mother, any property constituting the residue of his estate and which was held by Edith as the Administratrix thereof would have been held on trust for Mrs. Bacarri-Dixon absolutely who was free to do with them as she wished. While this result might appear morally unpalatable in present day, it accords with the laws for intestate succession at the time of Alfred's death in 1950. Desmond's claim must therefore fail.

ORDERS

[61] It is ordered as follows:

1. The claim is dismissed and judgement is entered for the Defendant.

2. Costs to the Defendant to be taxed or agreed.

Carole S. Barnaby
Puisne Judge