



[2021] JMSC Civ.32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV04436

BETWEEN	AUDREY BLACKWOOD	APPLICANT
AND	IAN BLACKWOOD	RESPONDENT

IN CHAMBERS

Ms. Yolanda Kiffin for the Applicant

Ms. Ana-Stassia McLeish instructed by Nelson Law for the Respondent

Heard: January 11, 2021 and February 19, 2021

Property Rights of Spouses Act - Application to extend time to file a claim – Criteria by which the court is to exercise its discretion - Overarching principle is fairness

Carr, J (Ag)

Background

[1] Mr. Ian Blackwood and Mrs. Audrey Blackwood were married on the 10th of July 2004. During their marriage Mr. Blackwood acquired property and constructed a home which the couple occupied together commencing in or around 2009. The marriage broke down and Mrs. Blackwood left the premises on the 28th of February 2014. Subsequently, Mrs. Blackwood filed a Notice of Application for leave to extend time to make an application under Section 13 (1) (C) of the Property (Rights of Spouses) Act (referred to as PROSA) on the 4th of April 2017. The Application

was supported by her affidavit filed on the same date. Mr. Blackwood opposed this application and filed an affidavit in response on the 8th of July 2020. The parties filed further affidavits on the 31st of July 2020 and the 28th of October 2020 respectively.

Submissions on behalf of the Applicant

- [2] Counsel Ms. Kiffin acknowledged that the application was made two years and a few months out of time. She argued that the court should focus on what was fair in the circumstances, in addition to the other factors such as delay, prejudice and the merits of the case. She also indicated that the delay could not be attributed solely to the applicant as the court also had administrative issues which resulted in the application only now being heard by the court.

Submissions on behalf of the Respondent

- [3] Counsel Ms. McLeish focused on the issue of delay and submitted that the delay in this case was inordinate. As a result, the respondent would be severely prejudiced in his defence. It was also argued that, because Mr. Blackwood thought that his wife had abandoned her claim, he incurred expenses in refurbishing the home. Finally, it was submitted that Mrs. Blackwood had not demonstrated through her affidavit that she had a good reason for the delay, and the application should be refused.

The Law

- [4] Section 13 (1) of PROSA provides for a spouse to make an application to the Court for division of property:

“A spouse shall be entitled to apply to the Court for a division of property-

- (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or**

- (b) on the grant of a decree of nullity of marriage; or
- (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.”

Section 13 (2) gives the time within which a person is permitted to file their application.

“(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.”

[5] This provision, allows the court to exercise its discretion where there is an application which is made outside of the limitation period. The Act however is silent as to the basis upon which a court should determine when to exercise that discretion.

[6] Morrison J.A. as he then was in the case of **Brown v. Brown**¹ examined the criteria that a court must look at in determining such an application.

“It seems to me, all that the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as the merits of the case, (on a purely prima facie basis), delay and prejudice, and also taking into account

¹ Brown (Annette) v. Brown (Orphiel) [2010] JMCA Civ. 12 at para. 77

the overriding objective of the Civil Procedure Rules of ‘enabling the court to deal with matters justly’.”

In light of those principles I propose to examine Mrs. Blackwood’s affidavit as to the following:

- A) Whether she has established that she has a meritorious claim.
- B) Whether she has provided a reason for the delay in making her application, and
- C) What would be the prejudice to either side if the application is granted?

Analysis and Discussion

The Merits of the case

[7] Mrs. Blackwood must establish that she has a claim that has a reasonable prospect of success. In her affidavit filed on the 4th of April 2017 she outlined that the parties were lawfully married in 2004. Mr. Blackwood purchased a lot of land in Manchester sometime between 2006 and 2007. A house was constructed on the land and the couple moved in on or around January of 2009. They resided there together with their daughter until she left the premises on February 28, 2014. This was the family home, their principal place of residence.

[8] The family home is defined as **“the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purpose of the household, but shall not include such**

a dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit.”²

[9] PROSA provides at Section 6 (1) as follows:

“Subject to subsection 2 of this section and sections 7 and 10, each spouse shall be entitled to one half share of the family home – (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation.”

[10] On the face of the affidavit therefore this is the family home. What appears to be in contention is the level of contribution made by Mrs. Blackwood. In her affidavit she indicates that her contribution towards the construction of the matrimonial home was not limited to thought and ideas but was also financial in nature. She said that she had, along with her husband, spent money through her savings and salary to aid in the construction and purchase of materials. It is also common ground between both parties that they jointly applied for and received loans from the National Housing Trust and the Bank of Nova Scotia. Mr. Blackwood admits in his affidavit filed on the 8th of July 2020 that up to 2014 when Mrs. Blackwood left, she had been assisting in mortgage payments. In these circumstances Mrs. Blackwood has established a prima facie case on the evidence contained in her affidavit that this was the family home and that by operation of law she is entitled to at least a one half share in the property.

Delay

[11] The fact that there was a delay in bringing this application is not in dispute. The starting point in accordance with the Act is the date of separation. The parties separated on February 28, 2014, and as such Mrs. Blackwood had up until the 28th

² Section 2(1) of the Property (Rights of Spouses) Act.

of February 2015 to make her application. The present application was filed on the 4th of April 2017 she was therefore two years over the limitation period.

- [12] In order for the court to be able to exercise its discretion under the Act the applicant must first outline a reason for the delay. In the case of **Allen (Delkie) v. Mesquita (Trevor)**³ the Court of Appeal held;

“The reasons for a tardy application are fundamental factors to be taken into account in determining whether an applicant had explained the delay in not acting timeously. In order to justify an extension of time to carry out a requisite step in any proceedings, there must be some material on which the court can exercise its discretion. Indeed, the absence of good reasons is not in itself sufficient to justify a refusal of an application to extend time, however some reason must be advanced.”

- [13] Mrs. Blackwood at paragraphs 15 and 16 of her affidavit in support of the application sought to explain what transpired. She stated that she was unaware of the requirement to make an application twelve months after separation until she was advised by an attorney. She was also of the view that issues in respect of the division of property would be dealt with at divorce proceedings. During the period of separation, she was under immense pressure as she was out of a home, paying rent and pursuing further academic studies.

- [14] Mr. Blackwood in response to this explanation indicated that subsequent to the separation the parties had been before the court on several occasions to deal with matters involving maintenance, custody and domestic violence. Throughout those proceedings Mrs. Blackwood was always represented by counsel presently on record, Ms. Yolanda Kiffin. In 2015 Mrs. Blackwood raised the issue as to the division of property in the Mandeville Parish Court but was advised by the Judge that it was not the proper forum to bring such an application. Having raised the

³ SCCA No. 8 of 2011 para. 18

issue in the presence of her own attorney, how then could Mrs. Blackwood realistically argue that she did not know that she ought to make an application to the court?

[15] I cannot find that the explanation given by Mrs. Blackwood is unreasonable. She has indicated that as soon as she was advised by her attorney that she needed to make an application, she did so. It is not unusual to find that persons are ignorant of the provisions under the Act and often feel that the issue of the division of property is to be dealt with at divorce proceedings.

[16] Although Ms. Kiffin represented her at the Parish Court in respect of matters involving maintenance, custody and domestic violence this does not mean that she was given any instructions as to property.

[17] In any event the failure of counsel to act or to advise her client accordingly, if indeed this was so, cannot be used as a tool to punish the applicant. The Court of Appeal commented on that issue in the decision of **Merlene Murray Brown v. Dunstan Harper and Winsome Harper**.⁴

“The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interest of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so has failed him, although it was not intended.”

Although there was no response to the affidavit specifically in respect of the actions of counsel, the cited case merely reaffirms the courts’ overriding objective to deal justly with cases.

⁴ [2010] JMCA App. 1 para. 30

- [18] Ms. McLeish also argued that the delay was further exacerbated by the failure on the part of the applicant to have this application adjudicated upon expeditiously. Since the application was filed, the matter has lingered through the courts for another three years.
- [19] What was Mrs. Blackwood's explanation for this? She indicated in her affidavit that at the date fixed for the first hearing Mr. Blackwood was unrepresented. He was advised based on the court records that he should obtain legal representation and file affidavits in response. Subsequently the matter remained on the list for several years without being given a date because the original file could not be located and there was another file on the court list with similar named parties and another suit number. Attempts were made by both the attorney and the Registrar to correct this error and as a result there was delay in bringing the matter fully before the court.
- [20] That delay, in fairness to both parties, cannot be the basis upon which this court makes a decision since it was mainly an administrative lapse on the part of the court.
- [21] I accept in the circumstances that Mrs. Blackwood has provided an explanation for the delay in filing the claim and that her explanation is a reasonable one. .

Prejudice

- [22] What is the likely prejudice that will be suffered by Mrs. Blackwood in the event that the court fails to grant this application? Since leaving the premises Mrs. Blackwood has found herself in dire financial straits. She outlined in her affidavit that at first she had to move in with relatives however this was temporary. She now resides in a rented premises. Her husband she alleges was abusive and as a result she had to flee the home without taking any furniture or appliances. She has since had to acquire furniture and other items at an additional cost. Even

though she was no longer residing there she continued to make the mortgage payments until she was no longer able to do so.

- [23]** Mr. Blackwood indicates that he too has suffered financial hardship and that he would be prejudiced by the granting of this application. Since the separation, he has paid all the mortgage payments and he has also made improvements to the home. It was also argued by his attorney that he would be at a disadvantage in defending the claim due to the passage of time. The court should therefore not deprive him of the benefit of the limitation period.
- [24]** In examining the affidavits filed on behalf of both parties, it is noted that Mr. Blackwood has had the full use of the premises, he has been residing there with the couple's daughter since Mrs. Blackwood left the home. The funds that he has spent on the improvement of the home as well as any money paid to offset the mortgage on the property are factors that would be considered by a court when determining any claim as to the division of property. If his evidence is accepted by the court this could only advance his case for a greater share in the home.
- [25]** Further Mr. Blackwood's contention that he would be handicapped in his preparation to meet the claim cannot stand. In his affidavit dated the 28th of October 2020, he outlined in fulsome details his defence to the proposed claim for an entitlement to a share of the property. He even went further to exhibit receipts and other documents in proof of these averments. In these circumstances I cannot agree with Counsel that he will be unduly prejudiced in defending this matter. On the other hand, if Mrs. Blackwood is not permitted to have her claim heard on the merits she would be unable to realize any of her investments in the home and would have lost all rights to the home as well as any money that she would have expended in its construction. It is apparent therefore that the applicant will suffer the greater hardship if her claim is not fully ventilated in the court.

Conclusion

[26] Mrs. Blackwood has established a prima facie case, she has given a good explanation for the delay to file her application in time and she has also demonstrated that she will suffer the greater prejudice if her application is not granted.

[27] Each case must turn on its own facts and the length of delay cannot be the only determining factor. In fairness to Mrs. Blackwood and in keeping with the overriding objective it is my determination that she should not be denied her opportunity to have her substantive claim heard on its merits.

Order

1. The Applicant is granted leave to make a claim under Section 13 (1) (C) of the Property (Rights of Spouses) Act.
2. The time for filing the Fixed Date Claim Form and Affidavit in support is extended to the 5th of March 2021.
3. Costs to the Defendant to be agreed or taxed.