

THE HIGH COURT

[2022] IEHC 583

[Record No: 2020/106M]

IN THE MATTER OF THE ESTATE OF [STATED PERSON] OF [STATED ADDRESS], [STATED OCCUPATION], DECEASED

– AND –

IN THE MATTER OF SECTIONS 172 AND 194 OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT 2010

BETWEEN:

Z

APPLICANT

– AND –

Y

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 14th October, 2022.

SUMMARY

This judgment concerns a failed application for (i) a declaration that the Applicant is a “qualifying cohabitant” within the meaning of s.172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and (ii) certain reliefs under ss.174, 187, and 194 of that Act.

1. The nature of this application means that it is necessary to examine in a little detail the personal relationships that each of Mrs Y and Ms Z had with the late Mr X. Though this is necessary, I have sought to be as sensitive as possible and to avoid any indelicacy in the pages that follow.

2. At the time of his death, Mr X was married to Mrs Y and in an extra-marital relationship with Ms Z.

3. Ms Z claims to be a “*qualified cohabitant*” within the meaning of s.172(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Section 172(5) provides as follows:

“(5) For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period – (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and (b) of 5 years or more in any other case.”

4. Here, there are no dependent children.

5. Significantly, s.172(6) of the Act of 2010 as amended, provides a ‘carve-out’ as to who may be a qualified cohabitant, providing as follows:

“(6) Notwithstanding subsection (5), where the relationship concerned ends before the coming into operation of section 4(2) of the Family Law Act 2019, an adult who would otherwise be a qualified cohabitant is not a qualified cohabitant if (a) one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and (b) at the time the relationship concerned ends, each adult who is or was married has not lived apart (which term shall, in this section, be construed in accordance with section 5(1A) of the Family Law

(Divorce) Act 1996) from his or her spouse for a period or periods of at least 4 years during the previous 5 years.”

6. As mentioned, Mr X was married to Mrs Y at the time of his death. So, item (b) becomes of critical importance in this application. Is it the case that at the time of Mr X’s death he had lived apart from Mrs Y for a period or periods of at least four years during the previous five years? I will call this the ‘Living Apart Question’.

7. Ms Z in her grounding affidavit avers, amongst other matters, as follows, when it comes to the Living Apart Question:

“I met the Deceased in 2011, at which point we began dating. I say that at the beginning of 2012 the Deceased and I had entered a committed, exclusive, intimate relationship. I commenced co-habiting and living with the Deceased at the end of 2012. We lived together at [STATED ADDRESS A]. I say that the Deceased and I resided together as a couple at that address, continuously, for a period in excess of 5 years and more particularly from the end of 2012, until the relationship was ended by the death of the Deceased, [in autumn 2018]”.

8. Mrs Y in her replying affidavit avers, amongst other matters, as follows, when it comes to the Living Apart Question:

“3. The Applicant alleges that between the period of late 2012 until [Mr X’s date of death] that she and my husband...cohabited in a committed, exclusive intimate relationship at [STATED ADDRESS A]. However, my husband and I remained married until his death....We were never estranged during our marriage. My husband resided in our home at [STATED ADDRESS B] from 1997 until the date of his death....I accept that the Applicant and my husband were in a relationship and that it was intimate. I deny...that we ceased to cohabit as husband and wife at [STATED ADDRESS B]....

29. Our relationship was ongoing and continued up until his death. During the period 2012 to 2018 this was not a celibate relationship.

30. We did not share a bedroom throughout our marriage. He worked nights for approximately 30 years. His sleeping patterns were totally irregular....

31. *In addition...the Deceased routinely came home and to bed wholly intoxicated or having drunk alcohol. As a result of his...night-time behaviour it was impossible to achieve a night's sleep while sharing a bed with him....*
33. *As a result of my husband's interest in building and in expanding our home....in or around [STATED DATE] he caused [an]...office premises to be built to the side/rear of the house. By reason of planning conditions, this structure is directly connected to our house. During the approximately two years that the construction took to complete, my husband's business was conducted from the living-room of our home.*

[Mr A, a son of Mr X gave evidence to the effect that he would often come to work with his father early in the morning and find him already in these office premises].

34. *I say that my husband always considered [STATED ADDRESS B] to be his home, it was as a matter of fact his home and it was for this reason that he carried out the various extensions and constructions including during the period [STATED DATE] to [STATED DATE]....*
39. *...[T]he bedroom which the Applicant claims to have shared with my husband for six years contains a double bed, one wardrobe [and] a three-drawer locker. The property [in which this bedroom sits] was fully let during the period [STATED DATE] to [STATED DATE] and the kitchen and bathroom facilities were shared among the occupants. My husband was a man who enjoyed his comforts. He was not the type of man who would or could have lived within the limits of the accommodation of the fully occupied downstairs unit.*
40. *When he died my husband had in excess of approximately 300 items of outerwear as well as large amounts of personal items and documents. The Applicant would appear to be suggesting that I maintained all of these items between 2009 when she alleges our marriage ended and 2018 when he passed away. This is just as unrealistic as the suggestion that he cohabited with her and two others at [STATED ADDRESS A] for a six-year period.*
41. *I accept that my husband stayed overnight from time to time with the Applicant and I would accept that he may well have had some limited clothing*

and perhaps toiletries there. I never could account for the whereabouts of my husband at all times and I very much doubt that the Applicant ever could either.

42. *I accept that my husband meant a lot to the Applicant. For this reason and in order to deal with my feelings towards [my late husband]...in a healthy way, I volunteered to give the Applicant half of his ashes and I made a point to include her in notifications of his death. I accept that they had a relationship....I do not accept that she cohabited with the Deceased for a period of six years.”*

9. Ms Z in her further affidavit avers, amongst other matters, as indicated below. In passing, I do not treat with the averments that Mrs Y was in a relationship with a third party. Mrs Y gave evidence in the witness box that that third party was a family friend and that she was quite vexed by the suggestion that she had been in a relationship with that third party. I accept her evidence in this regard and do not see that the claimed relationship has been established on the evidence before me. Turning then to Ms Z’s further averments, she avers, amongst other matters, as follows:

“4[A]t no time after the Deceased and I commenced a relationship, did the Deceased ever go on holidays, or any trips with the Respondent. They did not attend social functions, such as birthdays or weddings as a couple, something which the Deceased and I did regularly. I say that during our time together we were also on numerous holidays, and we travelled together extensively....At all times we presented ourselves as a couple to third parties....

5. *Insofar as I am aware, the relationship of the Deceased with Mrs Y was hostile and there were limited interactions between them....I...would not have been prepared to tolerate a situation where he was intimate with the Respondent....*

6 *....I reiterate my averment that the Deceased resided at [STATED ADDRESS A]. The Deceased did not live at [STATED ADDRESS B] until the date of his death and the suggestion that he did is simply untrue. I beg to refer to utility bills addressed to Deceased at [STATED ADDRESS A]....*

- 16 ...[A]s already set out the Deceased and I attended social events, family events, and gatherings, and held ourselves out as a couple. I would be astounded if the Respondent was not aware that this was the case. The respondent's sister-in-law...had worked for the Deceased for in excess of 30 years....[She] would regularly have seen myself and the Deceased together. I find it very strange and unlikely that [she]...would not have relayed the fact and nature of our relationship to [Mrs Y]....I beg to refer to a Christmas card addressed to both the deceased and myself and signed by [the said sister-in-law and certain other employees of the Deceased]....
17. At paragraph 29, the Respondent sets out the relationship with the Deceased was not celibate in the period from [STATED DATE]-[STATED DATE]. I genuinely do not believe that this was so. The averment that the Respondent and the Deceased were not estranged has to be viewed in the context of Mrs Y never visiting the Deceased at the hospital in [STATED DATE] when the Deceased was having surgery on his heart....I say that it is also particularly telling that one half of the Deceased's ashes were given to me. I say that when the Deceased passed away the notification on the RIP.ie website referred to your Deponent as his partner.
- 21 ...[T]he Respondent says that the Deceased always considered [STATED ADDRESS B] to be his home. I accept that he considered it to be his property, given that it was in his sole name. However, that did not change the fact that he was residing with me at [STATED ADDRESS A]....[T]he Respondent alleges that the property at [STATED ADDRESS A] was small, unsuitable for a couple cohabiting and would have been unsatisfactory because the Deceased was a man who enjoyed his comforts. I say that while the space was tight, the relationship between the Deceased and I was a good one, and he was very happy to spend his time with me at [STATED ADDRESS A]. I say that the Deceased stayed with me every single night before he would leave for work to do night shifts. I say that I was always aware of his whereabouts and that he would keep in touch with me regularly. I say that...we had plans to move to [STATED EU MEMBER STATE] and to buy land and a home there....
24. I say that usually the Deceased worked nights. He slept very little. I say that our days followed a familiar routine, and I am setting out a typical day so

that the Court understands why I am so adamant that the Deceased and I were cohabiting. Unless there was an emergency alarm call the Deceased only left for work at about 1am or 2am....At about 6am he would finish and return to [STATED ADDRESS B] where he kept his locked bedroom. [Court Note: I accept the evidence of Mrs Y that the bedroom was not locked]. He would sleep for an hour or so and take a shower, and he would open up the office for the staff coming in. When they came into the office he would then leave and come back to [STATED ADDRESS A], about 9am, for breakfast. I say that the Deceased always had his breakfast with me. I kept his diabetes medication and ensured that he took that at breakfast-time, and again in the evenings. Once we had finished breakfast the Deceased would then drive me to the...[shop] where I was volunteering. After that he would go back to the office for a few hours and then at about 4pm he would leave the office and come back to [STATED ADDRESS A]. Usually the Deceased made dinner for both of us. Usually, at about 5.30pm he collected me from the...shop where I was volunteering. If he was not available to collect me he always arranged for one of the girls in the office to collect me. I say that we always met our evening meal together at [STATED ADDRESS A]. Thereafter, we usually watched TV for the evening, and then got some rest, before [Mr X's] going back out again at 1 or 2 a.m.].

[Court Note: Convincing doubt was cast by Mrs Y and her son as to where Mr X went at 1 or 2 a.m. The suggestion is that he did not go to work and that he went instead to [STATED ADDRESS B]. There was also suggestion that Mr X liked regularly to attend at one or more local drinking establishments of an evening (as opposed to spending his evenings with Mrs Y). I accept that on the balance of probabilities Mr X must have gone to [STATED ADDRESS B] when he left Ms Z each evening at 1-2 a.m. The most likely place he went was [STATED ADDRESS B]. I also accept the oral evidence offered by Mr X's son that, if I might paraphrase, his father was a dedicated drinking-man, heading out to drink at one or more local licensed establishments on many an evening].

25. *We did attend weddings together, as a couple, Further I say that your Deponent was involving in organising the funeral of the Deceased. I requested certain prayers, selected the music, and after the Deceased had been cremated, half his ashes were given to me. I say that after the Deceased passed away, the Respondent contacted me looking for a suit to give to the funeral directors, in which the Deceased could be buried. As the Deceased and I were due to leave shortly for an extended holiday to [STATED EU MEMBER STATE] (with a view to purchasing property beside my daughter) we had already arranged to send on some of the Deceased's clothes in advance. The Deceased's most expensive suit had already travelled onto [STATED EU MEMBER STATE]. I provided the next best suit I could find."*

10. There was a further final affidavit from Mrs Y in which she avers, amongst other matters as follows:

“3[My] marriage to the Deceased subsisted until the date of his death. I deny the allegation that I was engaged in an extra-marital affair. Unfortunately...[the third party in question] pre-deceased the Deceased....This fact is known to the Applicant so she is therefore also aware that I could not obtain any evidence from [that third party]...to contradict her allegation. [Court Note: I have already indicated that I accept Mrs Y's evidence in this regard and do not see that the claimed relationship has been established on the evidence before me.]

4. *The Deceased and your Deponent [i.e. Mrs Y] attended family functions as a couple during the period of his sexual relationship with the Applicant....I can say that the Deceased regularly holidayed without your Deponent in circumstances where, due to his problematic relationship with alcohol I simply did not enjoy holidaying with him. This presumably allowed the Applicant and [Mr X to]...holiday together on occasion....*

5[T]he Applicant describes my relationship with the Deceased as 'hostile'. I would accept, as I would of any marriage, that at times our relationship was hostile or...may have appeared so to an outsider....[T]he Deceased, despite being married to me involved himself romantically with other women both before and since meeting the Applicant.

6. *I repeat my denial that the Deceased resided at [STATED ADDRESS A]. The Applicant exhibits a utility bill....I say and believe that it is common practice for utility companies to issue bills to the address using the service. I say that the Deceased also received utility bills to his home address of [STATED ADDRESS B]. Also a number of other organizations corresponded with him at this address. I say and believe that the gas service provider wrote to him at [STATED ADDRESS C]. This is another rental property owned by the Deceased. It is my understanding that the accounts for gas and electricity were set up in [STATED DATE] and [STATED DATE]. This is long before the Applicant and the Deceased became involved with each other....*
19. *It is difficult to understand the averment that the Deceased had plans to move to [STATED EU MEMBER STATE]. He did not speak the language and could very much be described as a 'home bird'. The Deceased had a number of investments in Ireland and debts within the country. I do not believe that [Mr X]...was ever in a financial position to move to [STATED EU MEMBER STATE]....It is impossible to see that the Deceased's assets were such as would have allowed him to move to [STATED EU MEMBER STATE], support the Applicant as alleged, and preserve my property rights."*

11. Is it the case that at the time of Mr X's death he had lived apart from Mrs Y for a period or periods of at least four years during the previous five years? Respectfully, I do not see that he did. When I look at the above and all the other evidence that has been placed before me, including the oral evidence, it seems to me that I am presented with the following situation:

- [1] Mr X's marital home was at [STATED ADDRESS B].
- [2] Even before Ms Z entered into his life, Mr X and his wife tended not to sleep together because of Mr X's unusual sleeping patterns/habits and frequent intoxication.
- [3] After Ms Z entered Mr X's life he appears to have continued to sleep at the marital home.
- [4] Throughout this time the relationship between Mr X and Mrs Y was not, to borrow from Mrs Y, "a celibate relationship". (Ms Z may not believe this, but I see no reason not to believe Ms Y. In truth, I find it entirely

convincing that a husband and wife who are living together might occasionally or regularly have intimate relations notwithstanding that their marital relationship on the whole may be floundering).

- [5] Taking Mrs Y's case at its height, after Mr X rose in the morning at the marital home, and after he opened and spent time at the office, he would attend at her house for breakfast and bring her to work. Then in the early evening, he would collect her from work or have someone else do so. They would then dine together. At some point in their interactions they also likely enjoyed some degree of intimacy.
- [6] It does not appear to me that Mr X and Ms Z always (perhaps even often) spent later-evenings together. I accept in this regard the evidence of Mr X's son that Mr X was a dedicated drinking-man, heading out to drink at one or more local licensed establishments on many an evening. To the extent that Ms Z suggests otherwise, that contrary suggestion seems, with respect, to be not wholly correct.
- [7] On those evenings that he did spend with Ms Z, Mr X headed off at 1-2am to sleep at the marital home (not to work as he pretended). (I note in this last regard the evidence of Mr X's son that his father did not even have a private security licence before 2016).
- [8] Because Mr X often drank to excess, Mrs Y declined to holiday with him; so Mr X took that as an opportunity to holiday with Ms Z.
- [9] When Mr X attended functions with Mrs Y during their marriage (even at times when he was in a relationship with Ms Z) he allowed himself and Mrs Y to be represented as a couple.
- [10] When Mr X attended functions with Ms Z he allowed himself and Ms Z to be represented as a couple and was occasionally addressed by others as such.
- [11] Mr X and Mrs Y may occasionally have argued (though I do have to ask in this regard, 'what couple does not?', *i.e.* there is little, if any significance to this fact).
- [12] It may be that Mr X indicated an intention to Ms Z that he would move to [STATED MEMBER STATE] with her. If he did, I struggle (for the reasons offered by Mrs Y) to believe that he was telling the truth in this regard.

[13] As to Mr X having been named on the utility bill at [STATED ADDRESS A], he was also named on utility bills at [STATED ADDRESS B] and [STATED ADDRESS C] and his being named on the bills for [STATED ADDRESS A] appears in any event to have dated from a time before he and Ms Z were allegedly living together.

12. Regrettably, each of Mrs Y and Ms Z has good reason to consider herself to have been ill-used by Mr X in his lifetime. However, I do not see that I can conclude on the basis of the foregoing that at the time of Mr X's death he had lived apart from Mrs Y for a period or periods of at least four years during the previous five years. The marital relationship between Mr X and Mrs Y appears to have cooled over time (though not to the extent that they never enjoyed intimate relations with each other). Mr X was certainly unfaithful (to the point of allowing himself to be represented in a relationship with Ms Z at the same time that he allowed himself to be represented as in a relationship with Mrs Y). When Mr X was not working and not out drinking, he appears to have spent hours with Ms Z, presumably occasionally enjoying intimate relations with her; however, Mr X returned home to the marital home at sometime around 1-2 a.m. each night where he was not, to borrow from Mrs Y, in "*a celibate relationship*". In those circumstances I do not see that Mr X and Mrs Y can be said to have lived apart at all, never mind for the period prescribed by s.172(6) of the Act of 2010.

13. I should note in passing that I am not persuaded that Mr X and Mrs Y can properly be described in any event as "*cohabitants*" (as opposed to "*qualifying cohabitants*") for the purposes of s.172.

14. Section 172(1) states as follows:

"For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other." [Emphasis added].

15. Given, in particular, points [1], [3], [5]-[7], and [13] as identified in para.11 above, I respectfully do not see that Mr X and Ms Z were 'living together' in the manner contemplated

by s.172(1), as opposed to spending time together and enjoying occasional intimate relations with each other.

16. Section 172(2) of the Act of 2010 provides that in determining whether or not two adults are cohabitants, the court shall (must) take into account the factors listed below:

(A) THE DURATION OF THE RELATIONSHIP. All else being equal the duration of the relationship between Mr X and Ms Z was clearly such that one could find a relationship of cohabitation to present.

(B) THE BASIS ON WHICH THE COUPLE LIVE TOGETHER. Given, in particular, points [1], [3], [5]-[7], and [13] as identified in para.11 above, I respectfully do not see that Mr X and Ms Z were ‘living together’ in the manner contemplated by s.172(2)(b).

(C) THE DEGREE OF FINANCIAL DEPENDENCE OF EITHER ADULT ON THE OTHER AND ANY AGREEMENTS IN RESPECT OF THEIR FINANCES. This was not explored in very great detail at the hearing; however, it does seem that there was some degree of financial dependence on Ms Z’s part vis-à-vis Mr X.

(D) THE DEGREE AND NATURE OF ANY FINANCIAL ARRANGEMENTS BETWEEN THE ADULTS INCLUDING ANY JOINT PURCHASE OF AN ESTATE OR INTEREST IN LAND OR JOINT ACQUISITION OF PERSONAL PROPERTY. This was not explored in very great detail at the hearing; however, to the extent that Mr X made promises (if he made promises) of financial provision for Ms Z and/or her family after he was gone, or that he wished to move to [STATED EU MEMBER STATE] (and I struggle, for the reasons offered by Mrs Y, to believe that he was telling the truth in this last regard) none of these things were done (perhaps tellingly so).

(E) WHETHER THERE ARE ONE OR MORE DEPENDENT CHILDREN. Presumably what is meant in this regard is whether there are one or more dependent children of the relevant alleged cohabitants. Here, there are none.

(F) WHETHER ONE OF THE ADULTS CARES FOR AND SUPPORTS THE CHILDREN OF THE OTHER. Neither Mr X nor Ms Z did so here.

(G) THE DEGREE TO WHICH THE ADULTS PRESENT THEMSELVES TO OTHERS AS A COUPLE. When Mr X attended functions with Mrs Y during their marriage (even at times when he was in a relationship with Ms Z) he allowed himself and Mrs Y to be represented as a couple. When Mr X attended functions with Ms Z he allowed himself and Ms Z to be represented as a couple and was occasionally addressed by others as such. I am not sure that this establishes much beyond that (i) Mr X was satisfied for himself to be described as the partner of Mrs Y or Ms Z, and (ii) each of Mrs Y and Ms Z allowed herself to be presented as the other half of a Mr X-Mrs Y or Mr X-Ms Z couple.

17. I have been referred by the parties to, and considered, the judgment of the High Court in *DC v. DR* [2015] IEHC 309. I do not see that it is necessary to consider that case in detail.

Conclusion

18. By summary summons of 18th January 2020, Ms Z has come seeking: (i) a declaration that she is a “*qualified cohabitant*” within the meaning of s.172 of the Act of 2010, as well as (ii) certain reliefs under ss.174, 187, and 194 of the Act of 2010. (A relevant order under these last-mentioned provisions (see s.173(1) and s.194) is only available to a qualified cohabitant). For the reasons stated above, I am not satisfied that Ms Z is a “*qualified cohabitant*” within the meaning of s.172 of the Act of 2010. I must therefore refuse the reliefs sought.

**TO MS Z AND MRS Y:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Mrs Y and Ms Z

I have just written a detailed judgment about the application brought by Ms Z. The judgment contains a lot of legal language which can be hard (even boring) to read. In a bid to make my judgments easier to understand by those who receive them I often now attach a note in 'plain English' briefly summarising what I have decided. I thought it might assist for me to add such a note in this case.

In a bid to ensure that people do not know who you are, I refer to you in this note as Ms Z and Mrs Y. This may seem a bit artificial. However, I think it is for the best.

This note is a part of my judgment. However, it does not replace the text in the rest of my judgment. It is written to help you understand what I have decided. Your lawyers will explain the rest of my judgment in more detail.

Ms Z has come to court seeking (i) a declaration that she is a "qualified cohabitant" within the meaning of s.172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and (ii) certain related reliefs. Respectfully, I do not see that Ms Z is a "qualified cohabitant" within the meaning of s.172. As a result I must refuse all of the reliefs sought by Ms Z.

I wish you both the very best.

Yours sincerely

Max Barrett (Judge)

Date: 14th October, 2022.