



[2018] JMSC Civ. 193

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 00410

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| BETWEEN | SOPHIA MCKOY | CLAIMANT/APPLICANT |
| AND | VINCENT DAVIS | DEFENDANT/RESPONDENT |

CONSOLIDATED WITH:

CLAIM NO. 2015 HCV 05787

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| BETWEEN | VINCENT DAVIS | CLAIMANT |
| AND | SOPHIA MCKOY | DEFENDANT |

Mr. Anthony A. Williams instructed by Usim, Williams & Co. for the Applicant.

Ms. Sonja Anderson-Byfield and Mrs. Yolanda Magnus-Mullings instructed by Abendana & Abendana for the Respondent.

Civil practice and procedure – Application for court orders – Application for extension of time pursuant to section 4, 5,6 and 7 of the Inheritance (Provision for Family and Dependents) Act – Sections 2 and 6 of the Property (Rights of Spouses) Act

HEARD: September 21, 2017 and March 23, 2018

PALMER HAMILTON, J (Ag.)

BACKGROUND

- [1] This is an application by Ms. Sophia McKoy (hereinafter referred to as “the Applicant”) for the Court to extend time to make an application under the **Inheritance (Provision for Family and Dependents) Act** (hereinafter referred to as “the Act”). The Applicant has initiated a Claim by way of Fixed Date Claim Form, seeking relief against the estate of her deceased common law husband Mr. Canute Davis (hereinafter referred to as “the deceased”) who died testate on the 30th day of June, 2011. She contended, inter alia, that she is entitled to one hundred percent (100%) of the legal and beneficial interest held by the deceased in all that parcel of land part of Hartlands in the parish of Saint Ann (hereinafter referred to as “the property”). The Applicant also declared that the disposition of the deceased’s estate effected by his Will is not such as to make reasonable financial provision for her.
- [2] Mr. Vincent Davis (hereinafter referred to as “the Respondent”), is the executor of the deceased’s estate and is being sued pursuant to a Grant of Probate dated the 14th day of January 2013. Given the competing Claim of the Applicant and ruminating the interest of the other beneficiaries, the Respondent filed a Claim seeking, inter alia, the Court’s opinion, advice and direction in the administration and winding up of the deceased’s estate. Both Claims were consolidated by an order of the Court.

THE CLAIM

- [3] The deceased’s net estate consists of real property only, being one half interest in the property which he held as Tenants in Common in equal shares with his sister Ms. Reta Davis. The deceased and Ms. Reta Davis both constructed separate dwelling houses on the property from their own resources and at all times treated the houses as separate.

- [4] At all material times the Applicant was the common law spouse of the deceased for over ten (10) years. She met the deceased in 1996 and in 2006 they moved to the matrimonial home built on the property and cohabited as man and wife up until his death in 2011. She obtained an Order dated the 26th day of April 2012 declaring her to be the spouse of the deceased under the Property Rights of Spouses Act (hereinafter referred to as "PROSA").
- [5] The last Will and Testament of the deceased was made before he met the Applicant and as such no financial provision was made for her in the Will but provisions were made for other beneficiaries.
- [6] The Beneficiaries of the said estate however, executed an Agreement dated the 1st day of August 2012 acknowledging that no financial provision was made for the Applicant and proposed to give her fifty percent (50%) interest of the net estate. The Applicant however rejected this proposal and contended that she is entitled to one hundred percent (100%) interest. This birthed the Claim of the Applicant.
- [7] It is trite that the application that Ms. Mckoy seeks to make pursuant to the Act shall ordinarily be made within six (6) months of the date on which the grant of administration in the deceased's estate is taken out. The Applicant is undeniably out of time and she therefore requires the permission of the court.

ISSUES

- [8] The substantive issue for the Court to determine is whether the time to make an application under the Act should be extended.
- [9] I wish to thank Learned Counsel for the breadth of their submissions which provided valuable assistance to the Court in deciding the issues raised in this application.

THE APPLICANT'S CASE

- [10] Learned Counsel for the Applicant submitted that pursuant to section 5 of the Act, the Court has the power to grant leave for an extension of time within which claims may be brought under the Act. Mr. Anthony Williams cited the case of **In re Salmon, DECD. Coard v National Westminster Bank Ltd. and others** Law Reports [1981] 167 in support of this submission. Learned Counsel adumbrated the guidelines laid down by Sir Robert Megary V-C that the Court should consider when exercising its discretion to extend time under the Act.
- [11] In addition to the principles in of **In re Salmon, DECD. Coard v National Westminster Bank Ltd. and others** (supra), Learned Counsel Mr. Anthony Williams also stated that another salient factor that the Court should consider when exercising its discretion, is whether the Applicant would experience serious hardship if the extension was refused. The case of **Re Ruttie (deceased). Ruttie v Saul** [1969] 3 All ER 1633 was cited to support this submission.
- [12] It was further submitted that the Court should consider whether the Claim for reasonable financial provision had a real prospect of success and the case of **Re Dennis (deceased)** [1981] 2 All ER 140 was relied on to buttress this submission.
- [13] Mr. Anthony A. Williams applied the legal principles to the circumstances of the case and he maintained that the Applicant is entitled to an absolute interest in the property in light of the following: -
1. She has a meritorious Claim with a reasonable prospect of success;
 2. There is a reasonable explanation for her delay;
 3. The Claimant was unaware of the limitation period as her previous Attorney did not advise her of same;

4. The estate has not yet been distributed and as such, the beneficiaries would not be prejudiced;
5. She would suffer great hardship if the application was not granted.

[14] In her affidavits, the Applicant explained that she was only notified of the issuance of the grant of probate one (1) month before the limitation period and this prejudiced her from properly and effectively engaging an Attorney and further, for the said Attorney to prepare an application pursuant to section 5 of the Act. She also submitted that her former legal counsel did not advise her of the statutory limitation period during the course of his retainer as her Counsel.

[15] The Applicant also disclosed that between the 30th day of August 2014 and the 31st day of April 2015, she suffered mental anguish, depression, hypertension consequent on the memory of the loss of the deceased which impaired her ability to engage in any legal process and consequently contributed to the delay.

[16] The Applicant also indicated that she reasonably expected the executor and beneficiaries to give her the agreed beneficial interest to finalize matters and so, she did not think it was prudent to file proceedings to obtain her benefit. The Applicant also indicated that there were negotiations between the parties prior the expiry of the limitation period and this is evident by the correspondences passing between the respective legal Counsel.

[17] Learned Counsel proffered that the estate has not been distributed and none of the beneficiaries have been prejudiced or is likely to be prejudiced especially when the executor, that is, the Respondent, by his own admission stated that the estate is heavily indebted.

[18] In answering the overarching question of whether the Applicant has a realistic prospect of success, Mr. Anthony Williams indicated that the Applicant has a realistic Claim based on the following circumstances: -

1. Both the Applicant and the deceased lived a happy life and he was responsible and did maintain her;
2. When the deceased became gravely ill he could no longer work and finance himself instead, the Applicant spent enormous sums of money from her earnings as a cosmetologist to take care of his medical needs;
3. The Applicant had to close her beauty salon just to provide full term dedicated attention to the deceased's medical condition;
4. The Applicant and the deceased lived in the matrimonial home for over fifteen (15) years quietly, peacefully, undisturbed, and the Applicant is impecunious to acquire a suitable home. Great hardship will be caused if she is to be removed to live elsewhere other than the matrimonial home.

[19] Learned Counsel relied on the cases of **Thompson v Roach and Roach** [1968] 13 WIR 297, **Williams v Mavaou** [2000] 61 WIR 302 and **In re Coventry, DECD. Coventry v Coventry** [1977 C. No. 2852] and **Franklyn v Bidy** (1960) 2 WIR 297 to support his averment that in cases where the issue of '*reasonable financial provision*' for maintenance arises under the Act, if the deceased husband had a moral and/or legal obligation to maintain the wife then reasonable financial provision must be made for the applicant.

THE RESPONDENT'S CASE

[20] The Respondent contended that leave to make an application under the Act out of time should be refused on the grounds that: -

1. The Applicant has failed to make the application for extension of time under the Act within a reasonable time of being notified of the issuance of the Grant of Probate in the estate of the deceased;

2. No good or any explanations at all have been advanced by the Applicant for the delay in making the said application;
3. Reasonable provision has already been made by the beneficiaries in the estate of the deceased for the said Applicant;
4. The application is a waste of the Court's resources and is unduly burdensome on the estate of the deceased as it is already heavily indebted and the costs of the application will only further serve to deplete the estate's resources and to prejudice the beneficiaries, including the Applicant.

[21] Learned Counsel for the Respondent relied on the judgments of **Donovan v Gwentoy's Ltd.** (1990) 1 WLR 472 and the Jamaican decisions of **Allen v Mesquita** (2011) JMCA Civ 36 and **Sharon Smith v Vincent Service** [2013] JMCA Civ 78 that dealt with the considerations for an extension of time for an application under PROSA.

[22] Learned Counsel contended that the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim and this benefit should not be taken away unless good reason is shown.

[23] The Respondent maintained that there was no negotiation between the parties and the communication between counsel for the parties only engendered status updates and information on the progress of the administration of the estate. He noted that while the agreement was communicated, there was never any negotiations nor room for negotiations as to any further beneficial interest. Learned Counsel indicated that at no point did the Applicant indicate her dissatisfaction with the proposal to give her fifty percent (50%) interest of the net estate and the Respondent received no warning and could not have foreseen this application.

[24] Learned Counsel maintained that there is another remedy available to the Applicant, that being, a claim of negligence on the part of her Attorney who failed to advise her of the limitation period. The case of **In re Salmon, DECD. Coard v**

National Westminster Bank Ltd. and others (supra) was relied on to support this position.

- [25] The Respondent stated that the application should not be granted as the substantial Claim has no 'realistic prospect of success', as the Applicant has not established that she was financially dependent on the deceased during his lifetime. It was further maintained by the Respondent that the level of dependency that ought to satisfy the test has not been met in the circumstances and the evidence of the Applicant shows a level of financial independence on her part.
- [26] Learned Counsel maintained that although the estate has not yet been distributed, there is sufficient prejudice to the beneficiaries due to, (a) the inability of the executor to commence the distribution process and to settle debts as this Claim has effectively "frozen" the distribution process; (b) the additional costs being incurred by the estate to defend this Claim and (c) the certainty of distribution that came with the expiry of a limitation period has now been replaced by an uncertainty as to how their share in the estate will be impacted. The Respondent submitted that the non-distribution of the estate should not be enough on its own to convince this Court to grant the application to extend time.
- [27] The Respondent also submitted that there is no special intervening trigger identified in this case for the Applicant to bring the Claim. The case of **McNulty v McNulty** [2002] All ER (D) 150 (Jan) was cited in support of this position.
- [28] Learned Counsel proposed that whilst the deceased failed to make any financial provision for the Applicant, the beneficiaries of the estate have done so and therefore, one half interest in the property is more than reasonable and in line with the legislative intent and that a grant of an absolute interest is unconscionable given the heavy indebtedness of the estate.

LAW AND ANALYSIS

- [29] It is an undisputed fact that the last Will and Testament of the deceased made no provision, financial or otherwise, for the Applicant and this is admitted by both parties. As a result, the Applicant is entitled as a surviving spouse to make an application under Section 6 of the Act, for reasonable provision by virtue of sections 4 (1) and (2) of the Act.
- [30] Notwithstanding the fact that the Applicant has surpassed the hurdles of sections 4 and 6 of the Act, section 5 provides that an application under section 6 shall not be made after six (6) months of the date on which the grant of administration in the deceased's estate is taken out, except with the permission of the Court.
- [31] There is no dispute between the parties that the Applicant is out of time in filing her application and must obtain permission in order to proceed with her substantive Claim. The Act however, endows the Court with the power to permit an extension of time, but it does not give any guidance or outline the factors to be considered by the Court when considering such an application. However, there are several English authorities and a few Jamaican authorities that provide useful guidance and assistance to the Court in this regard. I will outline the authorities I found most useful to the determination of the case at Bar.
- [32] In *Re Dennis (deceased)* (supra) Browne-Wilkinson J after examining section 4 of the UK **Inheritance (Provision for Family & Dependents) Act**, a provision very similar to section 5 of our Act, adopted the approach of Sir Robert Megarry V-C in *In re Salmon, DECD. Coard v National Westminster Bank Ltd. and others* (supra) and outlined guidelines for determining whether the court should exercise its discretion in granting an extension of time pursuant to the Act. Browne-Wilkinson J stated at page 143: -

“...First, the discretion of the court, though judicial, is unfettered. Second, the onus is on the applicant to show special reasons for taking the matter out of the six-month time limit; the Vice-Chancellor said that this is not a mere triviality but a substantial requirement. Third, the court has to consider how promptly and in what circumstances the application has been made after the time has expired; one has to look at all the circumstances surrounding the delay. Fourth, the court has to see whether negotiations had started within the six months period. Fifth, one has to consider whether or not the estate has been distributed before the claim has been notified. Sixth, the court has to consider whether refusal of leave to bring proceedings out of time will leave the applicant without recourse against anyone else, eg if the failure to apply within the statutory limit has been due to the default of legal advisers.”

- [33] The guidelines outlined by Browne-Wilkinson J are not exhaustive and ultimately the Court should be guided by the pronouncements of Ungood –Thomas J at page 1637 in **Re Ruttie (deceased). Ruttie v Saul** (supra): -

*“... the correct course at this stage is to look at all the circumstances of the case and say, without attempting formulation of the principles, **whether looking at these circumstances it is reasonably clear that the extension of time is required in the interest of justice.**” (my emphasis)*

- [34] In the case of **In re Salmon, DECD. Coard v National Westminster Bank Ltd. and others** (supra) the plaintiff married the deceased in 1932 but left him in 1944 after the marriage proved to be unhappy. After the plaintiff left the matrimonial home she never saw her husband again. In 1978 her husband died leaving an estate of seventy-five thousand pounds (£75,000). Letters of administration were granted to a bank on the 15th day of December 1978, and by virtue of section 4 of the United Kingdom **Inheritance (Provision for Family and Dependents) Act** the six-month time limit for making the application under the Act for financial provision out of the estate expired on 15th day of June 1979. In February 1979 a friend of the widow wrote to the bank asking on her behalf for an ex gratia payment in lieu of taking proceedings under the 1975 Act, but the bank refused and stated that the widow should take such action as she was advised.

- [35] Sir Megarry V-C refused permission to the widow to apply out of time for financial provision out of the estate of her deceased husband for the following reasons: -

- i. the delay was substantial and the fault was wholly on the widow's side;
- ii. there had been no negotiations while time was running and no warning was given to the bank that an extension of time was to be sought;
- iii. almost all of the estate had been distributed and no warning had been given to the bank that a claim might be made;
- iv. the widow had a remedy in negligence against her solicitors; and
- v. it would be unjust to the beneficiaries to extend what was a substantive statutory time limit when the widow had such a remedy against her solicitors.

[36] In the recent local decision of **Lystra Nicholas v Everalld Nicholas and Nick's Haulage Contractor's Ltd** [2017] JMSC Civ 132, the Honourable Mrs. Justice Sarah Thompson-James noted that the language of section 5 of the Act imputes a similar meaning to the limitation proviso in section 13 of PROSA and that the Court must be guided by the considerations that have been applied in PROSA cases of this nature. At paragraph 68 of the judgment, she noted that: -

*"In assessing what should be taken into account in the exercise of his discretion to extend time, Sykes J relied on the Court of Appeal cases of **Mesquita, Brown v Brown** [2010] JMCA Civ 12 and **Saddler v Saddler** [2013] JMCA Civ 11 which highlight the following factors:*

- i. *reasons for the delay;*
- ii. *length of the delay;*
- iii. *whether the applicant has a prima facie case worthy of the grant of an extension of time;*
- iv. *whether any prejudice would be caused to the respondent, as well as the applicant;*
- v. *the overriding objective and whether it would be fair to the parties to allow the application to be made out of time."*

[37] The Honourable Mrs. Justice Thompson-James also at paragraph relied on the dictum of Lord Griffith in **Donovan v Gwentoy's Ltd** (supra). She stated: -

*“...I would add to that the following dictum of Lord Griffith in **Donovan v Gwentoy's Ltd** [1990] 1 WLR 472 AT 479A:*

The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal.”

- [38] In the case of **Lystra Nicholas v Everalld Nicholas and Nick's Haulage Contractor's Ltd** (supra) the claimant, who at the time of the application was seventy (70) years old, initiated proceedings against the defendants, pursuant to PROSA and the Act; seeking several reliefs in relation to the estate of her deceased husband. The claimant contended, among other things, that the deceased failed to make provision for her in his Will and she was in need of maintenance. The claimant's action was almost six (6) years after the issuance of the grant of the probate and she therefore sought the permission of the Court.
- [39] The first defendant was the executor of the estate and the second defendant, Nicky's Haulage Contractors Ltd, was a company of which the deceased was a majority shareholder (eighty-five percent (85 %)) and director and the claimant held five percent (5 %) shares. The sole issue for the Court's determination was whether time to make an application under the Act should be extended. The claimant had been advised by her attorney that the action should have been brought under PROSA within a period of twelve (12) months.
- [40] The Honourable Mrs. Justice Thompson-James found that the claimant had not demonstrated special reasons sufficient for the court to take the matter outside the limitation period to make a claim under the Act. Although most of the estate had not yet been distributed, the delay of five (5) years and eight (8) months was substantial. The claimant's reasons for the delay were insufficient and the beneficiaries would have been prejudiced. Further, the claimant had been operating a business on the second defendant's property since the death of her husband, from which she gained an income and had not been accounted for. The Court noted that the estate was not incredibly large, and it was not unusual, given

that the claimant already had an interest in that home, to make provisions for his children, who did not have same.

[41] In **Sharon Smith v Vincent Service** (supra), the Honourable Mr. Justice Bryan Sykes (as he then was) granted the extension of time primarily on the basis that the limitation defence under PROSA could not defeat, what he concluded, was a prima facie case in equity. He also considered that the parties had been negotiating with a view to settling the case outside of litigation and that the Respondent did not assert that he would be hampered in defending the claim in any way.

[42] The case of **Berger v Berger** [2013] EWCA Civ 1305 concerned an appeal against an order of the lower court, refusing permission of a surviving spouse to make an application under the United Kingdom Inheritance Act. The Appellant and the testator were married for thirty-six (36) years. Probate was granted on 27th January 2006 but the Appellant applied under that Act nearly six and half (6½) years later on the 15th day of June, 2012. The Appellant was in her mid-80s and in poor health. She contended that the disposition effected by the deceased's Will was not such as to make reasonable financial provision for her. The testator's Will provided that the matrimonial home be held on trust for sale with the provision that the Appellant be allowed to live there as long as she wished or that it be sold to provide another property for her use. The deceased's share of the property that he held jointly with the Appellant was devised to her to be sold with his share of the proceeds to be given to his children and grandchildren. The residue of the estate was to be held on trust to pay the income of the Appellant during her lifetime and thereafter to be held on trust for the deceased's sons and grandchildren. Finally, the Will provided that notwithstanding the previous trusts, the trustees had the power during the lifetime of the Appellant to, from time to time, pay or apply the whole or such parts of the residuary estate to or for the benefit of his wife absolutely. Whilst the deceased was alive, he and the Appellant enjoyed a high standard of living, supported mainly by income from the company.

[43] Black LJ noted that from a letter written to the testator to his children, it was clearly the deceased's intention that the Appellant would receive a substantial income from the residue of the estate. Although the Court considered the potential merits of the claim, the fact that the estate had not yet been fully distributed and it was likely that sufficient capital could be found to make a reasonable award to the Appellant without disturbing any gifts that had already taken effect; the appeal was dismissed.

[44] It was further considered that the evidence did not establish that the appellant was advised about the possibility of a claim under the Act when she consulted solicitors in 2006. However, this was offset against what the court found to be a very substantial delay and the fact that the circumstances after the death of the deceased were such that the appellant continued to live on the property as she chose, and performed her functions alongside the deceased's sons as executor, trustee and director, albeit that the extent to which she participated could not be ascertained. Further, the appellant had demonstrated that she was quite capable of obtaining assistance to protect her interests as she had on several occasions following the death of the deceased, enlisted the services of accountants and solicitors in respect of her displeasure as to how the estate was being dealt with. In the premises, it was found that it would not have been appropriate to allow her to pursue her claim.

The Delay of almost two (2) years in Bringing the Claim

[45] The Applicant filed the application almost two (2) years after the issuance of the grant of probate. I find this delay substantial. In the case of **Re Dennis (deceased)** (supra) Browne-Wilkinson J indicated at page 143 that: -

*"... the onus is on the applicant to show special reason for taking the matter out of the general six-month time limit; ...**this is not a mere triviality but a substantial requirement.**" (my emphasis)*

- [46] The Applicant's reasons for the delay was that her former counsel failed to advise her of the limitation period. She further claimed in her affidavit that she suffered mental anguish, depression and hypertension consequent on the memory of the loss of the deceased which impaired her ability to engage in any legal process and consequently contributed to the delay.
- [47] While I do not doubt that she suffered some emotional trauma at the loss of her spouse, the Applicant has failed to provide medical evidence or otherwise to support her claim of substantial 'mental anguish'. I accept that she was only alerted of the issuance of the grant of probate a month before the limitation period, however, she has failed to account for the time frames and lapse of time.
- [48] Also, in agreeing with the Honourable Mrs. Justice Thompson-James in the case of **Lystra Nicholas v Everalld Nicholas and Nick's Haulage Contractor's Ltd** (supra), I find that there is no evidence as to what instructions were given to the attorneys of the Applicant in the case at Bar and whether those instructions would have required the attorneys to provide information about the cause of action under the Act. In this regard, I am of the view that her evidence is vague and insufficient to be considered a good reason for the delay.
- [49] Interestingly the Applicant claimed that the memory of the loss of the deceased impaired her ability to engage in any legal process but she was able to initiate proceedings for a declaration of spouse months after the death of the deceased. Her action in obtaining a declaration of spouse pursuant to PROSA months before the grant of probate suggests that she anticipated the need to legitimize her relationship with the deceased for legal purposes.
- [50] She was also aware of the proposal by the beneficiaries to grant her fifty percent (50%) of the estate and at no point indicated her dissatisfaction or approval of the amount. In my judgment, there was a great deal of inaction on the part of the Applicant. The fault for the delay is wholly on her side and cannot be attributed to

any extraneous factors outside of her control. The Applicant has failed to provide substantial and excusable reasons for her delay.

The Real Prospect of the Applicant's case succeeding

[51] I now embark on determining the real prospect of success of the Applicant's substantive Claim. Section 7 of the Act provides: -

“(1) Where an application is made for an order under section 6, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the maintenance of the applicant and, if the court considers that such reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters –

the size and nature of the net estate of the deceased;

- a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;*
- b) the financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future;*
- c) any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased;*
- d) any physical or mental disability of any applicant for an order under section 6 or any beneficiary of the estate of the deceased;*
- e) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;*
- f) the deceased's reasons, so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will;*
- g) the conduct of the applicant towards the deceased;*
- h) the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime;*
- i) any other matter which, in the circumstances of the case, the court may consider relevant.”*

- [52] The case of **Williams v Mavaou and another** (2000) 61 W.I.R 302 the first written judgment in this jurisdiction on the provisions of the Act, provides insight on section 7(1). The facts of the case are similar to the instant case, save that the application was made within the required period.
- [53] The deceased and his widow were married for twenty-four (24) years and for most of the marriage had lived in a house purchased by both their efforts but was purchased in the name of the deceased. Over the years, the couple extended and improved the house from their pooled resources. At the time of the purchase, the deceased assured his wife that her interest in the property was secure. Following his death, his Will bequeathed the house (his only asset) to his daughter and uncle, making no financial provision for his widow. The widow applied to the court for the financial provision for her maintenance under the Act.
- [54] Harrison J noted that in determining '*reasonable provision*', the court must consider the reasonableness of the provision actually made and determine the extent to which the Court should exercise its powers. Harrison J also noted that attention must be had to the reason the testator made no financial provision for the applicant.
- [55] He further noted that the matrimonial property was the only asset in the estate and was registered in the sole name of the testator. This was the location where the deceased and the applicant lived up to the time of his death. There was substantial improvement to the property as a result of their pooling of funds and resources. The applicant would have acted to her detriment and would have been entitled to a beneficial interest in the matrimonial property. The court also considered the fact that the applicant was financially less well off than the two beneficiaries.
- [56] The Court also considered the reasons advanced by the testator for not making provisions for the applicant, and noted that they surmised that the testator wished to give his daughter a share in his estate and he wanted the uncle to ensure that

her interest was protected. Harrison J further noted that the principle that emanated from **Franklyn v Biddy** (1960) 2 WIR 346 that a testator's will should not be governed by the personal inclination of the judge, if he were a testator, but rather by what a just and wise testator ought to have done in all the circumstances of the case.

- [57] The Court, citing at pages 313 to 314 the case of **Re Duranceau** [1953] 3 DLR 714, noted that the overarching question was:

"Is the provision sufficient to enable the dependent to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life?"

- [58] With respect to the financial resources and needs of the parties, the Court noted that the evidence showed that the applicant was 'economically less well off' than the two beneficiaries. The beneficiaries were a builder and businesswoman, respectively, whereas the applicant was a housewife who depended solely on the rental from a portion of the premises in order to maintain herself and the child, Christopher. The joint bank account of the deceased husband and herself had been exhausted.

- [59] I will adopt the words of the Honourable Mrs. Justice Thompson-James in **Lystra Nicholas v Everald Nicholas and Nick's Haulage Contractor's Ltd** (supra) at paragraph 77: -

"In considering whether there is a real prospect of success, it is well established that the Court should not embark on a mini trial, but simply assess whether or not the Claimant has an arguable case."

- [60] There is no doubt that the deceased failed to make provision for the Applicant in his Will. The Court is therefore enabled to consider the provisions of section 7 of the Act. There is evidence that the deceased contributed to her maintenance during his lifetime. The reason the deceased failed to make provision for the Applicant is explicable in that the Will was made before the deceased met the Applicant. The evidence of both parties also indicated that the deceased and the

Applicant shared a healthy relationship up until his death and that he would have wanted her to benefit from his estate.

[61] In relation to the factors under section 7, I have considered the following with respect to the Applicant: -

- i. Her health;
- ii. Her unemployed status;
- iii. The length of time she cohabited with the deceased;
- iv. The absence of clear information as to her income and assets;
- v. The fact that she would have contributed to the upkeep of the house;
- vi. The fact that she gave up her business to care for the deceased during his time of ailment.

[62] The evidence revealed that the Applicant and the deceased lived together for over a decade and she continues to live at the matrimonial home up to the time of the proceedings. Notwithstanding this, the veracity of her affidavit is doubted as her expenditure outlined therein significantly exceeds her income.

[63] In **Williams v Mavaou and another** (supra) and **Judith Parchment v Marrion Genus** (unreported) Supreme Court of Judicature of Jamaica, Claim No. HCV 00920 of 2005, judgment delivered on the 19th day of September, 2006, the Court granted the claimants a substantial percentage of the deceased's estate as both claimants in each case contributed to the purchase and construction of the matrimonial home.

[64] Although the Applicant in the instant case would have certainly contributed to the payment of bills, the property was purchased and constructed before she met the deceased. In fact, Ms. Reta Davis' affidavit notes that because of the close

relationship that she and the deceased shared, she assisted in the construction of the deceased's home. The Applicant's Claim for an absolute interest in the matrimonial home would require this Court to ignore the interest of Ms. Reta Davis and the testamentary dispositions to the other beneficiaries as well as ignore the debts owed by the estate.

[65] Also, the authorities have shown that any claims that the Applicant would have to the estate would be less the outstanding debts of the estate. What is 'Net Estate?' 'Net estate' is defined in section 2 of the Act as: -

“(a) property which the deceased had power to dispose of by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including any transfer or other tax payable out of his estate on his death; and for the purposes of this paragraph a person who is not of full age and capacity shall be treated as having power to dispose of by will property of which he would have had power to dispose by will if he had been of full age and capacity;

(b) other property including any sum of money which is treated for the purposes of this Act as part of the net estate of the deceased;

(c) other property including any sum of money which is, by reason of a disposition made by the deceased, ordered under section 13 to be provided for the purpose of the making of financial provision under this Act;”

[66] In the case of **McNulty v McNulty** (supra), the Court, when assessing the net value of the estate, noted at paragraph 57: -

“It is common ground that the available “pot” out of which any award in favour of [the applicant] ... would be made] ...consists in practice of the estate's share of the net proceeds of the sale...reduced by outstanding debts and liabilities of the estate...”

[67] In the said case, £ 46,000 was deducted from the net proceeds of sale and paid to the defendants in settlement of what they alleged to be loans made by them before their father's death. The Court accepted this debt as the witness statement of Mr. Parkinson confirmed that loans were made by the Defendants and there was no evidence of repayment of any of the loans.

- [68] The affidavits of both Ms. Reta Davis and the Respondent indicate that they both had a healthy relationship with their brother, the deceased, as both paid for the deceased's cremation and other funeral expenses and often assisted in supplementing his income and medical expenses during his time of ailment. The Applicant has not challenged this.
- [69] The Applicant in my view, has therefore failed to show that there are sufficient grounds to ignore the deceased's dispositions to both beneficiaries and a granting of an absolute interest in the matrimonial home. I also agree with the Respondent in that the agreement reached by the beneficiaries of the estate to give a fifty percent (50%) interest is reasonable. In my view the Applicant has not shown that she has a prima facie case that is likely to succeed at trial.

Prejudice to the Beneficiaries

- [70] Learned Counsel for the Applicant has argued that the beneficiaries would suffer no prejudice by her application as the beneficiaries are more 'economically well off' than her and the estate has not yet been distributed. In assessing this factor, the Court is obliged to consider the prejudice to the beneficiaries vis a vis the prejudice to the Applicant. I am guided by the principle laid down in the case of **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36 where at paragraph 26 Harrison JA in delivering the judgment of the Court stated: -

"... A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into consideration if there is any good reason which would prevail against the statute operating."

- [71] The Court continued at paragraph 30: -

"The common thread which runs through these cases is that a court will not grant an extension of time to file a claim, on the application of one party where to do so may cause prejudice to the other party and that an applicant must show that there are substantial reasons why the other party should be deprived of the right to limitation given by the law..."

[72] It is undisputed that both the Respondent and Ms. Reta Davis are in a stronger financial position than that of the Applicant. Also, the Applicant would have reasonably expected that she would remain in possession of the property following the death of her common law spouse. Notwithstanding this, relying on the guidance of the Honourable Mrs. Justice Thompson-James in the case of **Lystra Nicholas v Everalld Nicholas and Nick's Haulage Contractor's Ltd** (supra), I find that granting the application would result in depriving the Respondent of a legitimate defence provided for by law. The Applicant is obliged to show sufficient reasons why the Respondent should be deprived of his right to a limitation defence. As stated earlier, the Applicant has failed to provide a good reason for the delay in making the application. I also agree with the submission of Learned Counsel for the Respondent that the non-distribution of the estate by itself is not sufficient to convince this Court of why the beneficiaries should be deprived of their accrual right.

[73] The Respondent and Ms. Reta Davis have stated by virtue of affidavit evidence that they are owed substantial sums from the estate and granting the application would further lengthen the time for repayment. This is coupled with the fact that a grant of an absolute interest in the property to the Applicant would effectively result in the beneficiaries being deprived of part of their inheritance. All these factors would undoubtedly result in prejudice to the beneficiaries.

Other Remedies

[74] Learned Counsel for the Respondent submitted that the Applicant has another remedy available to her, that is, an action of negligence against her former Attorney for failing to advise her of the limitation proviso under the Act.

[75] In **Adams v Scholefield** [2004] WTLR 1049, CA, the Court noted that a prospective claim in negligence against the claimant's own solicitors is not to be totally ignored but is not a factor of any great importance and does not counterbalance other important factors.

- [76] Another remedy available to the Applicant is enforcing the agreement made by the beneficiaries. In the English case of **Rajabally v Rajabally** [1987] 2 FLR 390, the deceased was survived by his widow and two sons and a son by a first marriage. He left his estate consisting of the former matrimonial home to his widow and three children in equal quarter shares. After the deceased's health had failed him, the household was largely maintained by the widow who went out to work. After his death she continued to live in the house with her two sons. The eldest son, who suffered from a mental illness which severely affected his work prospects, lived on social security in a council flat where he had security of tenure. The widow made a claim under the United Kingdom **Inheritance (Provision for Family and Dependents) Act**. She made a claim effectively for the whole estate under those provisions.
- [77] The trial judge had accepted assurances from the two younger sons that they would not insist on their rights under the Will, and from the eldest son that he was prepared to take provision under the Will by being bought out at a valuation and would not require a sale of the property. In the light of those assurances the judge found that the widow's earnings plus her pension and the contribution made by one of the sons would enable her to maintain the household and service a loan with which to buy out the one-quarter share of the house. Accordingly, he held that the Will did make reasonable provision for the widow and dismissed her claim. The widow appealed the trial judge's decision.
- [78] On Appeal Browne-Wilkinson V-C noted that as a precondition to the making of an order under section 2 of the 1975 Act, the court must decide that the Will did not make reasonable provision for the applicant. Having regard to the facts as known to the court at the date of the hearing, it was not permissible to base a conclusion as to reasonable provision on legally unenforceable assurances given at that time by various parties that they would not insist on their legal rights under the Will. He further noted that the court was concerned to establish what legal rights had been

given by the Will. The Will did not make reasonable financial provision because by giving the widow only a quarter share in the former matrimonial home, she had no security in it, although she had contributed to its maintenance not only by her labour but also by substantial financial contribution from her earnings.

[79] Browne-Wilkinson V-C also noted that the widow should be provided with real security in the house, but account had to be taken of the limited means, very uncertain future and limited chances of employment of the eldest son. The Court held that in the circumstances, reasonable financial provision would be made for the widow by vesting the house in her absolutely, subject to a legacy in favour of the eldest son to be raised by a mortgage on the estate.

[80] In the instant case, the assurances made by the beneficiaries are properly contained in an agreement which bears all their signatures and can be legally enforced.

ORDERS & DISPOSITION

[81] The Applicant has failed to provide substantial reasons for the Court to take the matter outside the limitation period. The estate is heavily indebted and the executor must be given the opportunity to liquidate the estate's only asset for payment of outstanding debts and distribution to the beneficiaries. Notwithstanding the hardship that may be suffered to the Applicant, she has not shown the Court reasons for an award of an absolute interest in the property. Her own affidavit indicates that she is unable to settle the estate's outstanding debts and purchase the other beneficiaries' share in the estate. The Applicant however, is entitled to another remedy, by virtue of the agreement, to a half interest in the net estate. There are also no extenuating circumstances which would have allowed the Applicant greater than this half interest in the estate in any event.

[82] My Orders are therefore as follows: -

1. Notice of Application for Court Orders for leave for extension of time dated the 1st day of July 2016 and filed on the 7th day of July 2016 is refused and dismissed.
2. Cost of the Application to the Respondent Vincent Davis to be paid from the Estate.
3. In relation to the Administrative Claim, the Estate should be liquidated, testamentary expenses settled and a cash disbursement paid to the beneficiaries including a fifty percent (50%) interest equivalent to Miss Sophia McKoy's interest as provided for in the agreement.
4. Claimant, Vincent Davis' Attorney-at-Law to prepare file and serve Orders herein.
5. Leave to Appeal granted to Miss Sophia Mckoy.